

**Comments from the Legal Aid Community
to the Department of Education re:**

**Proposed Regulations on Borrower Defenses and
Use of Forced Arbitration by Schools in the Direct Loan Program,
and Proposed Amendments to Closed School and False Certification
Discharge Regulations**

Docket ID ED-2018-OPE-0027

August 30, 2018

Comments submitted on behalf of:

Atlanta Legal Aid Society, Inc.

Bay Area Legal Aid

Community Legal Services of Philadelphia

Empire Justice

Housing and Economic Rights Advocates

LAF Chicago

Lakeshore Legal Aid

Legal Aid Foundation of Los Angeles

Legal Services of New Jersey

Mobilization for Justice

National Consumer Law Center (on behalf of its low-income clients)

New York Legal Assistance Group

North Carolina Justice Center

Project on Predatory Student Lending of the Legal Services Center of Harvard Law School

Public Law Center

The Legal Aid Society of Columbus

TABLE OF CONTENTS

Introduction.....	1
I. Access to Relief Should Not Be Limited to Post-Default Collection Proceedings	6
a. The Department’s Proposal Would Preclude Most Deceived Borrowers From Accessing Relief ...	6
b. Precluding Access to Relief Before Default Would Cause Costly and Harmful Forced Default	7
c. Precluding Access to Relief Before Default is Arbitrary and Unjustified	8
d. Limiting Defenses to Repayment to Collection Proceedings is Inconsistent With the HEA.....	9
II. The Same Standards Should Apply Regardless of Whether a Borrower is in Default.....	10
a. There is No Evidence that Borrowers Have or Will Submit Large Volumes of Frivolous Claims	10
b. There is No Evidence that the Cost of Frivolous Claims Outweighs the Cost of Imposing New Barriers to Relief	12
c. Proposals to “Deter Frivolous Claims” Must be Reasonably Tailored to the Claimed Problem	12
d. Time Limits and Heightened Evidentiary Burdens are Not Reasonably Related to Deterring Frivolous Claims	13
III. Time Limits.....	15
a. The Department Cannot Legally Preclude Borrowers from Defending Against a Demand for Repayment.....	15
b. Imposing a Time Limit on Borrowers Not Facing Post-Default Collection is Arbitrary and Unjustified.....	16
c. A 30 to 65- Day Time Limit for Preparing Borrower Defense Applications is Unworkable and was Not Contemplated in this Rulemaking	18
d. Imposing a Time Limit on Borrower Defenses is Inconsistent with Department Policy with Respect to Other Discharges	19
e. Proposed Changes	19
IV. Evidentiary Burden	20
a. The Preponderance of the Evidence Standard Should be Maintained	20
b. Evidentiary Requirements should Account for Real Limits Borrowers Face in Accessing Evidence of Misrepresentations	21
V. The Standard for Borrower Defenses.....	22
a. A Federal Standard Should be a Floor, Not a Ceiling.....	22
b. Misrepresentation: Comments on the Proposed Standard.....	23
c. The Standard Should Encompass a Prohibition on Unfair, Abusive, or Otherwise Unlawful Conduct	32
d. Violations of State Law Harm Student Loan Borrowers Even in the Absence of Misrepresentations	36

VI. Relief.....	36
VII. Process for Individual Borrowers.....	39
a. The Proposed Rule Would Prejudice Unrepresented Borrowers, and Almost All Borrower Defense Applicants are Unrepresented	40
b. The Proposed Rule Unfairly Combines the Process for Borrowers with the Process for Schools..	42
c. The Department’s Proposal Unfairly Cuts Off Borrowers’ Rights to Further Consideration of Their Claims While Providing Schools with Numerous Opportunities to Be Heard.....	43
VIII. Group Process.....	44
a. Group Relief Promotes Equity and Efficiency.....	44
b. Group Relief is Essential to Ensuring that Cheated Borrowers Get Relief.....	45
c. The Department Should Not and Need Not Require Proof of Individualized Reliance and Harm.	46
d. Transcript Withholding Threats Do Not Justify Rescission of the Group Relief Process	47
e. Recommended Improvements to the 2016 Group Discharge Process	48
IX. Equal Access for FFEL Borrowers.....	49
a. FFEL Borrowers Should Have the Same Rights As Direct Loan Borrowers	49
b. The “Consolidation Path” Does Not Provide Sufficient Protection to FFEL Borrowers.....	50
X. Forced Arbitration, Class Action Bans, and Mandatory Internal Dispute Processes	52
a. The Department Concluded It Had Legal Authority to Impose these Conditions in 2016 and the Law Has Not Changed	54
b. Forced Arbitration and Class Waivers Still Do Not Benefit Borrowers	55
c. Predatory Schools’ Use of Mandatory Predispute Arbitration, Internal Claims Resolution Processes, and Class Action Waivers Thwart Effective Administration and Oversight of the Title IV Program.....	57
d. The Department Should Continue to Require Arbitral Records to Protect the Integrity of the Title IV Program.....	61
XI. Closed School Discharges	61
a. The Department Should Not Compound Harm to Students Already Impacted by School Closures by Forcing Them into Teach-outs and Denying Them Discharges.....	62
b. The Department Should Extend the Presumptive Eligibility Period for a Closed School Discharge to Borrowers Attending Within One Year of the Closure Date	77
c. The Department Should Not Amend or Downsize the List of Exceptional Circumstances It May Consider in Extending the Closed School Discharge Eligibility Period for Borrowers Who Withdraw.....	79
d. The Department Should Not Cut Off Its Discretion to Continue to Suspend Collection and Allow Borrowers Who Inadvertently Submit Incomplete Applications Time to Resubmit by Requiring “Completed” Applications	80

e.	We Support the Department’s Proposal to Allow Borrowers to Seek the Department’s Review of Guaranty Agency Denials of Closed School Discharge Applications	81
f.	The Department Should Not Repeal Automatic Closed School Discharges for Students Who Have Not Re-Enrolled in a Title-IV Eligible Institution Within Three Years of Their Schools’ Closures	82
XII.	False Certification Discharges.....	87
a.	The Department Should Not Preclude False Certification Discharge Whenever a Borrower Has Signed an Attestation of High School Graduation	88
b.	The Department Should Use the Origination Date and Not the Disbursement Date to Determine When an Institution has Falsely Certified a Borrower’s Eligibility	97
c.	The Department Should Not Rescind the Regulation That Explicitly Allows It to Grant Discharges to Borrowers Whose Satisfactory Academic Progress was Falsely Certified.....	99
d.	The Department Should Maintain § 685.215(d) as Set Forth in the 2016 Rule.....	101
XIII.	Rehabilitation Costs and Subsidized Loan Limits.....	103
XIV.	Deterrence and Accountability	103
XV.	Further Questions on the Department’s Proposed Regulations	104
XVI.	Conclusion	104
	Appendix: Questions Regarding Proposed Regulatory Amendments and Impact Analysis.....	105

ATTACHMENTS

- Attachment 1, Declaration of Myra Tyler, Supervisory Program and Management Analyst in Hearings and Interagency Appeals, U.S. Dep’t of Education (May 22, 2017)
- Attachment 2, Letter from S. Rosenthal, Federal Trade Commission, to Jeff Appel, U.S. Dep’t of Education (April 7, 2016)
- Attachment 3, Letter from Lou Pagano, Chief Operating Officer, Alta Colleges, to Westwood students (Jan. 25, 2016)
- Attachment 4, Letter from Rene C. Nunez, Vice-President Compliance/Student Relations, ICDC College, to ICDC students (May 20, 2016)
- Attachment 5, Solicitation re Marinello Schools of Beauty Debt Forgiveness
- Attachment 6(A-F), Materials Related to False Certification Comments

Introduction

These comments, submitted on behalf of organizations across the country that provide free legal assistance to low-income student loan borrowers, address the Department's proposed changes to regulations previously promulgated to protect federal student loan borrowers and taxpayers from misconduct and closures by schools.¹ We urge the Department to change course, as the proposed rules would effectively terminate the borrower defense program, leave defrauded and misled students without recourse, and encourage the growth of predatory programs that harm students and taxpayers alike.

Our comments are informed by our work as legal aid practitioners. We strive to meet the legal needs of individuals and families with limited economic means, who otherwise would be without professional legal assistance. The issues addressed by the proposed rule are of critical importance to the people we serve, as well as to the hundreds of thousands of other borrowers in identical circumstances. Our clients overlap with the populations most often targeted by predatory schools. They are often the first in their family to pursue higher education. They include people of color, immigrants, veterans, and older students—many of whom are parents.

In these comments, we share our experiences navigating the student loan process and working with clients who have unmanageable debt after having been subjected to unfair, deceptive, and predatory practices of for-profit schools. For every client we see, there are dozens more who remain unaware of their rights. It is therefore critical that borrower defense relief be accessible to those who need it most. We also share the legal expertise that we have developed as legal aid practitioners in the laws and procedures that affect our clients and that have bearing on these regulations—including statutory consumer protections, existing student loan regulations, and the existing administrative wage garnishment and Treasury offset procedures. Additionally, we share our experiences relevant to the closed school and false certification discharge regulations. Whereas the Department proposes changes that it expects will reduce closed school and false certification discharges,² our experience demonstrates the need to make these discharges more accessible to borrowers harmed by school closures and misconduct.

Based on our experience, we conclude that the proposed rules are woefully inadequate to protect students and provide relief to borrowers harmed by the federal student aid system, and would leave students and borrowers worse off than they would be under either the borrower defense regulations promulgated in 2016 or the regulations in effect now. A rule that is reasonably effective in protecting and providing relief to students harmed by this system must be consistent with the following principles:

¹ Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, 83 Fed. Reg. 37,242 (July 31, 2018).

² *Id.* at 37,297 (“Under the proposed regulations, the Department would expect to process and award fewer closed school and false certification discharges than it would have under the 2016 regulations.”).

- **First, the Department should not force borrowers to default in order to apply for relief or limit access to relief to borrowers in limited collection proceedings.** All borrowers who were harmed by school misconduct deserve relief, and limiting access to borrowers who default and are in collection proceedings would drastically, arbitrarily, and unnecessarily cut off access to relief.
- **Second, the Department should apply the same standards and procedures to borrowers regardless of whether they are in default or not.** The Department requests comments “regarding what types of provisions or requirements could be used to reduce frivolous claims while still ensuring a borrower a fair and meaningful opportunity to seek relief in the event of fraud” if the Department continues to accept borrower defense claims from borrowers who are not in default. But the Department provides no evidence that there is any need “to reduce frivolous claims” to “protect institutions and taxpayers” that would justify any additional limits on access to relief for borrowers harmed by school misconduct. Additionally, the Department’s proposals to deter “frivolous claims” by applying time limits and heightened evidentiary burdens to borrowers not in default are not at all tailored to the claimed problem of frivolous claims, would not be effective at deterring any such frivolous claims, and would come at a heavy cost of denying relief to defrauded and cheated borrowers.
- **Third, the Department should not impose time limits on a borrower’s right to borrower defense discharge.** Imposing a time limit on claims for borrowers not in default, and requiring borrowers in default to assert their borrower defense only during short 30-65 day periods following attempted notice of a default collection action, is unfair, contrary to well-established law, and inconsistent with the Department’s practice with respect to other discharge programs. Further, the Department’s arguments that a three-year time limit on “affirmative” claims is needed to deter frivolous claims and to allow institutions to respond to borrower’s claims are unsupported; in fact, a time limit would deny meritorious and frivolous claims alike, indiscriminately, and institutions may retain records longer than the three-year minimum required by the Department for certain records if they choose.
- **Fourth, the Department should retain the preponderance of the evidence standard and not subject student borrowers to any heightened evidentiary burden.** We agree with the Department’s conclusions in this NPRM and in the 2016 final rule that the preponderance of the evidence standard is the appropriate evidentiary standard and is “fair to students, taxpayers, and institutions.” We further stress that any evidentiary requirements that would make relief contingent on production of evidence beyond the borrower’s sworn testimony would pose insurmountable barriers for many borrowers with meritorious claims. As many applicants will not have access to documentary evidence to support their claims, or will present claims based on oral rather than written representations, the Department should not require that borrowers submit documents along with an application. The Department should

also consider applications for borrower defense in light of documents and evidence already in its possession.

- **Fifth, the substantive standard for borrower defense approval must be significantly revised for borrowers to have any reasonable shot at relief.** A clear and fair standard should align with consumer protections available under existing state law and federal law, and with which schools are already required to comply. The Department's proposed standard would dramatically, unfairly, and unjustifiably narrow eligibility for relief as compared to either the current state law standard or the 2016 standard. The Department's proposals to newly require borrowers to prove school scienter and limited types of financial harm are particularly concerning: based on our experience working with borrowers and submitting borrower defense applications, we expect these two new requirements would render borrower defense relief nearly impossible for most borrowers.
- **Sixth, the Department should abandon its proposal to allow for only partial relief and should instead provide full discharges for all meritorious borrower defense claims.** It is telling that the Department has not offered any proposal as to how it would determine the appropriate amount of partial relief to provide and solicits suggestions from the public on how it could do so. The Department has spent three years trying to come up with a reasoned and legal method to provide partial relief, and has failed to do so. This is because there is simply no fair and consistent way to provide borrowers who took out loans based on false information with less than full loan discharges. For example, the methods of calculating financial harm proposed elsewhere in the rule do not make sense in relation to the harms experienced by our clients, and would create unnecessary burden, complexity, and inconsistency of outcomes. The Department should instead adopt the approach used in the false certification and closed school discharge programs of providing full discharges for all meritorious claims.
- **Seventh, the Department should revise its proposed individual process to ensure that it is accessible and equitable to unrepresented borrowers.** We emphasize that most borrowers seeking borrower defenses will be unrepresented, and that unrepresented borrowers will already be at a disadvantage in navigating the administrative discharge process. This problem will be exacerbated by the procedural structure proposed by the Department, which will pit unrepresented borrowers against institutions and would further stack the deck against borrowers by giving schools but not borrowers the opportunity to review and respond to all evidence and to appeal adverse decisions. Additionally, the Department's proposal does not appear to allow borrowers to reapply based on evidence not previously considered: in our experience this is very important, as unrepresented borrowers often do not know what is needed to state or support a claim when they first submit an application, or only obtain critical evidence after filing their application when evidence from a government investigation or lawsuit becomes public. Additionally, borrowers will need

guidance as to what information to include in their applications, and applications submitted *pro se* should be liberally construed.

- **Eighth, the Department should abandon its proposal to rescind the 2016 provisions for group-based relief to borrowers.** The Department's proposal to rescind the 2016 provisions for group-based relief to borrowers and to instead require each borrower subject to the same school misconduct to independently apply for and prove their borrower defense claim would mean that most borrowers who have been cheated and have meritorious borrower defenses will never get relief, simply because they do not know about their right to relief, how to prove their claim, or how to navigate the borrower defense process. The Department should restore the group process provisions and make the process more efficient, transparent, and accountable by providing a process through which attorneys general, law enforcement authorities, and non-profit legal assistance organizations may petition the Department to initiate a group-relief process.
- **Ninth, the Department should open borrower defense relief to FFEL borrowers without requiring consolidation or proof of any special relationships between their schools and FFEL lenders.** While we support the Department's proposal to continue recognizing the eligibility for borrower defense relief of Direct Consolidation Loans that paid off FFELs and other loans, this proposal by itself is insufficient to address the needs of borrowers under the FFEL program for a number of reasons, including that not every borrower is eligible to consolidate into a Direct Loan in order to take advantage of the procedures outlined in this regulation.
- **Tenth, the Department's should not allow Title IV schools to use pre-dispute arbitration agreements and class action bans to silence students and evade accountability for institutional misconduct.** Unscrupulous schools have used arbitration clauses to discourage students from raising their claims, prevent them from doing so on a class-wide basis, and to hide evidence of illegal school conduct from the public. The result has been an unfair shifting of the burden of illegal conduct from schools to taxpayers. The Department should retain the 2016 regulations requiring institutions that seek the privilege of participating in the Direct Loan Program to agree as a condition of participation not to abuse forced arbitration clauses and class action bans against students participating in the program.
- **Eleventh, the Department should not compound harm to students whose schools have closed by restricting access to closed school discharges.** The Department's package of proposed school discharge amendments are without doubt a net loss to students whose educational goals are shattered by school dissolution and closure. While we support the proposals to provide review of guarantee agency denials of closed school discharges and to increase the eligibility window for students who withdraw prior to the date of school closure, we continue to propose that this window be increased to one year. Further, increasing this window does not make up for harsh and unjustified ways that the Department proposes to

restrict access to closed school discharges, including by eliminating automatic discharges for borrowers who did not reenroll in a Title IV-approved institution within three years of the closure and denying discharges to borrowers if they are offered an accreditor-approved teach-out, regardless of whether they enroll in and complete that teach-out.

- **Twelfth, the Department should not limit access to discharges for students whose eligibility to borrower was falsely certified by schools and should not create loopholes that would prevent borrowers from receiving relief when taken advantage of by unscrupulous schools.** We oppose the Department’s proposal to restrict eligibility for false certification discharge, but believe the proposed language can and should be revised to ensure that students whose eligibility for loans has been falsely certified by their schools have access to relief. The Department is correct in recognizing that the pre-2016 regulations are out of date and must be updated to ensure that borrowers without high school diplomas whose eligibility was falsely certified by their schools have access to relief. However, the language the Department proposes to address this problem would create a new loophole that would swallow the rule. Additionally, the Department should retain prior provisions that clarified that it may consider evidence that a school had falsified the Satisfactory Academic Progress (SAP) of its students to determine false certification eligibility without an application from the borrower and that provided procedural protections that would notify borrowers of the basis of a false certification denial.
- **Thirteenth, the Department should make its proposed technical amendments to clarify restrictions on collection costs and interest capitalization during rehabilitation and to reflect the Department’s policy regarding the impact that discharge has on the Direct Subsidized Loan limit.** These amendments reflect longstanding Department policy and would ensure that borrowers are not charged more simply because their loan is held by a guarantee agency.
- **Fourteenth, and finally, we remind the Department that effective deterrence of misconduct requires real accountability.** The Department’s proposal focuses on holding students accountable for their choices, but fails entirely to hold schools accountable for their illegal conduct. Indeed, by the Department’s own projections, it would discharge only a small percentage of loans taken on as a result of an unlawful misrepresentations, and would recover only a fraction of that sum from schools, while at the same time giving schools the green light to insulate themselves from liability for misconduct by using forced arbitration clauses and class action bans. As advocates who work with borrowers who have been harmed by the misconduct of predatory schools, we are deeply concerned that the proposed rule will result in more predatory conduct harming more student borrowers—and by extension their families, their communities, taxpayers, and society at large.

I. Access to Relief Should Not Be Limited to Post-Default Collection Proceedings

The Department should abandon its ill-conceived proposal to deny access to borrower defense relief to borrowers who have not defaulted or who are not subject to post-default collection proceedings. The proposal is not only callous in its disregard for the unnecessary financial distress it would impose on borrowers preyed upon for their federal aid dollars, but is also arbitrary, unjustified, and inconsistent with the Higher Education Act (HEA).

a. The Department's Proposal Would Preclude Most Deceived Borrowers From Accessing Relief

First and fundamentally, all borrowers who were harmed by school misconduct deserve relief. The Department previously made clear its commitment to “to making sure students” harmed by predatory practices “receive every penny of relief they are entitled to under law.”³ It should not back away from that promise now.

Data provided by the Department indicate that if access to borrower defense is limited to borrowers in post-default collection proceedings, or even just in default, the vast majority of borrowers would be precluded from raising school misconduct as a defense to repayment. For example, in 2016, the Department received 77,340 borrower defense claims. According to “BD Data Sheet D,” provided by the Department during the rulemaking, 9,670 claims (or 12.5%) concerned defaulted loans.⁴

The Department has not provided information about how many of these 9,760 claims could have been raised in a post-default collection proceeding, but the number would surely be significantly lower. This is because the Department does not adjudicate claims from borrowers who submit objections to Treasury offset after a one-time, 65-day objection period—an extremely short window that many borrowers miss or are never even aware of. And while objections to administrative wage garnishment may generally be raised even after the post-notice, pre-garnishment window closes, relatively fewer borrowers are subject to administrative wage garnishment. According to Education Department data obtained by the National Consumer Law Center through a FOIA request, between approximately January 2012 and September 2015, only 544,223 borrowers posted a wage garnishment on their federal student loans, as compared to the nearly 9 million borrowers who had their tax refunds or other federal benefits offset during

³ U.S. Dep’t of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015), *available at* <https://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges>; *see also* Borrower Defense to Repayment Negotiated Rulemaking Committee Meetings 2016, Opening Remarks of Jeff Appel, Deputy Under Secretary U.S. Department of Education (Jan. 12, 2016) at 4 (similar promise), *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd-appelremarks-011216.doc>.

⁴ Data Sheet D is available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/datasheetd.docx>. The National Consumer Law Center requested clarification on this data from the Department of Education on August 16, 2018, specifically to inform public understanding of the proposal and comments on it. The Department, however, declined to provide the requested information, stating that it does not provide such information to members of the public during the comment period. Emails on file with the National Consumer Law Center.

this same timeframe.⁵ Further, some borrowers with defaulted loans may not subject to any collection proceedings for years after they default because they lack wages or assets to offset.

Further, although the Department has conducted an impact analysis of the proposed rule that includes a projection of borrowers eligible if access to the borrower defense process is restricted to borrowers in post-default collection proceedings, that analysis is wholly inadequate. The Department’s impact analysis improperly relies on the number of borrowers “who, over the life of the loan, *might be in a position* to raise a defense to repayment,” 83 Fed. Reg. 37299, without providing any informed estimate of the number of borrowers who *will be in a position* to raise a defense to repayment. The Department should revise its model based on information about the current number of borrowers who have submitted affirmative claims who are subject to involuntary collection proceedings and eligible to raise an objection. Additional information relevant to this aspect of the model concerns the percentage of borrowers subject to involuntary collection who raise objections and receive hearings.

b. Precluding Access to Relief Before Default Would Cause Costly and Harmful Forced Default

The Department’s proposals to preclude so-called “affirmative applications” altogether or to preclude such applications after a specified time period would also cause forced default. Forced default would occur when financially distressed Americans are unable to access relief from invalid and unaffordable student loan debt until they have fallen so far behind on their payments that they default. This is a very real risk: indeed, nearly half of for-profit students default on their student loans within five years of entering repayment.⁶ Defaults by students cheated by predatory schools could be avoided if borrowers are permitted to seek relief *before* loan distress lands them in default.

Delaying relief to borrowers until they default and are subject to a collection proceeding would mean that defrauded and misled borrowers would in the meantime remain burdened by invalid—often unaffordable—debt. During this time, borrowers would be subject to the wholly unnecessary financial stress and real costs of responsibility for debt, including monthly bills and mounting interest. For many low-income borrowers struggling to pay for basic necessities, including heating and housing bills, continued student loan bills will cause cascading financial consequences for themselves and their families.

And the fact of default itself often causes devastating consequences for already financially distressed Americans, as well as their families, communities, and taxpayers. Defaulted borrowers are subject to snowballing collection fees and aggressive debt collection

⁵ Department of Education responses to National Consumer Law Center’s May 7, 2015 FOIA request. Available from NCLC upon request.

⁶ Adam Looney & Constantine Yannelis, Brookings Papers, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributes to Rising Loan Defaults* 50 (Fall 2015), available at <https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/>.

practices that can trap them in poverty. Defaults also tarnish borrowers' credit histories—driving up insurance and borrowing costs, and creating barriers to accessing employment and housing.⁷ Borrowers who default are also ineligible for further federal student aid, preventing them from getting a second chance at an education. Thus, even if scammed borrowers are later approved for full discharges in a post-default collection proceeding, delaying relief from their loans until that point will cost them severely. And if borrowers receive only partial relief, as contemplated in the proposed rule, these borrowers may continue to suffer from ongoing collection costs and actions, including wage garnishment and seizure of the Earned Income Tax Credit—a credit intended to help lift children out of poverty.⁸

c. Precluding Access to Relief Before Default is Arbitrary and Unjustified

Further, this limitation would lead to arbitrary outcomes. Under “Alternative A,” two borrowers who have suffered equal harm as the result of the same misrepresentation would be treated differently if one happened to default and the other did not. This is not only arbitrary, but inconsistent with the Department’s own stated intention elsewhere that the rules should “ensure equal treatment of borrowers” who have “suffered equal harm as the result of the same misrepresentation.”⁹ For example, in explaining its reasons for rescinding a provision of the 2016 Rule allowing borrower defense relief to be approved based on a nondefault, favorable contested judgment, the Department points to the “inequities that can result if, as a result of differences in State laws, two borrowers who have suffered equal harm as the result of the same misrepresentation receive different treatment.”¹⁰ Far from treating borrowers harmed by the same conduct equally, denying relief to borrowers not in default would penalize those who have managed to stay out of default.

Moreover, the Department incorrectly “expects a marked reduction in administrative burden as a result of the proposed changes to the circumstances under which it would consider a borrower’s defense to repayment application,” *i.e.*, post-default collection proceedings.¹¹ Under the proposal, the Department would “rely heavily upon existing collection processes[.]”¹² In our experience, “existing collection processes” are inadequate to adjudicate borrower defense claims. When a borrower objects to administrative wage garnishment or Treasury offset, the resulting hearing is handled by Hearings and Interagency Appeals. According to the Department, this office “does not, nor does it possess the necessary qualifications or authority to, review the merits of borrower defense claims submitted by borrowers.”¹³

⁷ See 81 Fed. Reg. at 76,051.

⁸ Persis Yu, *Voices of Despair: Student Borrowers Trapped in Poverty When the Government Seizes Their Earned Income Tax Credit* (National Consumer Law Center, March 2018), available at http://www.nclc.org/images/pdf/student_loans/voices-of-despair.pdf.

⁹ 83 Fed. Reg. at 37,258.

¹⁰ *Id.* The Department continues that it “[t]herefore” instead proposes a standard “that would ensure equal treatment of borrowers” regardless of where they live. *Id.*

¹¹ 83 Fed. Reg. at 37,926.

¹² *Id.*

¹³ Decl. of Myra Tyler, Supervisory Program and Management Analyst in Hearings and Interagency Appeals, U.S. Dep’t of Educ. (May 22, 2017), attached to these comments as Attachment 1.

d. Limiting Defenses to Repayment to Collection Proceedings is Inconsistent With the HEA

The Department plainly has the statutory authority to adjudicate borrower defense claims in an administrative proceeding not connected to any particular post-default collection action. The HEA specifically mandates that the Secretary specify through regulations the bases borrowers may “assert” as to defenses “to repayment,” and not to defenses “to collection” or “in collection proceedings.” 20 U.S.C. § 1087e. This statutory provision, by its plain language, refers to assertion of a defense to the borrower’s obligation to *repay* a debt at all, not merely a defense to involuntary *collection* of the debt, such as through wage garnishment or Treasury offset. Direct Loans enter repayment following a six-month grace period after the borrower leaves school or drops below half-time enrollment (except PLUS loans, which enter repayment even sooner—once the loan is fully disbursed).¹⁴ Had Congress intended to limit the Department’s authority to consider borrower defense relief to collection proceedings, rather than to all of repayment, it could have properly done so by authorizing only defenses to collection or defenses to collection proceedings, rather than by requiring the Secretary to develop regulations regarding defenses to repayment.

The Department’s description of its prior “interpretation” of the HEA is inaccurate. In numerous places throughout this NPRM, the Department claims that it reinterpreted the borrower defense regulation in 2015, and that, prior to 2015, it would only consider borrower defenses to repayment in connection with post-default collection proceedings. This explanation cannot be squared with prior instances in which the Department has entertained affirmative claims prior to 2015.¹⁵

Nor can it be squared with the fact that since at least 2003, the Direct Loan Master Promissory Notes have instructed borrowers to assert defenses to repayment by affirmatively contacting the Direct Loan servicer—not the collection agency or the collection proceeding official.¹⁶ This indicates that since at least 2003, the Department envisioned—and contractually

¹⁴ See Department of Educ., Federal Student Aid: Understanding Repayment, <https://studentaid.ed.gov/sa/repay-loans/understand> (last checked August 16, 2018); see also Department of Educ., Federal Student Aid, Federal Student Loans: Repaying Your Loans at 5 (Feb. 2015) (“For most loans, you’ll have six or nine months after you graduate, leave school, or drop below half-time enrollment before you must begin making payments. You can use this time to get financially settled, to determine your expected income and expenses, and to select a repayment plan. Once you enter repayment, you must make your payments on time to avoid delinquency and default.”); current Direct Loan Master Promissory Note (“Repayment: You must repay the full amount of the loans made under this MPN, plus accrued interest. You will repay each loan in monthly installments during a repayment period that begins on the day immediately following your 6-month grace period on that loan.”).

¹⁵ See Comment Letter on 2018 Borrower Defense Notice of Proposed Rulemaking, Project on Predatory Student Lending, Legal Services Center of Harvard Law School (Aug. 2, 2018), *available at* <https://predatorystudentlending.org/wp-content/uploads/2018/08/LSC-Prelim-Cmt-FINAL.pdf> (last visited Aug 23, 2018) (attaching documents demonstrating that, in 2015, the Department affirmed, rather than changed, its longstanding interpretation that the governing regulation allows borrowers to affirmatively seek loan cancellation based on school misconduct at any time, whether in repayment, forbearance, or default).

¹⁶ See, e.g., 2003 Federal Direct PLUS Loan Master Promissory Note with Borrower’s Rights and Responsibilities (“If you believe that you have a defense against repayment of your loan, contact the Direct Loan Servicing Center.”), *available at* <https://ifap.ed.gov/dlbulletins/DLB0307.html>; 2009 revised Federal Direct Subsidized Loan

promised—that borrowers in repayment could assert borrower defenses affirmatively by contacting their servicers. Additionally, this stands in contradiction to the Department’s statement in 2016:

*We disagree that proposed § 685.206(c) would be an expansion of borrowers’ rights as to the context in which a borrower defense may be raised. As explained by the Department in 1995, 60 FR 37769-37770, the Direct Loan borrower defense regulations were intended to continue the same treatment for borrowers and the same potential liability for institutions that existed in the FFEL Program—which allowed borrowers to assert both claims and defenses to repayment, without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings.*¹⁷

II. The Same Standards Should Apply Regardless of Whether a Borrower is in Default

The Department states that if it continues to accept “affirmative claims” from borrowers outside of post-default collection proceedings, then it “would need to implement provisions that would protect institutions and taxpayers against frivolous claims.”¹⁸ It therefore requests comments “regarding what types of provisions or requirements could be used to reduce frivolous claims while still ensuring a borrower a fair and meaningful opportunity to seek relief in the event of fraud.”¹⁹

We find fault with the assumption that there exists a compelling need “to reduce frivolous claims” to “protect institutions and taxpayers” that would justify any additional limits on access to relief for borrowers harmed by school misconduct. Additionally, we find fault with the Department’s proposals to deter “frivolous claims” by applying time limits and heightened evidentiary burdens to borrowers not in default; these proposals would come at a heavy cost of denying relief to defrauded and cheated borrowers and would not be effectively tailored to address the claimed problem of frivolous claims.

a. There is No Evidence that Borrowers Have or Will Submit Large Volumes of Frivolous Claims

The Department has not identified any evidence that any borrowers have or will submit frivolous claims. Indeed, the Department concedes it “does not have sufficient information” to know whether this concern is legitimate, including because the sample of applications it has processed thus far is “insufficiently representative to support conclusions.”²⁰ Because the Department has not identified any “frivolous” claims, but merely points to “potentially” “improper incentives,”²¹ it has not provided an adequate basis for regulating. If the Department

and Direct Unsubsidized Loan Master Promissory Note with Borrower’s Rights and Responsibilities (same language), *available at* <https://ifap.ed.gov/eannouncements/080709DirectSubUnsubMPN.html>

¹⁷ 81 Fed. Reg. 75926, 75956.

¹⁸ 83 Fed. Reg. at 37,244.

¹⁹ 83 Fed. Reg. at 37,244.

²⁰ 83 Fed. Reg. at 37,243.

²¹ 83 Fed. Reg. at 37,243.

intends to apply a different standard to affirmative claims based on a purported need to deter frivolous claims, it should clarify:

- Whether it has detected a pattern of frivolous filings in other contexts, such as in appeals by participating institutions of cohort default rate calculations, audit determinations, or program reviews;
- Whether the incentives for borrowers to file frivolous claims is materially different than the incentives for institutions to file frivolous claims;
- Whether borrower defense claims submitted between 2015 and 2018 that fail to state a claim might reflect reasonable confusion regarding the standard and/or the evidence needed to support a claim, which were in development and in flux during that period.

To be clear, there is a difference between claims that may be inadequately supported or that misunderstand the applicable standard for relief and “frivolous” claims. As attorneys who specialize in student loan law, it has been challenging for us to keep up with the developing and shifting standards. The Department cannot reasonably expect unrepresented student loan borrowers to have understood what the standard was for their loans and what they needed to include in an application to satisfy it during this period of unusual flux and uncertainty. Moreover, we remind the Department that review of applications should conform to the uniformly-recognized principle that pleadings from *pro se* litigants are to be liberally construed.²² In our experience, clients targeted by fraudulent, for-profit schools are the least prepared to navigate the Department’s forms and systems, even when those forms and systems are significantly simpler than those likely to be involved in borrower defense. Indeed, those of us who have worked with students who are eligible for “fast track” relief after attending a Corinthian school have found that many have had trouble navigating even this “streamlined” application process. Many borrowers do not know what information they need to attach or how to obtain it. Indeed, we previously noted significant concerns about the difficulty borrowers face in navigating borrower defense applications in response to the Department’s request for comments on the borrower defense information collection.²³

Thus, the Department should not label an application by an unrepresented borrower frivolous simply because it lacks legal explanation or corroborating evidence beyond the borrower’s testimony; indeed, the Department should not expect legal explanation or additional evidence from student borrowers. Additionally, the fact that an application highlights the borrower’s dissatisfaction with the program or outcome is not inconsistent with a borrower defense claim and does not render it frivolous, even if it would not be enough on its own to qualify the borrower for relief.

²² See, e.g., *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”) (internal citations and quotations omitted).

²³ See Comments on Borrower Defenses Against Loan Repayment, Docket ID No. ED-2015-ICD-0076, available at <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/comments-borrower-defenses-2015.pdf>.

b. There is No Evidence that the Cost of Frivolous Claims Outweighs the Cost of Imposing New Barriers to Relief

There is no evidence that the burden of processing “frivolous” claims poses a substantial risk to schools, taxpayers, or borrowers sufficient to warrant the cost to defrauded borrowers of erecting barriers to relief. As noted above, there is no evidence that there is a high volume of frivolous borrower defense claims. But even if there were, if a claim is actually frivolous, there is no need to engage the school and elicit a response prior to denial, and the Department can deny the claim expeditiously at no cost to the school and *de minimis* process cost to taxpayers. If the Department accepts affirmative applications without erecting barriers to entry—like time limits—then any *de minimis* costs attributable to processing more frivolous applications would be more than outweighed by the benefit to borrowers and taxpayers of ensuring that all borrowers with meritorious claims have access to relief.

As advocates for borrowers, we strongly disagree with the Department’s suggestion that permitting “an influx of affirmative claims” would harm borrowers. The Department argues that permitting all borrowers with borrower defense claims to assert them might hurt borrowers because distinguishing “between genuine and frivolous claims . . . may prolong the time it takes to provide relief to deserving borrowers.”²⁴ But borrowers—and the advocates who represent them—would absolutely prefer to wait a bit longer for relief than to have access to relief restricted—such as by limiting it to borrowers who can satisfy a heightened evidentiary burden—or closed off altogether, such as by refusing to consider applications from borrowers more than three-years out from school. Additionally, a longer wait is not inevitable—if there is an increase in the number of hours that need to be spent reviewing applications, the Department can respond by dedicating more staff time to review applications over a shorter period of time, rather than extending its staff review time over a longer period; both approaches should require the same total staff time.

c. Proposals to “Deter Frivolous Claims” Must be Reasonably Tailored to the Claimed Problem

The Department’s proposed “solutions” (a three-year time limit on affirmative claims, and potentially a heightened evidentiary burden) are not reasonably tailored to address the claimed problem of “frivolous” claims. The Department asserts that the problem it is concerned with is the burden on taxpayers, schools, and even borrowers of having to contend with applications that fail to assert an actionable misrepresentation or violation of state law.

There are reasonable and targeted ways to address these concerns. The following are reasonable responses to a concern about frivolous applications:

(1) Effectively communicate what is required to demonstrate a borrower defense to borrowers, both in general information, through effective servicing, through a functional borrower defense hotline, and through the application itself;

²⁴ 83 Fed. Reg. at 37,243.

(2) Address the problems that lead borrowers to file borrower defense claims but that are not within the scope of borrower defense—*i.e.*, the problems with schools other than misrepresentations and state law violations—through more effective oversight of Title IV participants and stronger school accountability measures. The Department could do so by more effectively using its existing authority, and by creating stronger oversight and accountability regulations through the proposed new rulemaking.²⁵

Additionally, to the extent claims are submitted that, even construed liberally, on their face fail to state a claim, then the Department can address this claimed problem by denying such claims when conducting its initial review for the completeness of the application.²⁶ It can resolve the application without engaging the school to solicit a response—thus relieving schools of any burden related to “frivolous claims.” And it can resolve the application without undertaking additional investigation or adjudicative proceedings—thus relieving taxpayers of any additional burden related to “frivolous claims.” Resolving applications in this way should not take long and thus should not significantly slow down the process of resolving applications and approving the applications of borrowers with meritorious claims.

Any of the above approaches would be targeted to the problems associated with potential “frivolous” affirmative applications that the Department claims it is seeking to solve. In contrast, the “solutions” that the Department proposes and seeks comment on are not tailored to the problems associated with frivolous claims, and cannot be justified on the basis of any concern about frivolous claims.

d. Time Limits and Heightened Evidentiary Burdens are Not Reasonably Related to Deterring Frivolous Claims

Imposing time limits, such as the proposed three-year limit on affirmative claims, is not reasonably tailored to the problem of frivolous claims, as time limits would deny meritorious and frivolous claims alike, indiscriminately. Time limits would also not deter frivolous claims; most borrowers would likely not be aware of time limits, and so those with “frivolous” claims would likely file applications after the time limit anyway—necessitating Department review. And, those borrowers with frivolous claims who are aware of time limits would simply be incentivized to file their claims sooner, simply changing when the Department must review the claim.

Further, evidence to prove some claims may not be available within the time limit—for example, when a government investigation or lawsuit results in public evidence years later. Forcing borrowers to file before relevant evidence is available or to lose their shot could encourage the filing of “use-it-or-lose-it” claims that are more resource-intensive to adjudicate because the clearest evidence is not yet available.

Similarly, a heightened evidentiary burden—such as requiring borrowers to prove their claims by clear and convincing evidence—is not reasonably tailored to the problem of frivolous

²⁵ See 83 Fed. Reg. 36814 (July 31, 2018) (notice of intent to establish negotiated rulemaking committee).

²⁶ To the extent the Department denies borrower defense applications for failure to state a claim, it should notify the borrower briefly in writing noting this reason for denial, and should allow for reconsideration if a new application with new evidence is submitted.

claims. A heightened evidentiary burden would lead to the approval of fewer claims, but at the cost of denying more claims by borrowers who were defrauded or otherwise harmed by school misrepresentations. It would not address the purported problems of borrowers filing too many frivolous claims and the Department and schools needing to spend resources to adjudicate those claims.

The Department cites no evidence that changing the evidentiary standard would deter the filing of frivolous claims, and we do not believe that changing the standard would have such an effect. In our experience, other than law students, the vast majority of unrepresented borrowers do not know the difference between the “preponderance of the evidence” standard and the “clear and convincing evidence” standard. Indeed, even the formal negotiators at the rulemaking on this very topic struggled to make sense of the meanings and distinctions between these two standards, repeatedly asking for explanations of the difference²⁷ and noting that they felt they needed a law degree to understand the terms.²⁸ During the rulemaking, the facilitator summarized that there was “a lot of confusion . . . on defining the terms,”²⁹ and the Department acknowledged that this “legal terminology . . . might not be clear to the borrowers, to the schools and to everybody involved in this process.”³⁰

Given this demonstrated lack of understanding regarding the meaning of the standards, changing the standard from preponderance to clear and convincing in an effort to deter borrowers from filing “frivolous” claims is simply unlikely to work, and the Department has put forward no evidence to the contrary. Additionally, as the legal aid negotiator noted during the rulemaking meetings, revisions to the 2016 Rule should be based on the facts of what has actually happened, and not unjustified speculation, and the evidence fails to demonstrate that there has been a flood of frivolous applications submitted while the Department has been applying the preponderance of the evidence standard.³¹

Finally changing the evidentiary standard would not reduce the burden on the Department to process claims and evaluate the evidence. Under either a preponderance or clear and convincing standard, the Department would be obligated to review the claims and assess the evidence; it would simply be applying a different lens to that review.

²⁷ See, e.g., Transcript of Borrower Defense Negotiated Rulemaking Meeting (Washington, DC Jan. 11, 2018) at 79-84, 102-106, 119-120, 129, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html>.

²⁸ See *id.* at 120 (“I guess coming into this I didn't think I needed a law degree in order to sit at this table. But that’s kind of how I’m feeling at this point.”).

²⁹ *Id.* at 83-84.

³⁰ *Id.* at 80; see also *id.* at 102-103 (Annmarie Weisman: “We've also heard that we want these regulations to be clearer and easier to understand. Something that a student wouldn't look at and say, well, what does this mean? That's tricky to do when you're talking about complex legal concepts. And we've used some legal terms that even in the legal community, there seems to not be widespread agreement, or even where there's agreement the definitions of some of the concepts are not as helpful as we might like them to be. So, we could bring you a definition of clear and convincing evidence. We would bring you a definition of preponderance of the evidence. But in looking at it, I'm not sure it would be helpful.”).

³¹ *Id.* at 130 (noting that based on the Department’s Inspector General Report, “the preponderance of evidence standard has largely been used thus far. And we have not seen this -- this flood of applications from well to do borrowers who attended highly regarded schools. Something like 98 percent of the applications have come from a small subset of schools. So, I think we need to base our discussion in the reality of what we have seen happen.”).

III. Time Limits

The Department should not impose time limits on a borrower's right to borrower defense discharge under any circumstances. We strongly oppose the Department's proposals to impose a time limit on claims to borrowers not in default and to require borrowers in default to assert their borrower defense within exceedingly short 30-65 day periods following attempted notice of a default collection action. These proposed time limits are unfair, contrary to well-established law, arbitrary, and inconsistent with the Department's practice with respect to other discharges.

a. The Department Cannot Legally Preclude Borrowers from Defending Against a Demand for Repayment

Given that there are no time limits on the government's ability to demand payment or collect student loan debt, fairness and longstanding legal doctrines, including the doctrine of recoupment, require that borrowers be allowed to defend against such collection and demands for repayment without time limit.

Well-established law provides that "statutes of limitation are not applicable to, or do not run against, defenses."³² Indeed, as far back as 1935, the Supreme Court explained in a tax collection case that a counterclaim against the government for recoupment in the "nature of a defense" "is never barred by the statute of limitations so long as the main [collection] action itself is timely."³³ Congress could have overridden this longstanding doctrine recognizing defenses and claims in the nature of recoupment as timely so long as there is an outstanding legal obligation to repay or collect. It did not do so. The HEA does not contain or reference any time limits on access to borrower defense relief.³⁴ Therefore, the doctrine of recoupment applies.

Further, in considering this issue during the 2016 borrower defense rulemaking, the Department requested the Federal Trade Commission's opinion on whether time limits on claims also apply to defenses against a loan holder under the FTC Holder Rule; the FTC confirmed that so long as a consumer can assert a defense against the seller, they can continue to assert that defense against the loan holder.³⁵ Following this analysis and inquiry, the Department explained in 2016 that "common law generally allows a debtor to assert claims from the same transaction as the loan at any time as a defense to repayment of the loan" and thus "[c]onsistent with that generally applicable principle," it agreed that "no limitation period" should apply to borrower defense claims asserted "as defenses to repayment of any outstanding loan obligation."³⁶

Proposed section 685.206(d)(5)(i)(A) [Alternative B] should therefore be amended to state that a borrower may apply for discharge of her outstanding loan balance based on a borrower defense at any time.

³² 51 Am. Jur. 2d Limitation of Actions § 98.

³³ *Bull v. United States*, 295 U.S. 247, 261-62 (1935).

³⁴ 20 U.S.C. § 1087e.

³⁵ Letter from S. Rosenthal, Federal Trade Commission, to Jeff Appel, U.S. Dep't of Education (April 7, 2016), attached to these comments as Attachment 2.

³⁶ 81 Fed. Reg. at 39,344.

b. Imposing a Time Limit on Borrowers Not Facing Post-Default Collection is Arbitrary and Unjustified

The Department has failed to set forth any rational justification for imposing new time limits to borrower defenses.

The Department argues a three-year limit is appropriate to “align[] with the Department’s record retention policies so that institutions will have the ability to respond to the borrower’s claim,”³⁷ but this argument does not hold water. First, the record retention policy only states a minimum retention time requirement, and institutions are welcome to exceed that minimum. Second, many records that are likely to be relevant to a borrower defense claim and the institution’s defense thereto are not covered by the record retention regulations anyway, as the Department itself recognized just two years ago:

*[E]ven a cursory review of claims raised by students and student borrowers over the years that would constitute potential borrower defense claims have turned not on the individualized aid-specific records itemized in the Department’s record retention regulations, but on broadly disseminated claims regarding such matters as placement rates, accreditation status, and employment prospects.*³⁸

Given that the school record retention regulations are insufficient to justify the proposed three year time limit, the proposed time limit is arbitrary.

The Department’s arguments that a three-year time limit on “affirmative” claims is needed to deter frivolous claims and to allow institutions to respond to borrower’s claims are also unsupported. As discussed above in Part II, time limits are unlikely to be effective in deterring frivolous claims, and are not reasonably targeted to addressing any problem of frivolous claims. Borrowers who do not assert borrower defenses early on do not for the simple reason that they do not know about their right to do so. These borrowers certainly will not know about arbitrary and arcane time limits, and so time limits will have no deterrent effect. Rather, they will simply punish twice-over borrowers who have already been mistreated once.

Borrowers who submit discharge claims after three or more years after leaving a predatory school do so because they were not previously aware of the scope of their school’s misconduct, or of their rights and how to pursue them. This fact is regularly borne out in our experience working directly with student loan borrowers who have suffered for years after being taken advantage of by their schools without realizing they had a right to have their loans discharged. For example, the New York Legal Assistance Group represented a group of borrowers who attended Wilfred Beauty Academy, a beauty school that systematically falsified students’ eligibility for financial aid to increase revenues and closed in the 1990s. These clients

³⁷ 83 Fed. Reg. at 37,288.

³⁸ 81 Fed. Reg. at 75,955.

were eligible for false certification discharges, but had no idea that such a thing existed. The experience of Ana Salazar, the lead plaintiff in the case, is typical. She initially borrowed \$6,625 to attend Wilfred. By 2014, she had made thousands of dollars in involuntary payments, and still owed a remaining balance of \$16,372. Her discharge application was granted in 2014. In addition to having her outstanding balance discharged, she received a refund of amounts she had paid over the years on the basis of involuntary collection, exceeding \$14,000. This is significant relief that would be denied to individuals in similar circumstances asserting borrower defense claims if a time limit is applied.

Our experience working with former Corinthian students eligible for relief based on group-findings of widespread misconduct similarly shows that borrowers eligible for a borrower defense are frequently unaware of their right to relief or how to obtain it before being advised by a legal aid attorney, despite the Department's attempts to inform eligible borrowers, and the relatively high level of publicity surrounding the collapse of Corinthian. For example: Housing and Economic Rights Advocates, Bay Area Legal Aid, and East Bay Community Law Center have conducted many half-day workshops to provide information and advice to former Corinthian (Heald, WyoTech, and Everest) students. The workshops ranged in size from 10 to 55 former students, all of whom lacked basic information on their right to discharge as a result of their school's misconduct. Many workshop participants were eligible for fast-track borrower defense, but prior to attending the workshop, they were unaware that they could apply for relief on their loans.

Notably, the relief available to Corinthian students based on findings of systemic misrepresentations applies to students who enrolled and left school as far back as 2010 or 2011—far more than 3 years ago. Although the three-year time limit would not appear to apply to borrowers with outstanding loans (or at least, not outstanding Direct loans that are not consolidated after the effective date of the rule), the Corinthian example is instructive. Going forward, borrowers like these in similar circumstances would be precluded from accessing relief based on the amount of time elapsed. This is deeply problematic: borrowers should not be penalized if the Department's communication attempts fail to reach them in time, or where there are no group findings and thus no targeted communications by the Department at all. Additionally, in our experience, servicers—the primary points of contact for borrowers regarding their loans—have failed to inform borrowers of their rights to pursue loan discharge. For example, in speaking with former Heald students eligible for borrower defense relief, a Bay Area Legal Aid attorney found that many had called their servicers to find out how they could seek assistance with discharging their loans. They reported that their servicer told them they were not eligible for any type of relief because they had graduated from Heald prior to its closure or were not attending close to the time of the school closure. Unfortunately, our clients are more likely to have been contacted by debt-relief scammers than to have gotten accurate information about the availability of relief through the borrower defense process—even when those students are eligible for Corinthian-related relief—from their loan servicers.

c. A 30 to 65- Day Time Limit for Preparing Borrower Defense Applications is Unworkable and was Not Contemplated in this Rulemaking

The Department has proposed that either all applicants [Alternative A], or those applicants who are more than three years out of school [Alternative B], will be subject to unworkably short 30 to 65- day time limits to submit all evidence supporting their borrower defenses, with the time limits triggered by putative notice of a collection action. This is a grossly inadequate amount of time to prepare a complete borrower defense application, particularly given the new facts the Department proposes borrowers will have to find evidence to prove, and given that some evidence will not be in borrowers' possession and they will have to seek, request, or develop it. Further, if these time limits are applied to bar subsequent applications for relief, they will deprive cheated borrowers of access to relief if they do not receive actual notice—for example, because they have moved and the notice was sent to their old address.

The Department's only justification for subjecting borrower defense claims to these time limits is its assertion that amending the existing collection proceedings deadlines is "beyond the scope of the negotiated rulemaking and because harmony of deadlines will reduce confusion for borrowers."³⁹ But it is only beyond the scope inasmuch as the Department failed to give notice that this rulemaking contemplated restricting borrower defenses to collection proceedings. Had the Department given such notice in advance of the rulemaking, or even proposed such restriction during the rulemaking meetings, advocates—including the legal aid negotiators—would surely have explained the need to extend or create exceptions to such timeframes for borrower defenses, and these timeframes would be within the scope of the rulemaking. Such restrictions were never discussed precisely because the Department's policy had been to accept and adjudicate borrower defenses outside of collection proceedings, the Department did not propose to restrict claims to collection proceedings during the rulemaking meetings⁴⁰ or in its notice of intent to engage in rulemaking, and there was clear consensus of the rulemaking committee that borrower defense claims should not be limited to post-default collection proceedings.⁴¹ Newly applying the 30-65 day collection proceeding objection timeframes to require borrowers to submit complete borrower defense applications and all supporting evidence within that short time frame—or to lose their right to assert a defense—is a shocking and never discussed proposal that would harshly deprive borrowers of reasonable opportunity to develop and support their claims.

Finally, the policy justifications underpinning limitations periods generally are inapplicable to the borrower defense context. Borrowers have no incentive to delay pursuing claims; they are simply unaware of their rights. And, as the overseer of the federal student loan

³⁹ 83 Fed. Reg. at 37,260.

⁴⁰ See Issue Papers 1 and 2 by Department of Education for Sessions I, II, and III, *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html>.

⁴¹ See, e.g., Transcript of Borrower Defense Negotiated Rulemaking Committee Meeting (Jan. 7, 2018) (a representative for state higher education officers summarized that "we seem collectively to have already agreed that . . . we are generally comfortable with the idea that a borrower doesn't have to go into default to go ahead and fill out an application. That's what this regulation and the construct is premised on, right;" neither the Department negotiators nor any other negotiators disagreed with the characterization that the rulemaking committee collectively agreed that borrowers should not be limited to asserting borrower defenses in post-default collection proceedings).

program, the Department cannot justly claim a right to “repose” from borrower defense claims in the same way as could a private litigant.

d. Imposing a Time Limit on Borrower Defenses is Inconsistent with Department Policy with Respect to Other Discharges

The Department’s practice with regard to other school-conduct based discharges, such as false certification, closed school, and unpaid refund discharges, is not to impose any time limits on relief for borrowers. The Department has not set forth any data demonstrating why that approach should not be used here.

Legal aid practitioners regularly work with student loan borrowers eligible for false certification or borrower defense discharges who have suffered for years after being taken advantage of by their schools without realizing that they had a right to have their loans discharged based on the schools’ misconduct. This includes both borrowers who were unaware that their school engaged in misconduct and that there is evidence to prove it, and those who were aware that their school engaged in misconduct but were unaware that they were eligible for discharge of their loans as a result until a specialized student loan lawyer told them about their discharge rights many years later and helped them to apply. In other words, the issue is both that borrowers often do not discover a misrepresentation or other misconduct and the source of evidence to prove it within three years, and that even if they do borrowers do not learn of their right to relief based on that misrepresentation within three years.

e. Proposed Changes

The best and simplest solution is to follow the Department’s practice with regard to other school-conduct based discharges, such as false certification, closed school, and unpaid refund discharges, and not impose any time limits on relief for borrowers. The Department has not set forth any data demonstrating why that approach should not be used here.

If, however, the Department is unwilling to recognize the right of borrowers to assert borrower defenses at any time that their obligation to repay remains, then any imposition of a time limitation by the Department should *at minimum* be made in consideration of the following issues identified for the Department by legal aid negotiators during the rulemaking meetings.⁴²

- First, there should be no limitation period applicable to claims for discharge of outstanding loan balances.
- Second, with regard to claims for refunds of amounts the borrower has already paid or had collected on the loans, the harm to borrowers with meritorious defenses who simply did not know about their right to assert a borrower defense could be mitigated by allowing claims “within three years from the date the student discovered the

⁴² See Memo re: Issue 1 - Time Limits on Borrower Relief to Borrower Defense Negotiated Rulemaking Committee; U.S. Department of Education, by Abby Shafroth and Juliana Fredman, Negotiators on Behalf of Legal Assistance Organizations (Jan. 16, 2018).

misrepresentation or discovered the right to seek relief based on that misrepresentation, whichever is later.”

IV. Evidentiary Burden

We agree with the Department’s conclusions in this NPRM and in the 2016 rule that the preponderance of the evidence standard is the appropriate evidentiary standard and is “fair to students, taxpayers, and institutions.”⁴³ The Department should retain the preponderance of the evidence standard and not subject student borrowers to any heightened evidentiary burden.

a. The Preponderance of the Evidence Standard Should be Maintained

The Department requested input on the burden of persuasion that the borrower should have to meet to get relief. We believe that if the evidence shows that it is more likely than not that a borrower was victim of an institution’s misconduct that provides a borrower defense, the borrower should get relief. In other words, the Department should not have to tell borrowers: “The government believes, based on the evidence, that you were a victim of school misconduct and took out loans based on such misconduct, but the government will nonetheless continue seeking repayment and collecting from you anyway.”

We therefore support maintaining the preponderance of the evidence standard. A preponderance of the evidence standard is the default standard for civil actions, including consumer protection claims. *See, e.g.*, Cal. Evid. Code § 115 (“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”). Indeed, most states apply the preponderance of the evidence standard to their state unfair and deceptive practices laws, which are the most appropriate analog to the borrower defense misrepresentation standard.⁴⁴

⁴³ 83 Fed. Reg. at 37,245.

⁴⁴ *See, e.g., Kelley v. Little Charlie’s Auto Sales*, 2006 WL 1075025 (W.D. Va. Apr. 21, 2006) (Virginia); *In re Cohen*, 185 B.R. 180 (Bankr. D.N.J. 1995), *aff’d*, 191 B.R. 599 (D.N.J. 1996), *aff’d on other grounds*, 106 F.3d 52 (3d Cir. 1997), *aff’d*, 523 U.S. 213 (1998) (New Jersey); Iowa Code § 714H.5(3), (4) (specifying preponderance of evidence standard in private causes of action for actual damages, but a higher standard for multiple damages); *Dunlop v. Jimmy GMC, Inc.*, 666 P.2d 83 (Ariz. Ct. App. 1983) (Arizona); *Troyk v. Farmers Group, Inc.*, 90 Cal. Rptr. 3d 589 (Cal. Ct. App. 2009); *Paul v. Tindel*, 2003 WL 24199540 (Colo. Dist. Ct. Apr. 2, 2003)(Colorado); *Nielsen v. Wisniewski*, 628 A.2d 25 (Conn. App. Ct. 1993) (even where punitive damages are sought) (Connecticut); *O’Neill v. Carman Dodge, Inc.*, 2014 WL 12684817 (Del. Ct. of Common Pleas Dec. 23, 2014) (liability and damages subject to preponderance of evidence standard) (Delaware); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 856–857 (Ill. 2005) (Illinois); *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 898 N.E.2d 194, 202–203 (Ill. App. Ct. 2008) (Illinois); *Cuculich v. Thomson Consumer Elecs., Inc.*, 739 N.E.2d 934 (Ill. App. Ct. 2000) (Illinois); *Kelly v. VinZant*, 197 P.3d 803, 812 (Kan. 2008)(Kansas); *Ray v. Ponca/Universal Holdings, Inc.*, 913 P.2d 209, 212 (Kan. Ct. App. 1995) (Kansas); *Krieger v. USDT Properties/Mutual of Omaha Bank*, 199 So. 3d 1194 (La. Ct. App. 2016) (Louisiana); *Commonwealth v. Desire*, 2011 WL 5299274 (Mass. Super. Ct. Oct. 20, 2011) (Massachusetts); *State v. Price-Rite Fuel*, 24 A.3d 81 (Me. 2011) (preponderance of evidence required to show intentional violation of UTPA) (Maine); *Regnier v. Payter*, 2003 WL 21246635 (Mich. Ct. App. May 29, 2003) (contrasting UDAP claims to fraud claims)(Michigan); *State ex rel. Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788 (Minn. 1993) (even where state seeks civil penalties) (Minnesota); *Betsinger v. D.R. Horton, Inc.*, 232

Preponderance of the evidence is also the standard that the Department uses in other proceedings regarding federal education loans, including the collection proceedings that the Department here proposes should be the forum for resolution of so-called “defensive” claims.⁴⁵

By contrast, there is no reason to limit relief only to borrowers who are able to satisfy a higher burden of proof, such as “clear and convincing” evidence standard. These higher burdens of proof are the exception to the rule in civil cases, and are typically reserved for claims where fundamental rights are at stake, such as habeas corpus rights in capital cases. *See, e.g., Calderon v. Thompson*, 523 U.S. 538 (1998). A higher evidentiary burden would result in denials of relief to many borrowers with credible evidence that they were scammed into taking out loans simply due to the difficulty of gathering overwhelming evidence. A heightened standard of proof is particularly inappropriate to an administrative proceeding that does not include evidence discovery rights for the plaintiff that would be available in court, and in which the vast majority of borrowers will not be represented by lawyers.

The Department considered arguments in favor of higher standards of proof, including the clear-and-convincing standard, during the 2016 rulemaking and found that the “preponderance of the evidence” standard “is appropriate” for borrower defense claims and “strikes a balance between ensuring borrowers who have been harmed are not subject to an overly burdensome evidentiary standard and protecting the Federal Government, taxpayers, and institutions from unsubstantiated claims.”⁴⁶

b. Evidentiary Requirements should Account for Real Limits Borrowers Face in Accessing Evidence of Misrepresentations

P.3d 433 (Nev. 2010) (Nevada); *Nickerson v. Quaker Group*, 2008 WL 2600720, at *12 (N.J. Super. Ct. App. Div. July 3, 2008) (Nevada); *Gennari v. Weichert Co. Realtors*, 672 A.2d 1190, 1209 (N.J. Super. Ct. App. Div. 1996) (dictum), *aff'd as modified on other grounds*, 691 A.2d 350 (N.J. 1997) (New Jersey); *Gosai v. Abeers Realty & Dev. Mktg, Inc.*, 605 S.E.2d 5 (N.C. Ct. App. 2004); *State v. Eddy Furniture Co.*, 386 N.W.2d 901 (N.D. 1986) (N. Dakota); *Isla Fin. Servs. v. Sablan*, 2001 WL 34883530 (N. Mariana Is. Dec. 14, 2001) (Commonwealth of the Northern Mariana Islands); *State ex rel. Fisher v. Rose Chevrolet*, 612 N.E.2d 782 (Ohio Ct. App. 1992) (Ohio); *Robinson v. McDougal*, 575 N.E.2d 469 (Ohio Ct. App. 1988) (Ohio); *State ex rel. Redden v. Discount Fabrics, Inc.*, 615 P.2d 1034 (Or. 1980) (Oregon); *Boehm v. Riversource Life Ins. Co.*, 117 A.3d 308 (Pa. Super. Ct. 2015); *Paschal v. East Hampton Properties, Inc.*, 2008 WL 9832828 (S.C. Ct. App. Jan. 9, 2008) (South Carolina); *Haynes v. Lunsford*, 2017 WL 446987 (Tenn. Ct. App. Feb. 2, 2017) (Tennessee); *Poulin v. Ford Motor Co.*, 513 A.2d 1168 (Vt. 1986) (Vermont); *Benkoski v. Flood*, 626 N.W.2d 851 (Wis. Ct. App. 2001) (even if there are also possible criminal penalties) (Wisconsin). *See also Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 965 A.2d 1032, 1038 (N.H. 2009) (suggesting that requirement that fraud be proved by clear and convincing evidence does not apply to UDAP claims)(New Hampshire); *Ballagh v. Fauber Enters., Inc.*, 773 S.E.2d 366 (Va. 2015) (Virginia). *See generally*, National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 11.8.1.1 (9th ed. 2016), *updated at* www.nclc.org/library.

⁴⁵ *See* 34 C.F.R. § 34.14(b), (c) (administrative wage garnishment); 34 C.F.R. § 31.7(e) (federal salary offset).

⁴⁶ 81 Fed. Reg. at 75,936.

We further stress that any evidentiary requirements that would make relief contingent on production of evidence beyond the borrower's sworn testimony would pose insurmountable barriers for many borrowers with meritorious claims. Therefore, as discussed below in section VII (Individual Process), we urge the Department not to require documentation beyond the borrower defense application when applying the preponderance standard. The Department should also consider applications for borrower defense in light of documents and evidence already in its possession.

Many applicants will not have access to documentary evidence to support their claims, or will present claims based on oral rather than written representations or misconduct. The Department should not require that borrowers submit documents along with an application. Rather, a borrower's statement attesting to the elements of a borrower defense, signed under penalty of perjury, may be sufficient evidence of a defense, particularly if the Department does not receive any evidence that conflicts with the statement.

V. The Standard for Borrower Defenses

A clear and fair standard should align with consumer protections available under existing state law and federal law, and with which schools are already required to comply. The Department's proposed standard would substantially, unfairly, and unjustifiably narrow eligibility for relief as compared to either the current state law standard or the 2016 standard. The Department's proposals to newly require borrowers to prove school scienter and limited types of financial harm are particularly concerning: based on our experience working with borrowers and submitting borrower defense applications, we expect these two new requirements would render borrower defense relief nearly impossible for most borrowers.

a. A Federal Standard Should be a Floor, Not a Ceiling

The Department has proposed eliminating existing state law bases for borrower defenses and allowing defenses based only on a new federal fraudulent misrepresentation standard for loans made after the effective date of the proposed rule, as well as for existing loans that are consolidated after that date. While we support federal standards as a floor for borrower relief, we strongly urge the Department to reconsider incorporating other state law bases for defenses to repayment into the borrower defense standard to ensure that these regulations do not eliminate important existing bases for borrower defenses. We therefore recommend that the Department both explicitly allow defenses based on state law violations and consider state and federal consumer protection law when refining and interpreting the proposed new federal standards.

Prior to and during both this and the 2016 negotiated rulemaking process, representatives of legal aid organizations and other organizations that represent the interests of student borrowers recommended that the Department create a federal standard as a floor, above which

state consumer protection law is recognized, rather than a ceiling that eliminates important bases for borrower defense relief under current law.⁴⁷ We are disappointed that the proposed rule does not reflect this recommendation, and believe that this is a mistake. State law traditionally provides the most comprehensive consumer protections to students. When we see clients who have been wronged, it is to state law that we turn as a matter of course. We work in collaboration with the state agencies that have been charged with enforcing state consumer protection laws. And every institution accepting Title IV funds, now and in the future, must already conform its practices to the requirements of state law, wherever it operates. To the extent that the Department's borrower defense regulation is disconnected from state law, it will ignore this legal landscape and deprive borrowers of their rights to defend against repayment based on school misconduct that violates state law.

Additionally, contrary to the suggestion that including state law standards would introduce confusion and increase burden of the borrower defense determination process,⁴⁸ we submit that doing so would provide much-needed clarity. State laws are regularly interpreted and applied in the courts, and these precedents provide valuable clarity to all relevant parties—students, schools, and lenders alike—as to what these laws mean and as to the rights and responsibilities of the parties. Further, because the Department will continue to apply state law standards in assessing borrower defenses to repayment of loans taken out prior to the effective date of the proposed rule, the Department will necessarily need to understand and apply state law standards regardless of whether they are eliminated from the process for new loans. For all of these reasons, we urge the Department to establish a federal standard as a floor above which state law protections may provide additional bases for relief.⁴⁹

Short of that, we urge the Department to consider state consumer protection law in interpreting and applying a federal misrepresentation standard. In applying this standard, the Department should adopt the decisional rules and interpretations that have been developed in the context of predatory schools and their impact on consumers under state law.

b. Misrepresentation: Comments on the Proposed Standard

⁴⁷ See, e.g., Memorandum re: Issue Paper 1—Borrower Defense Standard to the Borrower Defense Negotiated Rulemaking Committee and U.S. Department of Education, by Ashley Harrington and Suzanne Martindale, Negotiators for Consumer Advocacy Organizations; Abby Shafroth and Juliana Fredman, Negotiators for Legal Assistance Organizations Representing Students; Stevaughn Bush, Negotiator for Students; Walter Ochinko, Negotiator for Servicemember and Veteran Borrowers (December 8, 2017), attached as Appendix XX; Comments on Borrower Defenses Against Loan Repayment, Docket ID No. ED-2015-ICD-0076, *available at* <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/comments-borrower-defenses-2015.pdf>.

⁴⁸ See 83 Fed. Reg. at 37,256 (asserting using a federal standard will reduce the burden on borrowers and the Department.).

⁴⁹ Adopting a federal standard as a floor, but not a ceiling, to borrower relief would address the problem, rightly identified by the Department, that existing standards could disadvantage borrowers in states that have less favorable consumer protection law. 83 Fed. Reg. at 37,256.

Based on the experiences of so many of our clients who were induced to enroll in predatory schools based on false promises and assurances, we believe it is essential that the borrower defense rules provide for relief based on misrepresentations. However, the Department's proposed redefinition as to what constitutes a misrepresentation would have the effect of precluding relief to the vast majority of borrowers who were in fact lied to and harmed by predatory schools.

Below we offer comments on four details of the proposed misrepresentation standard: (1) the new scienter requirement, (2) the new financial harm requirement, (3) the standards for assessing borrowers' reliance on a misrepresentation, and (4) the inclusion of omissions as predicate misconduct.

i. Scienter: Borrowers Should Not Have to Bear the Cost of Misrepresentations When Scienter Cannot be Proven

For a number of reasons, we strongly oppose the Department's proposal to deny relief to students unless they can prove that their school "acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth."⁵⁰

First, it is highly unlikely that borrowers would have access to evidence that could prove such scienter on the part of the school—particularly without the benefit of legal counsel or the process of discovery. As such, requiring borrowers to prove as much would effectively deny relief to most cheated borrowers. The Department recognized this in 2016, explaining that one strong reason not to include any scienter requirement in the borrower defense standard is that "[g]athering evidence of intent would likely be nearly impossible for borrowers."⁵¹ The Department continues to acknowledge "that it is unlikely that a borrower would have evidence to demonstrate that an institution had acted with intent to deceive," but nonetheless requires borrowers to produce similar evidence of scienter in order to establish entitlement to relief, without any analysis of why this standard would be meaningfully more accessible to misled borrowers than an intent to deceive standard.⁵²

This is unfair and unwarranted. As legal aid practitioners who have helped cheated borrowers, we know that borrowers have little way of accessing and presenting evidence as to what recruiters or other school officials knew, intended, or should have known when telling them falsehoods. Further, the administrative process proposed by the Department neither gives the borrower any right to discovery that would allow it to develop evidence of institutional scienter nor requires the Department to undertake any affirmative investigation to search for such facts. Given the difficulty of proving scienter generally, and the added complication of doing it without

⁵⁰ 83 Fed. Reg. at 37,325.

⁵¹ 81 Fed. Reg. at 75,937.

⁵² 83 Fed. Reg. at 37,257.

the assistance of discovery or a lawyer, we believe the proposed scienter requirement would effectively close off relief for many borrowers, and torpedo the proposed rules.

Second, the Department has failed to offer compelling reason to depart from the overwhelming judgment of policymakers that scienter should not be required to secure relief from deceptive practices. Indeed, beyond the Department's own conclusion in 2016, we point the Department to the fact that the FTC definition of deception does not require scienter,⁵³ nor do the overwhelming majority of state UDAP statutes.⁵⁴ Indeed, as one court explained in interpreting a state UDAP law, to require proof of intent "would effectively emasculate the act and contradict its fundamental purpose."⁵⁵

Third, we agree with the Department's 2016 statement of principle that it "is more reasonable and fair" for an institution to be held responsible for harm it causes borrowers by misrepresentations or other misconduct than to leave borrowers to bear such costs, regardless of what the institution's intent was.⁵⁶ A borrower harmed by a school recruiter's false statement should be eligible for relief even if the recruiter did not know the statement was false. Providing otherwise would unfairly leave injured borrowers to bear the cost of harms caused by their schools, rather than placing the cost of that harm on the institution that caused it and could have better prevented it. Failing to hold schools accountable for mistakes that harm students, regardless of the schools' intent, is also inconsistent with the Department's firm stance on taking personal accountability. For example, in introducing its proposals, the Department states: "Postsecondary students are adults who can be reasonably expected to make informed decisions and who must take personal accountability for the decisions they make."⁵⁷ Surely if the Department wishes to hold seventeen-year-olds responsible for their mistakes, it should also hold institutions accountable for theirs.

In taking this position, we do not contend that borrowers are entitled to discharge of their loans based on trivial, harmless mistakes by a school. But rather than focusing on whether a school intentionally versus mistakenly provided misinformation or engaged in other misconduct, the better approach is to focus on whether such conduct was reasonably likely to harm students. Mistakes that are reasonably likely to harm students (e.g., advertising 90% job placement rates

⁵³ See, e.g., *Fed. Trade Comm'n v. Freecom Communications, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) (key question is not intent to deceive, but "the likely effect of the claim on the mind of an ordinary consumer"); *Fed. Trade Comm'n v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) (intent unnecessary even for action for monetary redress). See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.2.4.1 (8th ed. 2012), updated at <http://www.nclc.org>.

⁵⁴ See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §§ 4.2.4.1, 4.2.5.1 (9th ed. 2016), updated at www.nclc.org/library (citing cases from majority of states); see also National Consumer Law Center, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Laws* (March 2018), available at <http://www.nclc.org> (state-by-state survey of UDAP statutes' features, including scienter requirements).

⁵⁵ *Thomas v. Sun Furniture & Appliance Co.*, 399 N.E.2d 567 (Ohio Ct. App. 1978).

⁵⁶ See 81 Fed. Reg. at 75,947.

⁵⁷ See 83 Fed. Reg. at 37,243.

instead of 9%) are appropriate bases for borrower defenses, whereas mistakes that are not reasonably likely to be harmful (e.g., advertising that the faculty includes 20 Nobel Laureates instead of 19) are not.

ii. Financial Harm: New Requirements Ignore and Exclude Key Harms Borrowers Suffer

In a significant departure from both the 1994 and 2016 borrower defense regulations, the Department proposes here to require borrowers to prove that they suffered financial harm as a result of their school’s misconduct. This new requirement will create unjustified barriers to relief, unnecessarily complicate the application and review process for borrowers and the Department alike, and lead to inconsistent treatment of similarly situated borrowers.

Most troublingly, the Department’s proposal would specifically exclude and overlook the most obvious financial harm borrowers necessarily suffer when they “reasonably rely” on a misrepresentation “in deciding to obtain a loan to enroll or continue enrollment in a program at the institution”—the student loan debt that they would not have otherwise incurred. Under the state unfair and deceptive practices laws that have traditionally provided the primary basis for borrower defense claims, paying for a good or service—or taking out a loan—that the consumer would not have if not for a misrepresentation is recognized as sufficient harm or injury.⁵⁸

The Department fails to adequately explain why it refuses to recognize this plainly cognizable harm in its proposed rule. Rather, it simply states that it “does not agree that taking a Federal student loan, by itself, is sufficient evidence of financial harm to the borrower in the context of a borrower defense to repayment.”⁵⁹ This makes no sense, especially in light of the fact that the Department “will acknowledge a borrower defense to repayment only if it directly relates to the loan or to the school’s provision of educational services for which the loan was provided.”⁶⁰ The “context” of a borrower defense *is a federal loan*. Further, in the Department’s

⁵⁸ See, e.g., *DeCarlo v. Costco Wholesale Corp.*, 2018 WL 3627653 (9th Cir. July 31, 2018) (pleading that one would not have otherwise purchased product but for misrepresentation satisfied requirement to plead causal link between advertising and alleged economic injury); *Chavez v. Blue Sky Natural Beverage Co.*, 340 Fed. Appx. 359 (9th Cir. 2009) (injury requirement satisfied by allegation that buyer would not have purchased product but for misrepresentation); *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011) (Consumers’ alleged purchases of locksets mislabeled as “Made in U.S.A.,” which the consumers would not have bought if they had known the label was false, established injury in fact and loss of money or property as required for standing under Unfair Competition Law and False Advertising Law); *Jamison v. Summer Infant (USA), Inc.*, 778 F. Supp. 2d 900 (N.D. Ill. 2011) (actual damages requirement met where plaintiffs alleged that they would not have purchased product or paid purchase price absent misrepresentation); *Laughlin v. Target Corp.*, 2012 WL 3065551 (D. Minn. July 27, 2012) (plaintiff suffered injury by purchasing shoes she would not otherwise have purchased but for allegedly false statements). See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §11.4.2.8.4 (9th ed. 2016), updated at www.nclc.org/library.

⁵⁹ 83 Fed. Reg. at 37,259.

⁶⁰ *Id.* at 37,260.

explanation of the rule, it appears to recognize that taking out a loan should be considered evidence of financial harm if the misrepresentation was the basis for the borrower's enrollment decision⁶¹—but in the regulatory language itself it bars recognition of this same fact.

Similarly, the Department's proposal excludes "opportunity costs" from the types of financial harm it will recognize, even though opportunity cost is commonly recognized in the law and imposes real and significant financial harm on our clients. Our clients commonly suffer significant opportunity costs as a result of attendance at predatory schools that they would not have attended had they not been deceptively recruited. These costs include lost wages and childcare expenses. For example, when client "Julia" enrolled in Everest's night program, an admissions representative told her that the school would find her an after-hours externship so that she could continue to work at her existing job during the day. When the deadline for completing the 160 hours of externship work that was required for graduation loomed, and the school had not found her an externship site that offered night hours, Julia became desperate. She took leave from her job so that she could attend an externship site during the day, and was subsequently fired from her job because "school was getting in the way." She not only never obtained a job in her field of study after attending Everest, but lost much-needed income from the job she had but lost due to Everest.

Further, there is a growing body of research demonstrating that the opportunity cost of student loan debt continues past the point that an individual leaves school. Student loan debt has demonstrated negative impacts on individual decisionmaking about careers, marriage, family formation, and wealth accumulation. Individuals forgo opportunities and/or make less optimal decisions because of their student loan debt, and lose substantial wealth opportunities in the form of home equity and retirement savings because of student debt.⁶² One study found that households with an average student debt burden experienced a lifetime wealth loss of nearly \$208,000 compared to households without student debt, attributable to a decreased ability to put money into retirement savings or invest in a home during the life of the loan.⁶³

Additionally, the provisions regarding financial harm in both proposed § 685.206(d)(3) and § 685.206(d)(5)(v) fail to make clear how students who do not complete can demonstrate

⁶¹ See 83 Fed. Reg. 37,259 (noting that "the Department does not agree that taking a Federal student loan, by itself, is sufficient evidence of financial harm to the borrower" because students may have relied on information other than the misrepresentation in deciding to enroll, and thus a borrower may not "receiv[e] loan relief under the defense to repayment regulation if th[e] misrepresentation was not the basis for the borrower's enrollment decision *or* it did not cause subsequent financial harm" (emphasis added).

⁶² See, e.g., Andrew, M., *The changing route to owner occupation: the impact of student debt*, *Hous. Stud.* 25(1), 39-62 (2009); Rothstein, J., Rouse, C.E., *Constrained after college: student loans and early career occupational choices*, *J. Public Econ.* 95 (1-2), 149-163 (2011); Schrag, P., *Federal student loan repayment assistance for public interest lawyers and other employees of governments and nonprofit organizations*, *Hofstra L. Rev.* 36 (1), 27-63 (2007); Brown, M., Caldwell, S., *Young Student Loan Borrowers Retreat from Housing and Auto Markets*, *Liberty Street Economics* (April 17, 2013); Gicheva, D., Thompson, J., *The Effects of Student Loans on Long-Term Household Financial Stability, Student Loans and the Dynamics of Debt* 288 (Hesrhbein & Hollenbeck eds. 2014).

⁶³ Hiltonsmith, R., *At What Cost? How Student Debt Reduces Lifetime Wealth*, *Demos* (2013).

financial harm sufficient to satisfy the Department’s standards in light of the Department’s refusal to acknowledge that federal student loan debt and opportunity costs constitute financial harm (other than in the limited instance where the student’s school failed to offer a requirement necessary for completion of the program). This is a massive oversight in light of the high percentage of students at all schools, and at for-profit schools in particular, who do not complete their programs. A 2017 National Student Clearinghouse Research Center report finds the overall national six-year completion rate for the fall 2011 cohort was 56.9 percent, and the completion rate at four-year private for-profit schools was only 35.3 percent.⁶⁴ Failing to recognize the harm predatory schools inflict on non-completers would impose an especially harsh cost on students of color, who would be disproportionately denied relief: 80 percent of African-American and two-thirds of Latino students do not complete for-profit programs.⁶⁵

It will often be in students’ and taxpayers’ best interest for students to withdraw from programs once they realize that the programs were misrepresented or are otherwise unlikely to be the good investment advertised. For example, a group of Spanish-speaking clients of Legal Aid Foundation of Los Angeles sought help with debt for a medical assisting program in which they had enrolled because recruiters had told them that the program would be conducted entirely in Spanish. In fact, instruction and class materials were all in English, which they did not speak or read.⁶⁶ In such instances, borrowers are clearly harmed by enrolling and taking on debt for a program that will not benefit them as promised, and withdrawing makes absolute sense.

We should all be able to agree that the rule should not penalize borrowers from cutting their—and taxpayers’—losses by leaving fraudulent or low-value programs. Indeed, the Department endorses in its financial harm commentary that “the borrower has the opportunity to leave an institution should it not provide educational opportunities or experiences commensurate with the borrower’s expectations.”⁶⁷ Most borrowers who leave will still shoulder student loan debts tied to their initial enrollment. And available data confirms that completing predatory programs quite often does not make economic sense for borrowers or taxpayers. For example, a recent economic analysis concluded that borrowers who completed many for-profit certificate programs would be financially better off not attending the program.⁶⁸ And student loan default

⁶⁴ Shapiro, D., Dundar, A., Huie, F., Wakhungu, P.K., Yuan, X., Nathan, A. & Bhimdiwali, A. (2017, December). *Completing College: A National View of Student Completion Rates – Fall 2011 Cohort* (Signature Report No. 14). Herndon, VA: National Student Clearinghouse Research Center.

⁶⁵ Peter Smith & Leslie Parrish, Center for Responsible Lending, *Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees’ Futures* at 21 (Oct. 2014), <http://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf>.

⁶⁶ National Consumer Law Center, Comments to U.S. Dep’t of Educ. Re: Intent to Establish Negotiated Rulemaking Committee on Borrower Defense and Gainful Employment at 5, Docket ID ED-2017-OPE-0076 (July 2017).

⁶⁷ 83 Fed. Reg. at 37,259.

⁶⁸ See Stephanie Cellini, *Gainfully employed? New evidence on the earnings, employment, and debt of for-profit certificate students* (Brookings, Feb. 2018), available at <https://www.brookings.edu/blog/brown-center-chalkboard/2018/02/09/gainfully-employed-new-evidence-on-the-earnings-employment-and-debt-of-for-profit-certificate-students/>.

rates are higher among those who complete a postsecondary certificate (28 percent) than among those who withdraw from school (24 percent).⁶⁹

iii. Borrowers Should Receive Relief If They Relied on Misrepresentations or Reasonably Would Have Relied

In light of the vulnerabilities and circumstances that may render an act or omission misleading to some borrowers and not others, we urge the Department to reconsider its proposal to limit relief to only those borrowers whose reliance on a misleading statement was “reasonable.”⁷⁰ So long as a borrower actually relied to her detriment on a statement that was “misleading under the circumstances,” she should be entitled to relief.

To the extent the Department does maintain a requirement that reliance be “reasonable,” it should make clear that the reasonableness of reliance will be judged according to the circumstances surrounding the misrepresentation and the characteristics of the audience targeted by the misrepresentation. This is consistent with the practice in those states for which the UDAP law imposes a requirement that plaintiffs prove the reasonableness of their reliance.⁷¹

As it did in 2016, “the Department recognizes that the reasonableness of a borrower’s reliance on the misrepresentation may depend upon the circumstances, and its proposed rule thus states that the Department will look at whether a borrower reasonably relied upon the misrepresentation ““under the circumstances.””⁷² However, perhaps as a result of a drafting error, the Department does not include this “under the circumstances” language in its proposed regulatory language for “Alternative B.”⁷³ We urge the Department to ensure that the “under the circumstances language” is applied to consideration of applications submitted under an “affirmative” process.

In addressing the reasonableness of a student’s reliance on a misrepresentation, the circumstances relevant to whether an act or omission is likely to mislead should include the circumstances of the audience or population to which that misrepresentation or omission is directed.⁷⁴ Such “circumstances” should thus correctly include a “borrower’s distress or lack of

⁶⁹ Judith Scott-Clayton, *The looming student loan default crisis is worse than we thought*, Brookings: Evidence Speaks Reports, Vol 2, #34 (January 10, 2018).

⁷⁰ 83 Fed. Reg. at 37,325-26.

⁷¹ See, e.g., *Office of Attorney Gen., Dep’t of Legal Affairs v. Commerce Commercial Leasing, LLC*, 946 So.2d 1253, 1259 (Fla. Dist. Ct. App. 2007) (tailoring the reliance analysis where victims “were targeted specifically because they were technically unsophisticated”).

⁷² 83 Fed. Reg. at 37,257.

⁷³ *Id.* at 37,325 (Alternative B: for 685.206((d)(2)(i) (“a borrower may assert a claim under this section if the borrower establishes by a preponderance of the evidence that—(A) The institution at which the borrower enrolled acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth in making a misrepresentation of material fact, opinion, intention, or law upon which the borrower reasonably relied in deciding to obtain a Direct Loan to enroll or continue enrollment”).

⁷⁴ *Cf.* 81 Fed. Reg. at 39,343.

knowledge or sophistication,”⁷⁵ “limited English proficiency,”⁷⁶ and other characteristics that may make a borrower more or less susceptible to school deception. Similarly, the situation in which the statements or omissions were made can also render a statement or omission misleading, including when a school official has encouraged a prospective student to trust him, or is rushing a student through enrollment.

This approach is consistent with that of other federal agencies charged with ensuring protection of consumers, including the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), and the Office of the Comptroller of the Currency (“OCC”). For example, the FTC requires that banks affirmatively “tailor[] advertisements, promotional materials, and marketing scripts to take into account the sophistication and experience of the target audience.”⁷⁷ The FTC “unfairness” standard looks to, among other factors, whether a defendant “exercise[s] undue influence over highly susceptible classes of purchasers.”⁷⁸ Similarly, the CFPB observes the principle that “when representations target a specific audience, such as older Americans or financially distressed consumers, the communication may be considered from the perspective of a reasonable member of the target audience.”⁷⁹ Likewise, the OCC evaluates an act or practice “from the perspective of any specific audience to which it was targeted or which was reasonably foreseeable.”⁸⁰

This approach is also in accord with state law. For example, in assessing whether an act was unfair or deceptive in New York, courts focus on whether the conduct is “likely to mislead a reasonable consumer acting reasonably *under the circumstances, i.e. the plaintiff’s circumstances.*”⁸¹ Similarly, in California, when trade activity is “aimed at a particularly susceptible audience,” its deceptiveness or unfairness “must be measured by the impact it will likely have on members *of that group.*”⁸² New Jersey’s consumer protection law takes special consideration of whether “a professional seller is seeking the trade of those most subject to

⁷⁵*Id.*; see also *id.* at n.16 (quoting Restatement (Third) of Torts: Liab. For Econ. Harm § 11 TD No 2 (2014)).

⁷⁶ *Cf. id.* It is especially critical that limited English proficiency be taken into consideration under the substantial misrepresentation prong in light of the Department’s decision against recognizing the same as a basis for false certification discharge. See 81 Fed. Reg. at 39378 (“Some of the non-Federal negotiators recommended including limited English proficiency (LEP) as one of the characteristics that would disqualify a borrower from working in a particular profession and serve as the basis for a false certification loan discharge. We reviewed this proposal, but determined that it would not be practical to determine a borrower’s English language proficiency at the time the borrower enrolled in the program.”)

⁷⁷ Federal Reserve Board, Federal Trade Commission Act Section 5: Unfair and Deceptive Acts or Practices Manual, available at <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf>.

⁷⁸ *CFPB v. ITT Educ. Servs., Inc.*, -- F.Supp.3d --, 2015 WL 1013508, at *28 (S.D. Ind. Mar. 16, 2015).

⁷⁹ CFPB Bulletin 2013-07 (July 10, 2013), available at http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

⁸⁰ OCC Advisory Letter AL 2002-3, available at <http://www.occ.gov/static/news-issuances/memos-advisory-letters/2002/advisory-letter-2002-3.pdf>.

⁸¹ *Solomon v. Bell Atl. Corp.*, 777 N.Y.S.2d 50, 54 (App. Div. 2004) (emphasis added).

⁸² *Lavie v. Proctor & Gamble Co.*, 105 Cal.App.4th 496, 506 (2003) (emphasis added).

exploitation—the uneducated, the inexperienced and people of low incomes.”⁸³ Texas keys its consumer protection law to “specific circumstances” bearing on consumers’ “vulnerability,” “the most common being the buyer’s lack of knowledge with regard to a specific product, service, or transaction.”⁸⁴

Finally, our experience working directly with student loan borrowers has impressed upon us the need to consider the circumstances surrounding misleading statements. Many of the clients we represent have told us they were in vulnerable situations or “low places” when they were recruited, including being homeless, and many were the first in their family to attend post-secondary schools and had little idea what to expect from higher education. We share below some of their stories, which drive home the need to recognize that people in specific circumstances are more likely to a) trust what is being said to them by those offering “education,” and b) be taken in by promises tailored to speak directly to their desperate circumstances.⁸⁵

- “Lynn” was recruited into Robert Fiance, a notorious beauty school that is now closed, by a recruiter standing outside a welfare office in New York City. The recruiter said that Lynn (like others coming out of the welfare office) was “entitled” to “financial aid” which would afford her a “free” education. Lynn was a recent immigrant from a Latin American country where higher education is in fact covered in its entirety by government subsidies. In these circumstances, Lynn reasonably believed that the “financial aid” came with no requirement that it be repaid.
- Many of our clients were recruited by predatory schools while they were homeless or receiving disability benefits. For example, “T.B.” was living in a shelter when he was recruited into a pharmaceutical tech program at Lincoln Tech. He signed up because he needed a place to stay during the day when the shelter was closed. He has a severe learning disability and the school promised it would accommodate him, but then failed to provide any educational support. T.B. dropped out of the program with significant federal student loan debt.
- Similarly, a client who enrolled in a criminal justice program at Heald had been on SSI since childhood for serious intellectual disabilities. When she told her counselor that she could not follow the classes, she was encouraged to transfer to the Medical Assisting program. She did, but was unable to follow along in that program either, and withdrew with a significant amount of debt.

⁸³ *Assocs. Home Equity Servs. V. Troup*, 343 N.J. Super. 254, 278 (App. Div. 2001).

⁸⁴ *Thrall v. Reno*, 695 S.W.2d 84 (Tex. App. 1985).

The Department’s borrower defense standard must recognize that predatory schools deliberately target and exploit individuals who are in difficult to desperate circumstances.

iv. The Department Correctly Recognizes that Omissions Can be as Deceptive as Statements

We support the Department’s continued inclusion of “omission” in the definition of misrepresentation. Especially when it comes to technical issues such as accreditation and financial aid, our clients have no reason to expect anything other than fair dealing from their schools, and are often encouraged by officials to trust them to look out for the students’ best interests. Unfortunately, unscrupulous actors are able to exploit the asymmetry in information and bargaining power between themselves and our clients in countless ways.

Further, we emphasize that omissions should be understood and judged in the context of the specific audiences targeted. This is especially true when schools target immigrants without any context for understanding how the system of higher education works in the United States, and/or who speak limited English. For example, the Attorney General of Massachusetts investigated and documented the deliberating targeting of individuals with limited English proficiency by Everest Institutes in Massachusetts, which included omitting disclosure of the critical fact that classes would be in English when the relevance of that fact was clear. Below are just two examples of evidence the state collected from Everest teachers and employees:

- “S.K.” reported that admissions and financial aid representatives were encouraged to speak to prospective students in their native Spanish in order to convince them to enroll, despite the fact that they had no proficiency in English—the language of instruction at Everest.
- “J.M.” reported that “Finance Planners” at Everest prepared financial aid packages for students who did not speak English and did not understand the content of the documents they were signing.

c. The Standard Should Encompass a Prohibition on Unfair, Abusive, or Otherwise Unlawful Conduct

We urge the Department to adopt a stand-alone borrower defense standard that addresses unfair, abusive, or unlawful conduct. “Unfair” and “abusive” acts and practices are distinct from “deceptive” practices such as substantial misrepresentations. Similarly, acts may violate state laws intended to protect consumers without constituting a breach of contract or misrepresentation. But just like substantial misrepresentations, these practices result in significant harm to targeted students—typically substantial student loan debt for an education of little to no value. Because there are well-established precedents defining unfair and abusive practices that can be applied in the borrower defense context, and because students are often harmed by unfair, abusive, or otherwise unlawful school practices even in the absence of

actionable misrepresentations, the Department can and should include unfair, abusive, or unlawful practices in its standard for borrower defenses.

There is substantial precedent in state and federal law defining “unfair” acts or practices on which the Department can rely in adopting and applying an unfair conduct borrower defense standard. Most states, either by statute, or as clarified in case law, have adopted a definition of “unfair” patterned after the Federal Trade Commission Act,⁸⁶ as interpreted by the Supreme Court in *FTC v. Sperry & Hutchinson Co. (S & H)*, 405 U.S. 233 (1972). Generally, an unfair act or practice is one which offends established public policy; is unethical, oppressive, or unscrupulous; or causes substantial injury to consumers.⁸⁷ Additionally, the Consumer Financial Protection Bureau has interpreted the scope of “unfair” practices in the Dodd-Frank Act as “reflect[ing] the unfairness standard under the FTC Act.”⁸⁸

Over the years, unfairness standards have taken more concrete shape through court decisions and agency rulemakings. The Department can pull from this existing body of law in establishing and applying an unfair practices standard in the borrower defense context. For example, the following types of practices have all been found to be unfair, and could be readily applied to the context of school recruitment, enrollment, and financial aid practices:

- Coercive high-pressure sales tactics;
- Unfair provisions in contracts of adhesion;
- Taking advantage of disparate knowledge;
- Taking advantage of a vulnerable group; and
- Illegal conduct.⁸⁹

Contrary to its belief, the Department would not need to break new ground in tailoring or applying this standard to address protection of students.⁹⁰ For example, Massachusetts recently promulgated definitions of unfair as well as deceptive practices specifically “to address problems

⁸⁶ 15 U.S.C. § 45(a)(1).

⁸⁷ See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.3.3.3.1 (8th ed. 2012), updated at www.nclc.org/library; see also *FTC v. Sperry & Hutchinson Co. (S & H)*, 405 U.S. 233, 244-45 (1972); See Statement of Basis and Purpose of the FTC Trade Regulation Rule, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 16 C.F.R. pt. 408, 29 Fed. Reg. 8355 (1964), since rescinded.

⁸⁸ Consumer Financial Protection Bureau, Payday, Vehicle Title, and Certain High-Cost Installment Loans Proposed Rules, Docket No. CFPB-2016-0025, at p. 131 (May 29, 2016), available at http://files.consumerfinance.gov/f/documents/Rulemaking_Payday_Vehicle_Title_Certain_High-Cost_Installment_Loans.pdf.

⁸⁹ National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 4.3.1 (8th ed. 2012), updated at www.nclc.org/library.

⁹⁰ See 81 Fed. Reg. at 39,343 (“The Department believes it would face significant challenges in determining which cases of such conduct warrant relief. A wide variety of conduct can be considered deceptive, unfair, or abusive, under both State and Federal law, and characterizing particular conduct as falling under such standards would require the Department to engage in a nuanced application of complex legal doctrines that vary across jurisdictions and that often have not been subject to a degree of judicial development sufficient to make their application to the borrower defense context clear.”).

experienced by consumers when they seek or are enrolled in for-profit schools or occupational programs.”⁹¹

In defining and applying an abusive practices standard, we encourage the Department to look to the definition in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), as well as the CFPB’s application of the law to protect student loan borrowers. Both the CFPB and the State of Illinois have recently applied this abusive practices standard to protect student loan borrowers from predatory school conduct. The CFPB alleged ITT took advantage of students by putting them in a position where they had little choice but to take out high-priced private loans with the school.⁹² ITT required students to repay loans before the program was completed, even though students had no reasonable way to make payments while still in school. Students thus had to either take out new loans from the school or withdraw and lose out on any value of what they had already invested. The CFPB further alleged as abusive ITT’s practice of encouraging students to rely on the school’s financial aid staff to act in the students’ interests and then taking advantage of this reliance to push students into high risk loans. The federal court hearing the case agreed with the CFPB that a cause of action for abusive conduct could be based on a school taking unreasonable advantage of the students’ reliance on the school if the students believed the financial aid staff was acting in their interests.⁹³ Similarly, in Illinois’ case against Alta Colleges, the court agreed that Illinois could state a claim for abusive practices based on allegations including that the school targeted unsophisticated students, characterized salespeople as admission representatives, and used high pressure sales techniques.⁹⁴

Common themes emerge from schools whose business model is predicated on meeting enrollment targets. The tactics we frequently hear about are unfair or abusive—particularly when targeted at young, disabled, uneducated, unemployed, or otherwise vulnerable individuals—and saddle students with thousands of dollars in loans for educations that are ultimately worthless to them. Importantly, these tactics do not depend on specific misrepresentations, and so borrowers taken advantage of by these practices may not be eligible for relief unless the Department supplements its proposed standard to include unfair or abusive practices.

For example, at Everest Institute in Massachusetts, the philosophy of one Director of Admissions was, succinctly, to put “asses in classes.” Everest had recruiting and enrollment quotas. “C.K.” reported that Everest Brighton set monthly enrollment targets, and that pressure to meet these targets increased as the month passed. Employees were taught to do whatever necessary to get students to return to campus within 24 or 48 hours of first contact for the best

⁹¹ 940 C.M.R. 31.01 *et seq.*; available at <http://www.mass.gov/ago/docs/regulations/940-cmr-31-00.pdf>.

⁹² Complaint, *Consumer Fin. Prot. Bureau v. ITT Educ. Services, Inc.*, Case No. 1:14-cv-292 (S.D. Ind. Feb. 26, 2014), available at http://files.consumerfinance.gov/f/201402_cfpb_complaint_ITT.pdf.

⁹³ *Consumer Fin. Prot. Bureau v. ITT Educ. Services, Inc.*, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015).

⁹⁴ *People v. Alta Colleges, Inc.* (N.D. Ill. Sept. 4 2014), available at www.nclc.org/unreported.

chance of getting them to enroll before they had time to consider otherwise. “N.N.” was told to call each student “continuously” until they agreed to come to the campus for an “interview.” When students did come in, she was trained to get them to enroll on the spot, before they “had time to think about it.” “E.M.” observed that Everest Chelsea instructed its admissions representatives to call potential recruits repeatedly and to ignore no-call requests until the student submitted three formal requests that the school stop calling him or her.

These types of high pressure sales tactics are often “unfair” and thus actionable under state UDAP laws, even if they are not deceptive.⁹⁵ Unfair and abusive sales tactics are the result of systematic recruiting efforts by for-profit colleges, in service of a business model that requires significant churn and growth in enrollment in order to meet profitability targets. These practices are not confined to Corinthian-operated schools.⁹⁶

Our experience shows that many schools continue to engage in unlawful conduct that is unfair or abusive, but is not tied strictly to any specific statement or omission of fact and thus may not satisfy the substantial misrepresentation or breach of contract standards. Our clients report that the financial aid process is like a “whirlwind,” and they are encouraged to “just fill out” loan documents in order to “get the ball rolling” without reviewing them. When one client, “Melissa,” asked to bring the documents home so that she could review them with her family, she was told that was not necessary because they were “just formalities.” Many clients have told us about similar tactics used to coerce them to sign loan documents once they were already enrolled. For example, clients have told us that New England Institute of Art gave teachers lists of students to send to the financial aid office as class was beginning. The financial aid officers would tell the students that before they could return to class, they must sign paperwork that the students had not seen before. Because of the school’s strict attendance policy, which penalized students for missing even a few minutes of class, our clients felt compelled to sign paperwork that they never had a chance to read and to borrow loans that they did not want, or risk all of the money, work, and hope they had already poured into their education.

Especially if the Department does away with the ability to raise state consumer protections as a basis for borrower defenses, we strongly urge it to include unfair and abusive practices as a distinct basis for borrower relief. Rather than jettisoning this basis for relief through the elimination of state-law based claims, the Department should take this opportunity to expand relief opportunities to borrowers in all states who are preyed upon through these types of unfair and abusive conduct.

d. Violations of State Law Harm Student Loan Borrowers Even in the Absence of Misrepresentations

Finally, we emphasize again that the borrower defense standard should encompass the most robust consumer protections available under state law, preferably by making the federal standards for relief a floor and not a ceiling that eliminates state bases for relief. Adopting a federal standard as a floor, but not a ceiling, would address the problem rightly identified by the Department that existing standards do not adequately protect students in states with weak consumer protection laws, without eliminating existing protections for students in other states.⁹⁷

The HEA has imposed a consumer protection role on the states by requiring state authorization standards for Title IV eligibility. Because it leaves to the states the primary responsibility for regulating institutions and protecting students from abusive school conduct, states have enacted detailed laws with which schools are required to comply for the benefit of students.

The following are examples of common state law violations that seriously harm students, but would not be covered by the Department's proposed standards:⁹⁸

- Failure to comply with state refund rights.
- Failure to comply with state cancellation rights.
- Failure to comply with state laws that require the provisions of enrollment agreements in the students' primary language.
- Failure to comply with state tuition recovery fund laws.
- Failure to comply with laws prohibiting the changing of class formats, locations, times, etc. without student consent.

In light of the important student loan borrower protections provided in state law—both through general consumer protection laws, including unfair and deceptive acts and practices laws, as well as through laws and regulations specifically developed to protect against abuses in the higher education and student loan context—we urge the Department to make new federal standards a floor above which state law protections may provide additional bases for relief.

VI. Relief

⁹⁷ 81 Fed. Reg. at 39,339.

⁹⁸ For specific citations to these types of state laws, see National Consumer Law Center, Student Loan Law Manual § 13.6.3.2 and Appx. E (5th ed. 2015), updated at www.nclc.org/library. See also National Consumer Law Center, *Ensuring Educational Integrity: 10 Steps to Improve State Oversight of For-Profit Schools* (June 2014) and *Update: Step 2: Protecting Online Education Students* (Dec. 2015); and National Consumer Law Center, *State Inaction: Gaps in State Oversight of For-Profit Higher Education* (Dec. 2011), all available at <http://www.studentloanborrowerassistance.org/advocacy/reports/>.

The Department should abandon its proposal to allow for only partial relief and should instead provide full discharges for all meritorious borrower defense claims.

It is telling that the Department has not offered any proposal as to how it would determine the appropriate amount of partial relief to provide and solicits suggestions from the public on how it could do so. The Department has spent three years trying to come up with a reasoned and legal method to provide partial relief, and has failed to do so. This is because there is simply no fair and consistent way to do so. For example, the methods of calculating financial harm proposed elsewhere in the rule do not make sense in relation to the harms experienced by our clients, and would create unnecessary burden, complexity, and inconsistency of outcomes. The Department should instead adopt the approach used in the false certification and closed school discharge programs of providing full discharges for all meritorious claims.

The extent of the injury borrowers suffer significantly exceeds their federal student loan debt or even the cost of attendance. For many reasons, students who were lured into predatory schools on the basis of false promises and abusive and unfair recruiting tactics will never be made whole by the borrower defense process, even if they are granted a full discharge of their federal student loans:

- First, a complete borrower defense is an inadequate remedy *even for just the damage that borrowers have suffered vis-à-vis the Title IV program*: borrowers who attend fraudulent schools lose out on portions of their lifetime grant eligibility, which the Department does not propose to restore as a borrower defense remedy. This means that borrowers effectively lose several thousands of dollars in critical Pell grants that could be used to support a second chance at a better education.
- Second, many of our clients incurred additional private student loan debt and out-of-pocket costs that are not addressed through the borrower defense process. Indeed, a Senate committee report concluded that private loans are a predictable consequence of manipulative practices by predatory institutions to inflate tuition beyond federal aid limits to maximize revenue while masking noncompliance with the 90/10 rule.⁹⁹
- Third, our clients also suffer consequential economic damages as a result of attendance at predatory schools, including lost wages and other economic opportunity loss and childcare expenses.

⁹⁹ See United States Senate Health, Education, Labor and Pensions Committee, *For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* at 9, 39-40 (July 30, 2012) (“Some schools increase tuition in order to create a gap between the total amount of Federal aid a student can receive and the cost of attending.”); see also Proposed 34 C.F.R. § 685.222(i)(5) (“The total amount of relief granted with respect to a borrower defense cannot exceed the amount of the loan and any associated costs and fees . . .”).

- Fourth, many of our clients have suffered consequential losses related specifically to hardships they have experienced with their student loans after attending a fraudulent school, including lost housing, job, or credit opportunities related to negative student loan credit history; seizures of much-needed wages and Earned Income Tax Credits that led borrowers to miss rent payments and face eviction for their families;¹⁰⁰ and other financial hardship stemming from the loan obligations. For example, “J.” was homeless when she was recruited by Everest. After she incurred thousands of dollars of federal student loan debt for a certificate without value, her subsequent inability to pay that debt damaged her credit. When she finally obtained a Section 8 voucher for subsidized housing for herself and her daughter, after years on the waiting list, she was unable to find a landlord who would rent to her because of negative credit reporting related to her student loans. As another example, “Scott” took out federal and private loans and his parents took out Parent PLUS loans to pay for his education at Audio Engineering. Scott graduated but was never able to get a paid job in his field of study (despite his school’s false claim otherwise—a spot check of the school’s job placement statistics revealed that the school had reported him as “employed” by a hobby bar band he had formed while in school but never made any money from). Scott’s parents struggled to pay back the PLUS loans, and the financial stress they created were a factor in their decision to file for bankruptcy.
- Fifth, many borrowers have also experienced significant emotional distress from the manipulation they experienced, their embarrassment and loss of hope when they found they had sacrificed so much for a false promise of a better future, and from the stress of crushing student loan debt. The proposed borrower defense rules specifically exclude this type of injury from relief determinations.¹⁰¹

Under the state unfair and deceptive practices laws that have traditionally provided the primary basis for borrower defense claims, all of these types of harm—direct and consequential, pecuniary and emotional—may provide a basis for relief, including relief that exceeds the amount paid for a service or good.¹⁰² We understand that pursuant to section 455(h) of the HEA,

¹⁰⁰ See National Consumer Law Center, *Stop Taking the Earned Income Tax Credit from Struggling Student Loan Borrowers* (May 2016), available at <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ib-stop-taking-earned-income-tax.pdf> (sharing stories of borrowers harmed by offset of the Earned Income Tax Credit following student loan default).

¹⁰¹ Proposed 34 C.F.R. § 685.222(i)(5) (“The relief to the borrower may not include non-pecuniary damages such as inconvenience, aggravation, emotional distress, or punitive damages.”).

¹⁰² See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §12.3.3 (8th ed. 2012), updated at www.nclc.org/library. See, e.g., *Gent v. Collinsville Volkswagen, Inc.*, 116 Ill. App. 3d 496, 504, 451 N.E.2d 1385, 1390 (1983) (affirming award of \$6000 for UDAP claim based on concealment of problems with car; although plaintiff only paid defendant \$3,879.75 for the car; expenditures on towing, repairs, auto loan interest, and rental of a substitute vehicle supported larger compensatory award); *Hale v. Basin Motor Co.*, 795 P.2d 1006 (N.M. 1990) (noting with regard to relief that “[c]ertainly, high among the factors motivating legislatures to enact [UDAP

a borrower is not authorized to recover *more* from the Secretary than the borrower has paid on their loan, along with cancellation of outstanding amounts due on the loan. However, in light of all these legally cognizable—and very real—injuries borrowers suffer above and beyond the amount of their federal student loan debt, failing to provide full relief even from that debt for harmed borrowers would result in a completely inadequate remedy.

We therefore recommend that the Department amend the proposed regulations to provide individuals with meritorious borrower defenses with full discharges on eligible loans, including cancellation of outstanding balances and refunds of amounts already paid, just as is provided for false certification and closed school discharges. Providing full relief to all such borrowers is far and away the best and simplest solution for meeting the Department’s commitment “to making sure students” harmed by predatory practices “receive every penny of relief they are entitled to under law.”¹⁰³ Further, the Department’s attempt to distinguish between why it provides full discharges for false certification and closed school, but not for borrower defenses, is illogical. The Department explains that the difference is that the bases for those discharges are “relatively straightforward” whereas it “anticipate[s] that determinations for borrower defense claims will involve more complicated issues of law and fact” that will make it “hard to know what happened.”¹⁰⁴ But these issues relate to potential differences in relative difficulty in resolving the merits of claims, not to the amount of relief appropriate.

If, however, the Department is unwilling to commit to full discharges in all cases of meritorious defenses as recommended, we urge it to take other steps to simplify the process for all parties and provide better assurance that borrowers will consistently receive the relief to which they are entitled. One way to do so is to indicate that when an individual or group borrower defense is approved, the Secretary ordinarily will discharge all amounts owed to the Secretary on the loan at issue and afford the borrower recovery of all amounts previously collected on the loan. In the unusual circumstance where such relief is not warranted, the Department must explain in writing the basis for its determination and allow the borrower the opportunity to respond.

VII. Process for Individual Borrowers

The Department should revise its proposed individual process to ensure that it is accessible and equitable to unrepresented borrowers. We emphasize that most borrowers seeking borrower defenses will be unrepresented, and that unrepresented borrowers will already be at a

laws] is the frustration experienced by consumers having to run around to straighten out unfair or deceptive trade practices”).

¹⁰³ U.S. Dep’t of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015), available at <https://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges>; *see also* Borrower Defense to Repayment Negotiated Rulemaking Committee Meetings 2016, Opening Remarks of Jeff Appel, Deputy Under Secretary U.S. Department of Education (Jan. 12, 2016) at 4 (similar promise), *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/bd-appelremarks-011216.doc>.

¹⁰⁴ 83 Fed. Reg. at 37,263.

disadvantage in navigating the administrative discharge process. This problem will be exacerbated by the procedural structure proposed by the Department, which will pit unrepresented borrowers against institutions and would further stack the deck against borrowers by giving schools but not borrowers the opportunity to review and respond to all evidence and to appeal a materially adverse decision. Additionally, the Department's proposal does not appear to allow borrowers to reapply based on evidence not previously considered: in our experience this is very important, as unrepresented borrowers often do not know what is needed to state or support a claim when they first submit a claim, or only obtain critical evidence after filing when evidence from a government investigation or lawsuit becomes public. Borrowers will need guidance as to what information to include in their applications and that applications submitted *pro se* should be liberally construed.

a. The Proposed Rule Would Prejudice Unrepresented Borrowers, and Almost All Borrower Defense Applicants are Unrepresented

The process proposed by the Department is ill-suited to unrepresented borrowers, who are the overwhelming majority of borrowers seeking relief based on borrower defenses. Our organizations turn away thousands of borrowers per year seeking our help with loan cancellation due to acts by their schools that would entitle them to borrower defense cancellation under any fair standard. We urge the Department to consider the needs of borrowers who cannot afford legal representation when finalizing and implementing these proposals. The legal aid community urges the Department to consider the needs of borrowers who cannot afford legal representation. One important way to do so is by granting relief pursuant to the group process. But the process for individual borrowers to seek relief must also be fair and accessible to unrepresented borrowers. In our experience, clients targeted by fraudulent, for-profit schools are the least prepared to navigate the Department's forms and systems, even when those forms and systems are significantly simpler than those likely to be involved in borrower defense.

We urge the Department to conform to the uniformly-recognized principle that pleadings from *pro se* litigants are to be liberally construed.¹⁰⁵ Requirements that applicants submit legal justification or reasoning will stand between defrauded borrowers and much-needed relief.

We also urge the Department to bear in mind that even seemingly simple requests for documentary evidence will pose insuperable barriers for many borrowers with meritorious claims. We therefore recommend that the Department limit requests to only that information truly necessary to approve a borrower's claim and, whenever possible, not require documentation beyond the application itself.¹⁰⁶ The Department has access to records of federal student loan

¹⁰⁵ See, e.g., *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”) (internal citations and quotations omitted).

¹⁰⁶ See Proposed 34 C.F.R. § 685.222(e)(1)(i)(B) (requiring individual borrowers to “[p]rovide evidence that supports the borrower defense”), *id.* at (e)(1)(ii) (requiring individual borrowers to “[p]rovide any other information or supporting documentation reasonably requested by the Secretary”).

borrowers' identities, loan information, schools attended, and years attended, and should not require borrowers to submit this information that it already possesses. While some of this information is also available to borrowers via NSLDS, we regularly serve clients who do not have access to the internet and therefore have difficulty accessing information about their loans on NSLDS. Almost none of our clients are even aware of NSLDS before we tell them about it.

Former students also often lack records from their schools (and rarely have school records of their own). Many defrauded borrowers also do not have stable living situations, making it difficult to retain records, and many do not have permanent mailing addresses, a fact that makes it difficult for them to request documentation from their schools be sent to them.

Records from schools that closed after the student attended are often unobtainable. We have also found that many schools, whether closed or not, that have engaged in misconduct resist legitimate requests for records from former students, unless that request is submitted by a lawyer on behalf of a student.¹⁰⁷ Even then, we have found that after an attorney request, schools have often taken months to respond even with repeated follow-ups, or responded that they could not locate the records sought, or demanded payment of unaffordable record fees, or produced misleading sub-parts of records sought.

Additionally, the Department should consider information already available to the federal government, including other claims submitted about the school, state and federal investigations, reports such as the 2012 Senate Health, Education, Labor and Pensions Committee Report and GAO reports, lawsuits, audits, and other data sources. Doing so will reduce the burden on borrowers for whom it is often difficult, if not impossible, to access evidence beyond their own testimony of a school's misconduct. By using all available resources to verify a borrower's claim before denying an application or requesting further documentation from a borrower, the Department can better ensure that it meets its goal of providing all defrauded borrowers with the relief they deserve.

Third, in many cases, the borrower's claim will be based on oral statements (or omissions) made by school representatives, for which no documentary evidence is available. Again and again, clients have told us that recruiters from various career programs made unsupported job placement claims or guarantees to them verbally in one-on-one recruiting calls or in-person meetings that went further than the more general assertions of job readiness made in school advertisements. These borrowers were not provided written documentation of these promises, but remember what they were told and how it convinced them to enroll. Even when schools have students sign or initial disclosures and waivers among the stacks of paperwork

¹⁰⁷ For example, one client came to a legal aid office while living in a domestic violence shelter. She could not use her address for regular mail. She went in person to her former school, Salter, to request her school file on two separate occasions, and was denied. She called several times as well and was told that records could only be sent by mail. It was not until she sought legal aid and was able to use her attorney's address that she obtained her records.

enrolling students are required to sign, hundreds and thousands of our clients have told us that they were made promises at enrollment that bear no similarity to any such paperwork.

The Department should therefore ensure that neither its application form nor its review procedures suggest to borrowers or officials that evidence of written misrepresentations or other documentary evidence are necessary for a successful claim, or that written evidence provided by a school carries greater weight than testimonial evidence from one or multiple borrowers. The Department should track similar claims by other students and take note of this evidence when reviewing borrower defense applications.

b. The Proposed Rule Unfairly Combines the Process for Borrowers with the Process for Schools

In the 2016 regulation, the Department appropriately separated the adjudication of individual borrowers' applications for a defense from the question of whether to undergo a recoupment process against the school.¹⁰⁸ The legal aid community strongly supported this component of the 2016 Rule, noting that it is critical to ensuring that unrepresented borrowers need not face off against sophisticated, represented, schools that may have a significant stake in the proceeding that goes well beyond the few thousand dollars of loan relief sought by the individual. We strongly oppose the Department's proposal to give schools a role in the process to discharge direct loans, which loans are governed by regulations and by the contract between borrowers and the Department of Education.

First, we believe that it is completely inappropriate to involve schools in individual borrowers' administrative adjudications. Although schools clearly have an interest in, and should be involved in, any process that the Department undertakes to recoup funds from schools as a result of a borrower defense discharge, that interest is fully and appropriately protected at the time that the Department seeks to recoup from the school. And indeed, the proposed rule provides for exactly such a process, allowing schools to avoid recoupment if, in a later proceeding, it can show that the Department's finding of wrongdoing was erroneous. The Department should not make the discharge process for borrowers more difficult by involving unnecessary parties in an unnecessarily adversarial process.

Moreover, the particular ways the proposed rule involves schools privileges the schools within the process, with no gesture toward fairness or balance for borrowers.¹⁰⁹ For example, the rule requires the Department to share the information it is considering when making a finding directly with schools and not with borrowers, and allows schools "an opportunity to provide a

¹⁰⁸ See Proposed 34 C.F.R. § 685.222(e) (Procedure for an Individual Borrower); Proposed 34 C.F.R. § 685.222(e)(7) ("The Secretary may initiate a separate proceeding to collect from the school the amount of relief resulting from a borrower defense under [the individual process]").

¹⁰⁹ Indeed, a fair process would require corrections in favor of borrowers, who are largely unrepresented and without legal expertise or significant financial resources, even in the absence of schools' involvement.

response and any supporting evidence.”¹¹⁰ The legal aid community would like to know: **why has the Department provided this opportunity to schools and not to borrowers at the point in the process when the Department is determining whether to discharge the borrower’s loan, and not the school’s liability?**¹¹¹

The proposed rule also invites input from schools without requiring that the school’s submission be complete, or even requiring that schools submit evidence that supports the borrower’s claim. Indeed, the proposed rule says only that “[u]pon receipt of a borrower’s request for relief based on defense to repayment, the Department will notify the school of the pending request, provide a copy of the borrower’s request and any supporting documents to the school, provide a waiver signed by the student permitting the institution to provide the Department with items from the student’s education record relevant to the defense to repayment claim, and invite the school to respond and to submit evidence”¹¹²

In addition, it is not clear that the Department of Education would actively investigate the claims beyond requesting evidence from the school. The proposed rule’s preamble merely states that “the Department’s Federal Student Aid office will make a decision on the defense to repayment based on the submissions from the borrower and the school, if any.”¹¹³ The proposed rule itself lists minimal additional sources.¹¹⁴ The Department should not rely on schools’ self-interested rebuttals to substantiate the claims of borrowers who will struggle to obtain evidence for themselves. Instead, the Department should pursue robust investigations of wrongdoing.

c. The Department’s Proposal Unfairly Cuts Off Borrowers’ Rights to Further Consideration of Their Claims While Providing Schools with Numerous Opportunities to Be Heard

Beyond its inappropriate inclusion of schools in individual borrowers’ adjudications, the process that the Department proposes is unfairly biased against borrowers because it cuts off borrowers’ right to appeal or seek reconsideration of an adverse decision while providing schools with yet more opportunities for post-adjudication recourse.

The Department’s 2016 Rule included a provision allowing borrowers to seek reconsideration after the Department issued a written decision. The proposed rule, however, eliminates this possibility. The Department does not explain this departure, saying only:

¹¹⁰ 83 Fed. Reg. at 37,261; *see also* Proposed 34 C.F.R. § 685.206(c)(8)(i) (“The Secretary will provide the school the information that will be considered when determining whether to grant the borrower defense to repayment discharge and allow a reasonable opportunity to respond and submit additional evidence.”).

¹¹¹ The proposed rule does provide for borrowers to receive information initially provided by a school, just as schools receive the information that the borrower has submitted at a time prior to this later, school-only part of the process. *See* Proposed 34 C.F.R. § 685.206(c)(7).

¹¹² *See* Proposed 34 C.F.R. § 685.206(c)(7).

¹¹³ 83 Fed. Reg. at 37,262.

¹¹⁴ *See* Proposed 34 C.F.R. § 685.206(c)(8)(i).

Under the process and standard included in these proposed regulations, the Department expects to receive and consider all relevant evidence from the borrower and the institution during its consideration of the borrower's defense. Therefore, we do not believe that an appeal process or a process for reconsideration will be needed, nor is one included in these proposed regulations.¹¹⁵

Surely, despite appearances to the contrary, the Department is not asserting as its reason for this departure that it is immune from error, that it will issue no erroneous decisions, or that it will make no mistakes. From our representation of clients seeking borrower defense discharges, as well as clients seeking every other type of discharge available, we are all too aware that the Department makes frequent and egregious errors within its administrative processes resulting in erroneous decisions that are adverse to borrowers entitled to all types of discharges.

The legal aid community would like to know: **will borrowers who have received denials be permitted to submit new applications with new evidence?** This right is very important to borrowers, and especially the vast majority of borrowers who will not be represented by counsel and may not understand what facts or arguments they need in order to state a claim, or may not have access to sufficient evidence to meet the Department's imposing burden of proof until there is a government investigation or decision.

Despite cutting off borrowers' rights to reconsideration, the proposed rule nevertheless gives schools many more opportunities to have their claims and arguments considered, including in a second proceeding if the Department seeks recoupment from the school.¹¹⁶

VIII. Group Process

The borrower defense rule should promote efficiency, should treat like borrowers alike, and promote providing relief to all borrowers who are eligible. The Department's proposal to rescind the 2016 provisions for group-based relief to borrowers and to instead require each borrower subject to the same school misconduct to independently apply for and prove their borrower defense claim would mean that most borrowers who have been cheated and have meritorious borrower defenses will never get relief, simply because they do not know about their right to relief, how to prove their claim, or how to navigate the borrower defense process.

a. Group Relief Promotes Equity and Efficiency

Because some types of harmful misconduct are likely to apply to many borrowers who attended the same program or institution, there should be an efficient and equitable process for

¹¹⁵ 83 Fed. Reg. at 37,262.

¹¹⁶ See Proposed 34 C.F.R. § 685.206(c)(13).

determining whether groups of student borrowers should be provided relief based on widespread misconduct.

A group process promotes equity by ensuring that borrowers subjected to the same misconduct are treated the same by the Department. This is especially important because many borrowers may not otherwise be aware of their right to relief or may face challenges to collecting evidence or filing individual claims.

A group process is also more efficient than requiring each individual borrower subjected to the same misrepresentation to file an individual defense, and requiring the Department to assess each application and make individualized determinations. Indeed, as the Department recognized in 2016, a group process “promote[s] greater efficiency and expediency in the resolution of borrower defense claims.”¹¹⁷ Furthermore, in light of the subsequently documented delays that the Department is already experiencing in processing individual claims,¹¹⁸ it would be more efficient and appropriate for the Department to process group claims where it has evidence that a school has engaged in widespread misconduct, rather than adjudicating each claim relating to the same misconduct one-by-one. Indeed, the Department states that the current, individualized process “has proven to be burdensome to borrowers, given the time it takes to adjudicate each claim, and costly to taxpayers.” This rationale would call for *expanding* access to group applications as a means of reducing borrower burden and the time needed to adjudicate, not eliminating them.¹¹⁹

b. Group Relief is Essential to Ensuring that Cheated Borrowers Get Relief

The Department’s proposal to rescind the 2016 provisions for group-based relief to borrowers and to instead require each borrower subject to the same school misconduct to independently apply for and prove their borrower defense claim would mean that most borrowers who have been cheated and have meritorious borrower defenses will never get relief, simply because they do not know about their right to relief, how to prove their claim, or how to navigate the borrower defense process.

Based on our experiences working with borrowers, we believe that the vast majority of students entitled to relief will never know of the opportunity to apply for such relief. The inclusion of a group process is therefore critical to ensuring that as many borrowers as possible

¹¹⁷ 81 Fed. Reg. at 39,347.

¹¹⁸ See, e.g., U.S. Dep’t of Educ. Office of Inspector General, Federal Student Aid’s Borrower Defense to Repayment Loan Discharge Process, ED-OIG/I04R0003 (December 8, 2017), *available at* <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf> (noting failure to establish timeframes for processing claims, that the Department had stopped processing unique claims altogether, and that the Department often took more than a year to provide discharges even for approved applications supported by group-based findings).

¹¹⁹ 83 Fed. Reg. at 37,251.

who are entitled to relief actually get it, and that borrowers who were victims of the same illegal conduct by a school are treated similarly by the government.

Indeed, all of the relief that the Department has reported granting thus far has been to borrowers whose claims were considered through a process that made findings applicable to groups of borrowers and simplified or eliminated their application process and need to present evidence.¹²⁰ To the extent the Department has since provided any relief to borrowers outside of the Corinthian findings groups, ACI, or ITT findings groups, we request information about such relief, including the number of approved claims, the schools such claims were associated with, and the extent to which the Department required individualized evidence of harm from the borrowers in order to access relief.

Further, by the Department's own estimates, the elimination of a group relief process would cost borrowers significantly. The Department expects that the volume of loans tarnished by conduct that would give rise to a borrower defense will not change, but that far fewer borrowers will receive relief primarily due to changes in the process that would limit or extinguish claims outside of post-default proceedings and that would require individual applications and "lack any explicit process for aggregating like applications."¹²¹

c. The Department Should Not and Need Not Require Proof of Individualized Reliance and Harm

The first reason the Department offers for rescinding the 2016 group process provisions is that the new standard it proposes would necessitate an individualized inquiry.¹²² This is because under the Department's proposed standard, whether a claim is approved depends on evidence that the borrower reasonably relied on the misrepresentation in deciding to enroll or continue enrollment in the institution and how the borrower was harmed by the misrepresentation beyond taking out a loan.

¹²⁰ See Dep't of Educ. Office of Inspector General, Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process, ED-OIG/I04R0003 (Dec. 8, 2017), available at <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf> (describing the categories of borrowers who have had claims for relief approved, which are specific groups of borrowers from Corinthian covered by the Department's misrepresentation findings and subject to a streamlined application process that does not necessitate additional individualized evidence, ACI (where borrowers received automatic group relief), and a smaller group at ITT's California campuses that ED found falsely guaranteed employment); see also Dep't of Educ., Press Release: American Career Institute Borrowers to Receive Automatic Group Relief for Federal Student Loans (Jan. 13, 2017); Dep't of Educ., Press Release: U.S. Department of Education Announces Path for Debt Relief for Students at 91 Additional Corinthian Campuses (March 25, 2016), <https://www.ed.gov/news/press-releases/us-department-education-announces-path-debt-relief-students-91-additional-corinthian-campus> ("These campuses represent the largest group of borrowers eligible for loan relief so far from the ongoing investigation into Corinthian.").

¹²¹ 83 Fed. Reg. at 37,299 (describing the removal of the group discharge provisions as a "significant factor" in reducing borrower defense discharges).

¹²² *Id.* at 37,262-63.

This is a problem of the Department’s own making, and it can and should be resolved by aligning the standards for group relief with longstanding state consumer protection law standards. Specifically, to ensure an equitable and efficient process, the Department should adopt commonly used standards that find deceptive conduct actionable when an entity makes a misrepresentation that is “reasonably likely to mislead” and upon which a consumer is “reasonably likely to rely.” The Department may also use the approach it adopted in 2016 of recognizing, in the case of a substantial misrepresentation, “a rebuttable presumption that each [group] member reasonably relied on the misrepresentation.”¹²³ Similarly, the Department should not and need not require individualized proof of financial harm as an element of a borrower defense.

This is the approach that the Department appropriately undertook in the 2016 Rule, and the Department has failed to offer a compelling reason to depart from that approach with a result of providing far less relief to cheated students.

d. Transcript Withholding Threats Do Not Justify Rescission of the Group Relief Process

The second reason that the Department offers for not including a group process is that doing so would “subject borrowers who did not individually submit defense to repayment claims to the possible collateral consequences of debt relief, including potentially having their transcript withheld.”¹²⁴

This rationale cannot reasonably justify rescission of the group process. First, as a legal matter, it is not at all apparent that schools have the right to withhold students’ transcripts as a consequence of a loan discharge. The Department has cited no authority for its assertion that schools may do so, and the National Consumer Law Center investigated this assertion and could find no support for it. To the contrary, the legal precedent indicates that while schools may have a basis for withholding official transcripts if the student owes the school an unpaid debt, including a defaulted Perkins Loan or an unpaid fee or tuition debt,¹²⁵ schools may not withhold transcripts if the student does not owe a debt, including if a loan debt has been discharged such

¹²³ 81 Fed. Reg. at 39,419.

¹²⁴ 83 Fed. Reg. at 37,263.

¹²⁵ See, e.g., *Ball State Univ. v. Irons*, 27 N.E.3d 717, 721 (Ind. 2015) (recognizing that school has a common law lien over transcript based on student’s tuition debt and “may not be compelled to release the transcript absent payment of the unpaid tuition balance”); *Song v. Regents of Univ. of Minnesota*, No. CIV. 11-427 ADM/TNL, 2011 WL 5835087 (D. Minn. Nov. 21, 2011) (finding student unlikely to prevail on merits of claim for transcript where school declined to release transcript until student paid back funds received that she was not entitled to due to her suspension of enrollment); see also U.S. Dep’t of Educ., Fed. Student Aid Dear Colleague Letter CB-98-13 [Attachment A](#) (Sep. 1, 1998) (noting that the Department encourages institutions to withhold transcripts for defaulted Perkins Loans to encourage repayment).

as through bankruptcy.¹²⁶ For example, the Seventh Circuit concluded that a student who did not owe an enforceable debt to a school had a right to receive an official copy of her transcript.¹²⁷

Second, there is no evidence that schools do in fact withhold transcripts on the basis of a loan discharged as a result of a borrower defense or false certification discharge, even if they legally could. And in our experience, this is extremely unlikely. As discussed in XI(f), *infra*, legal aid attorneys often request student records, including transcripts, on behalf of our clients, and whether the former student received a discharge of Direct Loans has not been an issue.

Third, even if transcript withholding were a real legal and factual risk to borrowers who receive borrower defense discharges, this would still not provide reason to abandon the 2016 group relief provision, as the regulation provided that borrowers identified as members of a group would be notified and given the opportunity to opt out of the process.¹²⁸ Thus borrowers in a group who do not want to receive relief and “the possible collateral consequences of debt relief, including potentially having their transcript withheld” would have the opportunity to opt-out and avoid such consequences.

In short, if the Department’s true concern about a group relief process is that borrowers may unwittingly lose access to their official transcripts, then appropriate remedies are to either (a) make clear to schools that they may not withhold transcripts on the basis of a borrower defense discharge or (b) include reference to any risk of transcript withholding in the notice of the group process and opportunity to opt out, so the borrower may make the choice herself.

e. Recommended Improvements to the 2016 Group Discharge Process

The Department should restore the 2016 provision for a group process. Further, to ensure that a group relief process reasonably achieves the goals of efficiency, consistency, and provision of relief for borrowers when there is sufficient evidence of systemic wrongdoing by a school, we make the following suggestion for strengthening the final rule:

The 2016 group process provision would be enhanced by greater transparency. The 2016 Rule allows the Department to identify groups, but does not set forth any automatic triggers for when a group will be identified. Nor does it allow for those outside of the Department, such as attorneys general and legal aid organizations, to request that the Department consider and decide whether evidence supports the existence of a group for purposes of borrower defense, as discussed during the rulemaking meetings. We urge the Department to:

¹²⁶ *In re Kuehn*, 563 F.3d 289, 294 (7th Cir. 2009).

¹²⁷ *Id.* (finding that school had no enforceable right to recover against student whose debt was discharged in bankruptcy and therefore could not withhold her transcript, and concluding “Giving weight to custom that amounts to an implicit term of the educational contract, and following the reasoning in *Hirsch*, we conclude that Kuehn has a state-law right to receive a certified copy of her transcript).

¹²⁸ 81 Fed. Reg. 75,926, 76,084 (§ 685.222(f)(2)).

1. Maintain and implement the 2016 group process provision;
2. Define a non-exhaustive list of circumstances that would warrant group treatment; and
3. Adopt the following language: “A state attorney general, state or federal enforcement agency, or a nonprofit organization that provides legal representation may submit a written request identifying a group of borrowers for the Secretary to initiate the process described in either paragraphs (g) or (h) of this section. The Secretary will issue a written determination, within a reasonable period of time, whether such a process, as appropriate, will be initiated.”

IX. Equal Access for FFEL Borrowers

There can be little question that Federal Family Education Loan (“FFEL”) borrowers deserve and need equal access to a fair borrower defense process alongside that provided for Direct Loan borrowers. Unfortunately, the proposed regulations fail to deliver such equity, and would leave many FFEL borrowers out in the cold. While we support the Department’s proposal to continue recognizing the eligibility for borrower defense discharge of Direct Consolidation Loans, we urge the Department to open the relief process to FFEL borrowers without requiring consolidation.

a. FFEL Borrowers Should Have the Same Rights As Direct Loan Borrowers

Borrowers whose federal student loans happened to be made through the FFEL program rather than the Direct program should not face barriers to relief as a result. Pursuant to § 455(a) of the HEA, Direct Loans and FFEL loans are to have the same terms, conditions, and benefits. Consistent with that principle, the Department of Education has long reassured schools that it intends to provide “equitable determinations” of borrower defense liability under the Direct and FFEL programs.¹²⁹ Borrowers similarly deserve equitable treatment in this process regardless of which program their federal loans were made through. Indeed, unlike schools, which prior to July 2010 could choose which loan program to participate in, borrowers generally had no choice as to which program their federal loans were made through.¹³⁰

In our experience, borrowers rarely know whether their loans are Direct or FFEL—they simply know that they were told to sign paperwork to obtain financial aid, and that now they owe student loans. This is especially true for borrowers who have been harmed by school misconduct. For example, a client who attended Everest Brighton recalled that she was rushed

¹²⁹ See, e.g., 60 Fed. Reg. at 37,768-69 (Jul. 21, 1995) (reassuring schools in the context of borrower defense regulations that “[t]he Direct Loan regulations are intended to ensure that institutions participating in the FFEL and Direct Loan Programs have a similar potential liability” and that “[t]he Department intends to perform its oversight responsibilities for both loan programs in a manner that provides equitable determinations of institutional liability”).

¹³⁰ See, e.g., Federal Student Aid Handbook 2-13 (2008-2009), available at <http://ifap.ed.gov/sfahandbooks/attachments/Vol2Ch20809.pdf> (explaining that schools can apply to participate in either or both the FFEL and Direct programs; students that attended schools that only participated in one program did not have a choice as to the source of federal Stafford or other loans they received).

through signing a pile of forms without opportunity to read them in an enrollment process that took less than 30 minutes. Though she was told that the papers were only for school purposes and that she was receiving “government grants,” in fact she unknowingly took out various federal loans. Moreover, many borrowers whose school years spanned the discontinuation of the FFEL program in July 2010 took out both FFEL and Direct loans for their education. To provide them relief on only some of their loans would be arbitrary, confusing and unfair.

The lack of relief for FFEL borrowers is a major issue. According to the Department’s statistics, over 14 million individuals have outstanding FFEL loans.¹³¹ And as advocates have noted, many of the federal loans disbursed to former students of Corinthian Colleges are FFEL loans.¹³²

b. The “Consolidation Path” Does Not Provide Sufficient Protection to FFEL Borrowers

We appreciate that the proposed rules confirm that Direct Consolidation loans are eligible for discharge through the Direct Loan borrower defense process. While this is critical for the many borrowers who have consolidated their loans or may do so to access new repayment plans or emerge from default, there are several problems with the proposal to make consolidation a necessary prerequisite for FFEL borrowers to access the borrower defense process:

- **First**, requiring consolidation creates another administrative obstacle for vulnerable borrowers without assistance of lawyers to navigate the process, and these obstacles may be incredibly complicated—or actually impossible—to overcome under the Department’s newly proposed limits on defensive and affirmative applications. The Department has proposed precluding borrowers with new Direct Loans—consolidated after the effective date of the rule—from asserting defenses unless they are either in collection proceedings or within three years from leaving school. Given that the FFEL program ended in 2010, borrowers would not be eligible to apply “affirmatively” for relief of their FFEL loans if they consolidate after the effective date of the proposed rule, as the 3-years-from-school time limit would appear to apply to such borrowers. FFEL borrowers who have not yet consolidated may also not be able to apply for relief through the “defensive process,” as that process requires applying for borrower defense relief during a collection proceeding. But if a borrower has defaulted FFEL loans and receives notice of a collection proceeding, then the rules may require the borrower to consolidate into a Direct Consolidation Loan in order to be eligible for relief—but consolidating would remove the borrower from default, and thus from the scope of the collection proceeding. As

¹³¹ See <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>.

¹³² See Coalition letter to Secretary King re: Recommendations to Improve Proposed Borrower Defense Regulations (March 11, 2016), available at http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/CoalitionLetterOnBorrowerDefense_2016.pdf.

attorneys familiar with the student loan consolidation and collection proceeding processes, we are unclear how to navigate the procedural morass this rule would create for FFEL borrowers; we cannot imagine how unrepresented borrowers could navigate it.

- **Second**, not every FFEL borrower is eligible to consolidate into a Direct Consolidation Loan.¹³³ For example, FFEL borrowers cannot consolidate if their wages are currently being garnished or if there is a judgment on the loan.¹³⁴ Unless ED changes the rules to permit all FFEL borrowers to consolidate, these FFEL borrowers will be unable to access the borrower defense process.
- **Third**, a borrower can only consolidate portions of a loan that have not been paid—which the Department has said in the past means that borrowers who consolidate FFEL loans into a Direct Consolidation Loan are largely ineligible for relief on the portion of the loan already paid. This is again unfair to FFEL borrowers and arbitrarily provides different relief to FFEL borrowers based on when they consolidate their loans. Perversely, it penalizes those FFEL borrowers who have diligently made payments on their loans, and makes it such that a borrower would receive more relief by not making payments when they were required. Unless the Department wishes to encourage the non-payment of FFEL loans and penalize those who have made payments, the borrower defense process must allow for refunds of amounts already paid on FFEL loans.
- **Fourth**, even when borrowers are able to consolidate, it may be risky for them to do so unless they have certainty that the loans will be discharged. For example, consolidation is one of the few ways borrowers are able to get their loans out of default. Many of our clients who would be interested in submitting borrower defense claims also struggle financially and are at risk of delinquency or default. Borrowers who have consolidated all of their loans into a Direct Consolidation Loan prior to defaulting, however, are not eligible to reconsolidate.¹³⁵ For at-risk borrowers, consolidation thus generally means giving up a key option for addressing a potential future default. Additionally, consolidation may make FFEL borrowers financially worse off. Borrowers in an income-driven repayment plan who consolidate would lose credit for their payments made toward forgiveness.¹³⁶ Some borrowers would lose their interest rate reductions for on-time payments. And borrowers consolidating Parent PLUS loans with other federal loans would be ineligible for most income-driven repayment programs.¹³⁷ Borrowers should

¹³³ For a discussion of limitations on eligibility to consolidate, *see generally* National Consumer Law Center, *Student Loan Law* § 7.2.2 (5th ed. 2015), *updated at* www.nclc.org/library.

¹³⁴ 34 C.F.R. § 685.220(d)(1)(ii)(B)-(C). The loan can only then be consolidated if the garnishment order is lifted or the judgment is vacated, respectively.

¹³⁵ 34 C.F.R. § 685.220(d)(2)-(3).

¹³⁶ 34 C.F.R. §§ 685.209(a)(6)(iii), (c)(5)(v)B, 685.221(f)(3); *see also* National Consumer Law Center, *Student Loan Law* § 3.3.3.8 (5th ed. 2015), *updated at* www.nclc.org/library.

¹³⁷ 34 C.F.R. §§ 685.209(a)(1)(ii), (c)(1), 685.221(a)(2) (providing that Parent PLUS loans and consolidation loans that repaid a Parent PLUS loan cannot be repaid using REPAYE, PAYE, or IBR).

not have to risk losing legal and financial protections in order to assert a borrower defense claim.

To address these problems and ensure FFEL borrowers have equal access to the borrower defense process, we recommend that the process should remain open to FFEL borrowers even if they do not consolidate. As the Department acknowledges, it alone “has the ultimate discretion to grant or deny a discharge application.”¹³⁸ The Department should exercise that authority to consider borrower defense applications (and group relief, to the extent it preserves group relief) for FFEL borrowers on equal footing with applications and group relief for contemporaneous Direct Loan borrowers, and without any requirements to consolidate into Direct Loans or any limitations on FFEL borrowers’ recovery of amounts already paid. This is the most straightforward and just solution to ensure FFEL borrowers defrauded by their schools do not face arbitrary barriers to relief. At minimum, the Department should stipulate to or presume a referral relationship for FFEL borrowers who have proven a borrower defense under the existing or proposed standard.

Additionally, though we strongly urge the Department to open up its borrower defense process to FFEL borrowers directly, *i.e.*, without requiring consolidation, if it does not do so, we urge that the Department commit to a “pre-approval” process whereby it will determine FFEL borrowers’ eligibility for discharge—contingent upon consolidation—prior to requiring consolidation or advising borrowers to consolidate to access relief. The Fourth Special Master Report indicates that this has been the Department’s practice, but the Department should make a formal and enduring commitment to pre-determination if it is going to require consolidation for relief. This is important to protect against encouraging borrowers to consolidate—and forfeit certain rights and benefits—when consolidation may not result in relief. This type of pre-approval would also be essential to including FFEL borrowers in any process for group relief—the Department could assess the eligibility of all FFEL borrowers in a group and notify them of the relief they would receive if they consolidate, inform them of how to consolidate, and advise them as to alternative avenues for relief if they do not consolidate.

X. Forced Arbitration, Class Action Bans, and Mandatory Internal Dispute Processes

We oppose the Department’s proposal to rescind the 2016 rules reining in abuses of arbitration clauses, and to instead allow Title IV schools to force student borrowers to adjudicate their grievances against schools in arbitration. Unscrupulous schools have used pre-dispute arbitration clauses to discourage students from raising their claims, prevent them from doing so on a class-wide basis, and to hide evidence of illegal school conduct from the public. The result has been an unfair shifting of the burden of illegal conduct from schools to taxpayers. Simply

¹³⁸ Brief for Defendant-Appellee, *Salazar v. Duncan*, No. 15-832, at 8 n.4 (2d Cir. Jun. 22, 2015) (citing 34 C.F.R. § 682.402(e)(7)(iii)(B)(2) and further explaining that the Department “manages the FFEL and Direct Loan programs as a whole”).

requiring that schools employing pre-dispute arbitration disclose the terms to students, as the Department’s proposal would do, addresses none of these challenges. Instead, the Department should retain the 2016 regulations requiring institutions that seek the privilege of participating in the Direct Loan Program to agree as a condition of participation not to use pre-dispute arbitration clauses, class action bans, and mandatory internal dispute resolution processes against students participating in the program with claims that could constitute borrower defenses.¹³⁹

Although most schools do not use forced arbitration clauses and class action waivers,¹⁴⁰ predatory schools use them to prevent borrowers from obtaining relief from their schools—leaving injured borrowers with few options but to struggle with unaffordable loans or attempt to seek relief from the government instead.¹⁴¹ Simultaneously, because borrowers facing forced arbitration clauses cannot obtain redress from the schools that defrauded them, the government and taxpayers are often left on the hook for the fraud. This is why so many speakers in the public hearings prior to and during the establishment of both this rulemaking committee and the 2016 committee suggested that agreement not to use forced arbitration should be a condition for accessing Title IV funding—as a way to promote relief for borrowers and to protect taxpayers.¹⁴² Conditioning access to federal funding programs on agreement not to shirk accountability for misconduct relating to those funds sensibly protects taxpayers and student loan borrowers. For

¹³⁹ “Pre-dispute arbitration” or “forced arbitration” refers to a contractual provision, agreed to in advance of any dispute or claim, which requires a party to take any claims that may later arise to arbitration instead of to a court, for resolution by a private company chosen by the author of the contract. These provisions are often found in contracts of adhesion—standardized, preprinted form contracts that are presented to students or other consumers on a take-it-or-leave-it basis, with no opportunity to bargain. In binding arbitrations, the arbitrator is empowered to issue a final, binding ruling on the merits of a suit, subject only to sharply limited judicial review.

“Class action bans” are terms in contracts that purport to preclude a party from participating in a class action lawsuit or other class proceeding, either as a lead plaintiff or as member of the class. Companies often attempt to use these terms to limit their liability exposure and to prevent consumers from banding together to leverage their resources as a group in asserting claims that may not be economically viable or otherwise feasible to pursue individually.

“Mandatory internal dispute process” terms often purport to require students to notify their school of any disputes they have and to submit to an internal institutional process for attempting to resolve the disputes before students can assert their disputes in court or in administrative or arbitration proceedings. This can delay or prevent students from asserting their rights to a neutral third-party, especially when the internal process is not reasonably timely or accessible, and can create opportunities for sophisticated or predatory schools to suppress public information about student complaints and misconduct and to coerce students not to pursue their rights.

¹⁴⁰ See, e.g., Tariq Habash and Robert Shireman, *The Century Foundation Report: How College Enrollment College Contracts Limit Students’ Rights*, available at <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/>.

¹⁴¹ See, e.g., Comments of the Project on Predatory Student Lending & the National Consumer Law Center to the Department of Education on Intent to Establish Negotiated Rulemaking Committee for Pay as You Earn, ID: ED-2014-OPE-0124-0115.

¹⁴² See, e.g., Statement of Joanna Darcus at Public Hearing, National Consumer Law Center, Washington, DC (July 10, 2017); Public Statement of Pamela Banks, Senior Policy Counsel, Consumers Union, Transcript of Public Hearing in Washington D.C. (Sept. 10, 2015) at p. 96; Statement of Debbie Cochrane, Institute for College Access and Success, Transcript of Public Hearing, San Francisco (Sept. 16, 2015) at pp. 20-21; Statement of Nick Campins, California Department of Justice, Transcript of Public Hearing, San Francisco (Sept. 16, 2015) at p. 43.

the reasons upon which almost all negotiators agreed during the 2016 rulemaking,¹⁴³ the Department should retain and, if anything, strengthen the 2016 regulatory provisions on this topic that limit participating institutions' use of forced arbitration, class action bans, and mandatory internal dispute processes as a condition of receiving Title IV funds.¹⁴⁴

Indeed, as the Department observed in promulgating the 2016 Rule:

*[E]vidence showed that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program. It is undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school[s] to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.*¹⁴⁵

In proposing to rescind the arbitration provision of the 2016 Rule, the Department ignores this and other important evidence demonstrating the need and rationale for the provision. It instead offers two justifications for rescinding the provision—"subsequent legal developments" and its "reweighing" of the benefits of arbitration—neither of which withstands scrutiny.

a. The Department Concluded It Had Legal Authority to Impose these Conditions in 2016 and the Law Has Not Changed

The Department asserts that one justification for rescinding the 2016 arbitration provisions is "subsequent legal developments."¹⁴⁶ In 2016, however, the Department reasonably and accurately concluded that it had legal authority to impose conditions on use of arbitration as part of its Title IV program participation agreements,¹⁴⁷ and there have been no subsequent legal changes that alter that conclusion.

The only new case cited by the Department as a relevant "subsequent legal development" is *Epic Systems Corp. v. Lewis*, 584 U.S.—, 2018 WL 2292444 at 17 (May 21, 2018), but this case has no bearing on the 2016 arbitration provisions. *Epic* dealt with the entirely distinct issue of whether the National Labor Relations Act renders agreements between employers and their employees that require individual arbitration of legal disputes unenforceable by courts, and concluded that it did not. The Court concluded that nothing in the NLRA manifested Congress's intent to displace the Federal Arbitration Act's mandate that courts enforce arbitration

¹⁴³ See 81 Fed. Reg. 39,330, 39,381 (June 16, 2016).

¹⁴⁴ See 34 C.F.R. 685.300(b)(11), (d)-(i) (as promulgated in the 2016 Borrower Defense Rule, 81 Fed. Reg. 75,926 (Nov. 1, 2016)).

¹⁴⁵ 81 Fed. Reg. 75,926, 76,025 (Nov. 1, 2016).

¹⁴⁶ 83 Fed. Reg. at 37,265.

¹⁴⁷ See 81 Fed. Reg. at 76,021-24.

agreements. *Epic* relates to when a court must enforce an arbitration agreement; it does not address, and has no bearing on, the authority of the Department of Education, or any other entity, to include contractual conditions relating to arbitration within the course of its own program participation agreements or contracts.

Further, the *Epic* decision did not break new ground relevant to the Department’s authority, but rather—as the Department recognizes—was “consistent with” the Supreme Court’s 2011 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347–51 (2011). Importantly, the Department analyzed the *AT&T* decision in the course of promulgating the 2016 Rule, and concluded that the imposition of conditions on participation in Title IV programs was authorized under the HEA and did not “override, displace, or disregard the FAA.”¹⁴⁸ Rather, “these regulations impose a condition on the participation by a school in this specific Federal program, a Federal program in which Congress explicitly stated that ‘no institution shall have a right to participate . . .’ 20 U.S.C. 1087b(b).”¹⁴⁹ “An institution that chooses not to continue to participate” in Title IV programs “remains free to rely on” predispute arbitration provisions.”¹⁵⁰

The Department also cites a congressional resolution disapproving a rule published by the CFPB that would have regulated pre-dispute arbitration agreements in contracts for specified consumer financial products and services as reason that rescinding the 2016 provision is appropriate, describing this as “Congress’s clear action.”¹⁵¹ But again, the CFPB’s rule was entirely distinct, and sought to regulate the contracts of entities not in privity with it. Further, Congressional Action against the CFPB’s distinct rule cannot reasonably be taken as clear indication of Congressional intent regarding the HEA or the Department’s 2016 Rule. To the contrary, the fact Congress did pass a resolution disapproving the CFPB rule but did not pass a resolution disapproving the Department’s rule indicates that if Congress did disagree with the Department’s rule, it could and would have acted to disapprove it.

b. Forced Arbitration and Class Waivers Still Do Not Benefit Borrowers

The Department also claims on “reweighing” the issue, it now “believe[s] arbitration offers a number of potential advantages in this context”—citing various potential, but notably unsupported, benefits to arbitration. 83 Fed. Reg. 37,265 (“arbitration may . . . be more accessible to borrowers It may also allow an institution to more quickly identify and stop bad practices It may also allow borrowers to obtain greater relief than they would in a

¹⁴⁸ *See id.*

¹⁴⁹ 81 Fed. Reg. at 76,023.

¹⁵⁰ *Id.* at 76,025.

¹⁵¹ 83 Fed. Reg. at 37,265.

consumer class action And it may reduce the expense of litigation that a university would¹⁵² otherwise pass on to students”).

Notably, none of those purported “benefits” to students are supported by any evidence. In contrast, there is ample evidence that forced arbitration results in reduced relief to consumers who have been harmed by illegal practices. After three years of empirical study, the CFPB reported that consumers brought fewer than 1,500 arbitration claims across six consumer financial markets between 2010 to 2012, and fewer than a third of the claims filed with the largest arbitration firm resulted in a decision by an arbitrator, which decisions resulted in combined relief of less than \$400,000.¹⁵³ By contrast, about 32 million consumers obtained about \$220,000,000 from class action settlements in each of those years.¹⁵⁴ Furthermore, 90% of the arbitration clauses examined for the CFPB study waived class action proceedings, practically eliminating any form of relief for most borrowers.¹⁵⁵ These data show that forced arbitration clauses frequently pose insurmountable barriers to consumers seeking relief.

Further, if the Department truly seeks to put the interests of students first, it should listen to students. Students themselves do not agree that any benefits to them weigh in favor of allowing schools participating in Title IV to close the courthouse door to them. Thus negotiators representing the interests of students—as well as consumers, legal assistance organizations that represent students, and military-connected students—firmly opposed the Department’s proposal to rescind the 2016 provision in the course of this rulemaking.¹⁵⁶

Finally, the Department’s arguments about the potential benefits of arbitration to students ignore that the 2016 Rule did not preclude students from arbitrating their disputes if they in fact prefer arbitration. Rather, as the Department recognized in rejecting similar claims about limits on arbitration potentially hurting students in 2016, the regulations merely required that students get to freely make the choice as to whether they want to arbitrate after their dispute with their school arises.¹⁵⁷ Use of Predispute Arbitration Clauses, Class Action Waivers, and Required Internal Dispute Processes Threatens the Title IV Program

¹⁵² It is unclear why the Department says the expense of litigation “would” rather than “may” be passed on to students, without citing evidence that schools would or could pass on costs of litigation to students in the form of higher tuition and fees.

¹⁵³ See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY; 1:11-13 (2015).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 13.

¹⁵⁶ See Memo to the Department of Education re: Issue 4 – Arbitration – Requiring students to sign away their legal rights violates the requirement of “sound administration” of federal aid, submitted by (Dec. 8, 2017) (Abby Shafroth and Juliana Fredman (Negotiators for Legal Assistance Organizations That Represent Students); Ashley Harrington and Suzanne Martindale (Negotiators for Consumer Advocacy Organizations); Stevaughn Bush (Negotiator for Students); William Hubbard and Walter Ochinko (Negotiators for Veterans and Servicemembers).

¹⁵⁷ Cf. 81 Fed. Reg. 75,926, 76,029 (“The regulations do not bar the use of arbitration and therefore do not deny students the benefits that the commenters ascribe to arbitration. Rather . . . the regulations ban predispute arbitration agreements for borrower defense-type claims. The regulations do not bar the school from seeking to persuade

c. Predatory Schools’ Use of Mandatory Predispute Arbitration, Internal Claims Resolution Processes, and Class Action Waivers Thwart Effective Administration and Oversight of the Title IV Program.

As the Department acknowledged in 2016, “only a small percentage of non-profit institutions currently use arbitration agreements with their students.”¹⁵⁸ On the other hand, “some institutions, notably Corinthian, aggressively used class action waivers to thwart actions by students for the very same abusive conduct that government agencies, including this Department, eventually pursued. Corinthian used these waivers to avoid the publicity that might have triggered more timely enforcement agency action, which came too late[.]”¹⁵⁹ The Department found that predispute arbitration agreements and class action waivers “jeopardize the taxpayer investment” in student loans, because those devices “insulat[e institutions] from direct and effective accountability for their misconduct,” “deter publicity that would prompt government oversight agencies to react,” and “shift the risk of loss for that misconduct to the taxpayer.”¹⁶⁰

Requirements that students must go through an internal claims process with their school before they can bring claims to the Department or a court present similar problems, especially when the school is predatory. These processes can delay or prevent students from asserting their rights to a neutral third-party, particularly when the internal process is not reasonably timely or accessible, and can create opportunities for predatory schools to suppress public information about student complaints and misconduct and to coerce students not to pursue their rights. In 2016, the legal aid negotiator proposed to limit participating schools’ use of forced arbitration. Included in her proposal were the following information and arguments, which remain equally compelling today:

[T]he use of pre-dispute arbitration agreements by institutions are indicative of an institution’s failure to protect students’ rights and a failure in its responsibility to soundly administer the Title IV program. The proposed regulatory change will protect students and taxpayers from future liabilities resulting from borrower defense claims. As explained below, when predatory schools bind their students to arbitrate any and all disputes that they may have against the school, it functions on the whole to suppress meritorious student complaints. This in and of itself is an indicator that the school is not acting in the best interest of its students or as a sound administrator of Title IV funds. Whereas the Secretary’s regulations are intended to promote transparency and fairness, pre-dispute arbitration is a secretive and one-sided proposition. Moreover, whereas

students to agree to arbitrate, so long as the attempt is made after the dispute arises.”); *see also id.* at 76 (“limiting agreements to arbitrate borrower defense claims to those entered into after a dispute has arisen will achieve the goal of an informed decision by the borrower”).

¹⁵⁸ 81 Fed. Reg. at 76,016.

¹⁵⁹ *Id.* at 76,022.

¹⁶⁰ *Id.*

federal regulations look to sources external to the school for signals of unlawful conduct as a proxy for schools' unlawful, fraudulent, and unfair behavior, pre-dispute arbitration prevents meritorious student complaints from becoming public, thereby interfering with the proper functioning of the regulation and of oversight more generally.

A. Pre-Dispute Arbitration Agreements Prevent Meritorious Student Complaints from Being Raised and from Alerting the Department and Enforcement Agencies to Failing and Predatory Schools

“Pre-dispute arbitration” or “forced arbitration” refers to a contractual provision, agreed to in advance of any dispute or claim, which requires a party to take any claims that may later arise to arbitration instead of to a court, for resolution by a private company chosen by the author of the contract. These provisions are often found in contracts of adhesion—standardized, preprinted form contracts that are presented to consumers on a take-it-or-leave-it basis, with no opportunity to bargain. In such binding arbitrations, the arbitrator is empowered to issue a final, binding ruling on the merits of a suit, subject only to sharply limited judicial review

...

To prevent students from successfully seeking relief, and to prevent the Department of Education, accreditors, and law enforcement agencies from learning about complaints and settlements, predatory schools frequently require students—as a condition of enrollment and before they even know what disputes they may later have—to waive their legal rights. In particular, in order to enroll, students are required to sign contracts in which they agree that they may not take any dispute to court, and frequently they must also agree not to combine with others who may have similar disputes, and to keep their disputes (including evidence and outcomes) secret. For example, a large, publicly-traded for-profit college uses an enrollment agreement that, contrary to Massachusetts law, purports to preclude incidental, special, consequential, or punitive damages. The agreement appears to require that any claim be brought within two years, which limitation is not permissible under Massachusetts law. The agreement also allows the school to recover its attorneys' fees from the student if the student brings an unsuccessful action in court to challenge the arbitration provision or to challenge or correct the arbitration award. The same enrollment agreement makes “[a]ll aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator . . . strictly confidential,” giving the school the right to go to court “to prevent any actual or threatened breach of this provision.” Arbitration records are not public like court records, so potential claimants and their representatives generally have no access to prior pleadings or awards, or the reasoning offered by prior arbitrators in similar cases. Moreover, bans on classwide arbitration of claims means that evidence of a widespread pattern and practice of

unlawful conduct on the part of a school is unlikely to arise in arbitration, and every student must go it alone.

These actions by the school greatly reduce the likelihood that its own fraudulent activities will result in any significant liabilities, and they prevent information about the disputes from reaching the Department, accreditors, and other law enforcement agencies. The result—because of the inability of students to pursue their claims—is that students’ rights are curtailed, and indicators of failing administrative capability are suppressed.

B. Elimination of Pre-Dispute Arbitration Agreements Between Title IV Institutions and Students Will Enhance Administration of Program Funds and Reduce Future Borrower Defense Claims

The Department should amend Title IV regulations as proposed because this additional step will further ensure the sound administration of program funds, and will reduce student and taxpayer liability on borrower defense claims in the future.

Such a move could help avoid another situation such as occurred with respect to Corinthian Colleges by making claims of wrongdoing by groups of borrowers—the same claims that form the basis of borrower defenses and that indicate a failure of administrative capability—known to the Department and to the public. Corinthian relied heavily on pre-dispute arbitration agreements in student enrollment contracts. The presence of such agreements undoubtedly suppressed the fact that Corinthian was committing widespread misconduct for years prior to the enforcement actions that were taken against it, and prevented borrowers from obtaining relief on meritorious claims—claims that must now be resolved through the borrower defense process. In fact, the company forced a number of these claims, which had been raised on behalf of classes of borrowers, into individual arbitrations between 2010 and 2012, and then settled most of the claims and fought a few of them out of the public eye. In the meantime, borrowers continued to enroll, and many of those same borrowers have now submitted or will submit borrower defense claims. . . .

Enrollment contracts that restrict the methods by which students can seek resolution of disputes with institutions place students and taxpayers at risk, and are indicative of an institution’s failure to protect students’ rights and a failure in its fiduciary responsibility to the U.S. Government. To reduce future taxpayer liabilities from borrower defense claims, the Department should revise current regulations to indicate that the inclusion, in an enrollment agreement or other contract between the school and students, of predispute arbitration or other restrictions on students’ ability to seek judicial resolution of complaints, indicates that an institution is failing to soundly administer Title IV program funds.

###

The substance of this proposal was adopted by the Department and supported by nearly all of the negotiators. It subsequently formed the basis of the 2016 Rule. Since that time, new information has emerged indicating that ITT Tech also used arbitration to conceal evidence of misconduct until it was too late to hold the school accountable—due to its closure and bankruptcy, which left taxpayers and borrowers to bear the costs of the alleged misconduct. Borrowers with claims against ITT Tech recently have acquired arbitration files related to claims brought by former ITT nursing students in Albuquerque, New Mexico. Both the CFPB and the New Mexico Attorney General sought these materials in support of enforcement actions those agencies brought against ITT before the school declared bankruptcy,¹⁶¹ but ITT’s aggressive litigation tactics long kept even enforcement agencies from obtaining these documents, even after ITT Tech declared bankruptcy.

The borrowers’ attorneys have reviewed these documents in detail and have concluded that they contain reams of direct evidence of unfair and deceptive recruiting and educational conduct by the school that ITT was able to hide from public view—including from the Department, law enforcement, and ITT students—through its use of binding and confidential arbitration clauses. The attorneys found that the documents include:

- Evidence that ITT represented to its prospective and enrolled students that the school held a critical nursing accreditation at a time when it did not have this accreditation, or that accreditation was forthcoming when it was not. ITT’s lack of this form of accreditation functionally prevented its students from becoming nurses in New Mexico.
- Evidence, in the form of emails between administrators, that the administration knew that students were confused about accreditation, and took advantage of that confusion. Administrators discuss their intentionally vague answers to students’ questions. When ITT executives told the New Mexico campus to cease all efforts to obtain this accreditation, the nursing program continued to tell students that it was working toward accreditation and would obtain it soon.
- Evidence that the school’s nursing program was generally in disarray, with nearly 100% faculty turnover during its first year and a sharp drop-off in clinical partners during its second, third, and fourth years.

This is but one illustration of why the Department should not weaken or diminish the existing arbitration provision promulgated in 2016. Had this evidence been publicly filed in court rather than in arbitration, this predatory conduct could have been identified and stopped earlier, sparing thousands of students an expensive but low-value education. Millions in taxpayer dollars could have been saved in the form of the federal financial aid that ITT nursing students in New

¹⁶¹ *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 1:14-cv-00292 (S.D. Ind. Feb. 26, 2014); *King v. ITT Educ. Servs., Inc.*, 1:14-cv-00321 (D.N.M. Apr. 4, 2014).

Mexico received. The confidentiality required by ITT’s arbitration agreement enabled the school to continue these practices and to amass enormous profits at the expense of its students.

d. The Department Should Continue to Require Arbitral Records to Protect the Integrity of the Title IV Program

We also urge the Department to maintain provisions from the 2016 Rule requiring schools to submit arbitral and judicial documents regarding borrower-defense-related claims. There is no reasonable justification for abandoning the requirement that schools provide such potential evidence of a school’s fraud or other wrongdoing at a time when the Department could use that information to detect and investigate fraud on the Title IV program.

The Department’s explanation for rescinding this requirement is the cursory claim that “reviewing such records” would be a “burden to the Department” and to schools.¹⁶² But the Department provides no evidence to support its claim that the regulation would be too burdensome, and in 2016 the Department estimated a very low burden associated with this provision. For example, the Department estimated that fewer than 100 schools would ultimately be required to submit records, and would only be required to submit records for four filings each. This would not create a burdensome volume of materials for the Department to review.¹⁶³ The Department has ample discretion to create an efficient process for reviewing records as needed and as reflects its chosen cost-benefit analysis. Further because the records would simply be copies of documents that schools were already submitting to other entities, the cost to schools of submitting copies to the Department as well would be low.¹⁶⁴

More fundamentally, the Department does not weigh any costs imposed by submission and review of such records against the benefits of having evidence that would enable it to detect and stop fraud on the Title IV program, and thus protect students, taxpayers, and the integrity of the student aid program. This is an egregious oversight, both as a matter of accurate cost/benefit analysis and in light of the Department’s statutory duty “to protect the financial interest of the United States and to promote the purposes of” the Direct Loan program.¹⁶⁵

XI. Closed School Discharges

As with the borrower defense proposals, the primary theme of the Department’s closed school discharge proposals is to defend schools that commit fraud and narrow borrowers’ ability to seek closed school discharges as much as possible. The result? Reducing access to quality

¹⁶² 83 Fed. Reg. at 37,265-66.

¹⁶³ 81 Fed. Reg. at 76,076 (estimating that 98 schools would be required to submit records to comply with the final regulations, and estimating that each would have an average of four filings).

¹⁶⁴ 81 Fed. Reg. at 76,076 (estimating a total burden of “7,840 hours (98 institutions × 4 filings × 4 submissions/filing × 5 hours) under OMB Control Number 1845–0143”).

¹⁶⁵ 20 U.S.C. §1087c.

education and preventing borrowers from choosing higher education institutions and programs that are best for themselves and their families.

The Department's proposed changes ignore the reality that a closed school discharge is not a boondoggle to eligible students, but rather a Congressional imperative to alleviate some of the harm that students experience when schools close. These students waste months or years of their lives and often give up job opportunities to pursue a credential they cannot obtain. They incur not just federal student loan debt, but thousands of dollars in non-dischargeable private student loans and other consumer debt to finance their education. The closed school discharge regulations, which only offer federal loan relief, do not and cannot make these students whole.

But, the closed school discharge regulations are a bright light in a situation over which students have no control. They return some control to students by ensuring that they can choose their path forward. Under current regulations, students presently have the right to decide what is best for them and their families after a school closure, based on many individual factors. They can choose to complete their program through a teach-out, if one is offered; to transfer some credits and complete the program at a school of their choice, if it will accept those credits; or obtain a closed school discharge to start fresh at a new school, in a new program, or by foregoing a higher education altogether.

Despite the Department's rhetoric about its strong support for student choice and informed decision-making, the Department's proposed rule robs students of even this limited choice. The Department proposes making students ineligible for closed school discharges whenever a failed school offers an accreditor-approved, and sometimes state-approved, teach-out opportunity. In doing so, the Department aims to save for-profit schools and itself money by reducing discharges and forcing students to enroll in teach-outs regardless of their quality and fit to the student's individual goals and circumstances or the increased and unmanageable debt some students may be required to incur. This proposal serves no one. It would result in a dramatic reduction in the discharge rights of students attending failing schools, yet is offered by the Department without any previous indication that it was under consideration in negotiated rulemaking,¹⁶⁶ without any consideration of the language and purposes of the HEA, and without any consideration of evidence regarding such a drastic reversal of a long-standing federal policy.

a. The Department Should Not Compound Harm to Students Already Impacted by School Closures by Forcing Them into Teach-outs and Denying Them Discharges

We strongly oppose the Department's proposal to deny discharges to students harmed by a school closure who choose not to participate in or complete an accreditor-approved or state-

¹⁶⁶ Although the Department had ample opportunity, it never proposed this language or concept in any of its written or oral proposals during the negotiations. See Dep't of Educ., Issue Paper 5 for Session 2 (Jan. 8 – 11, 2018) and Issue Paper 5 for Session 3 (Feb. 12 – 15, 2018).

approved teach-out (referred to hereinafter as the “mandatory teach-out proposal”).¹⁶⁷ The Department’s proposal will drastically impact student borrowers’ long-established right to the discharge of loans incurred for a closed school by forcing students to complete degrees at schools they do not choose to attend. The Department proposes this change despite its contradiction to the clear meaning of the HEA discharge mandate and without stakeholder input or a consideration of evidence underlying its cursory assumptions.

The teach-out proposal is in direct conflict with both the plain language and Congressional intent of the closed school discharge provision in the HEA. That provision mandates that the Department grant a closed school discharge whenever “the student borrower, or the student on whose behalf a parent borrowed, is unable to complete the program in which such student **is enrolled** due to the closure of the institution”¹⁶⁸ Nothing in the legislative history or the language of this discharge provision authorizes the Department to legally cut off closed school discharge rights when a student opts out of an accreditor-approved (and state-approved) teach-out.

The Department claims that “if [an] orderly closure or []teach-out plan has been approved by the school’s accrediting agency and, if applicable, the school’s State authorizing agency [. . .] the closure of the school did not render the student unable to complete the program in which the student was enrolled.”¹⁶⁹ The Department has not defined what it means by “orderly closure.”

To the extent that the Department intends “orderly closure” to refer to teach-outs offered at different locations of the closing school or at different institutions, the Department’s claim is contrary to the plain language and purpose of the HEA discharge provision. Congress used the present tense in referring to a program in which a student “is enrolled.” Yet, the Department itself acknowledges that teach-outs are offered “*after* the school has closed.”¹⁷⁰ In addition, even if a teach-out were available prior to a school closure, until a student agrees to separately enroll in the teach-out, *it is only an offer*. There is no enrollment agreement between that student and any teach-out institution or other campus, nor is the teach-out institution or other campus a party to the enrollment agreement between the student and the closing school. The proposed rule would force students to either enter into a separate enrollment agreement with a teach-out institution or to renounce both their discharge rights and the option of completing a devalued degree.

Thus, until a student chooses to separately enroll in and complete a teach-out offered by a different institution or at a different campus, the HEA clearly states that the borrower has a right to a closed school discharge if the student is unable to complete his or her program at the closed

¹⁶⁷ Proposed 34 C.F.R. §§ 674.33(g)(4)(i)(B), 682.402(d)(3)(ii)(C) and (iii), and 685.214(c)(1)(i)(C) and (ii).

¹⁶⁸ 20 U.S.C. § 1087(c) (emphasis added).

¹⁶⁹ 83 Fed. Reg. at 37,268.

¹⁷⁰ 83 Fed. Reg. at 37,245 (emphasis added).

school campus due to its closure. Denying closed school discharges on this basis would be a direct violation of the plain and clear mandate of Congress. Because the Department’s proposal is thus unlawful, the Department should not enact this proposed regulation.

Teach-outs are not always the best option for closed school students. In the past, the Department concluded that although “teach-outs can be beneficial to borrowers . . . , a closed school discharge may be a better option for some students.”¹⁷¹ It also stated, in discussing students who withdraw prior to a closure, that

it is not always in the borrower’s best interest to continue a program through graduation [because] the value of the degree the borrower obtains may be degraded, depending on the reasons for the school closure. Borrowers at closing schools may incur unmanageable debt in exchange for relatively low-value degrees. We do not believe that it is good public policy to require borrowers to repay that debt if they cannot or choose not to complete the program and are eligible for a closed school discharge.¹⁷²

Based on our experiences, this consideration is equally applicable to students who have the option of participating in a teach-out. Some of our organizations have assisted students impacted by school closures for as many as twenty-five years. During this time, many teach-outs have been offered by for-profit schools of no better quality than the failing schools that closed, with high cohort default rates, low job placement rates, and low completion rates. Most teach-outs differ in key respects from the closed school programs that students signed up for. Students often do not get to choose between teach-out options because they are usually presented to students as a last resort.

Students often decide that it is better to opt for discharge over participating in a teach-out, including for the following reasons:

- The closing school provided low quality education and, as a result, the students did not obtain the knowledge or skills they needed from classes they took *before* the school closed. Even if the students manage to complete the teach-out program, they may not have the skills or knowledge necessary to obtain or keep the job for which they were trained.
- Some students prefer not to continue their educations at all. We often hear from students that, because the school closure was such a demoralizing experience and undermined their faith in the higher education system, they prefer to move on with their lives without a postsecondary education and without student loan debt.

¹⁷¹ 81 Fed. Reg. at 39,369.

¹⁷² 81 Fed. Reg. at 76,034.

- Sometimes students will discover that the teach-out school has a reputation for offering low-quality education that leads to poorly trained graduates, and, as a result, few employers will hire students from those schools.
- Some students find the same program is less costly or free at community colleges or other institutions that will not accept the transfer of any credits from the closed school. In addition, these institutions may have far better graduate outcomes. These students prefer repeating the classes taken at the closed school in order to reduce their level of student loan debt and increase the likelihood that they will earn a valuable credential that will lead to employment.¹⁷³

Forcing students to complete teach-outs in any of these circumstances serves neither students nor taxpayers.

Further, some students are not even eligible to complete teach-outs, even when one is offered. For example, an attorney from New York Legal Assistance Group represented a student loan borrower whose school had closed and who attempted to complete her program through a teach-out plan. However, because the borrower did not have a high school diploma and had been admitted to her original school by taking an “ability to benefit” test, the school offering the teach-out program required her to take an “ability to benefit” test to enroll and take out aid needed to pay for the program. The client was unable to pass the new school’s test, and thus was unable to enroll in the offered teach-out program. Under the Department’s proposal, this client would be barred from obtaining a closed school discharge even though she could not complete the offered teach-out.

It is unclear whether the Department has reversed its prior conclusion that closed school discharges are the better choice for some students than teach-outs. At one point, the Department states that students “*may* be better served by completing their programs . . . at another school through a teach-out plan, than by having their loans forgiven and being required to start their education over at another institution.”¹⁷⁴ At another, it claims that teach-outs categorically “better serve students and reduce the risk to taxpayers”¹⁷⁵ Either way, to justify imposing mandatory teach-outs for closed school students, the Department should provide evidence demonstrating that for all or the vast majority of students, teach-outs are in fact a better option than closed school discharges. The Department has failed to do so.

The Department claims it does not have “sufficient data to know if any of the past closed school discharges were awarded to students who were also provided with a reasonable teach-out opportunity.”¹⁷⁶ But the Department could obtain relevant data from its own records and from

¹⁷³ For other reasons that students opt for discharges, see the following section.

¹⁷⁴ 83 Fed. Reg. at 37,268 (emph. added).

¹⁷⁵ 81 Fed. Reg. at 76,034.

¹⁷⁶ 83 Fed. Reg. at 37,301.

teach-out schools, accreditors and state oversight agencies. Before enacting this significant and harsh regulation, the Department should analyze data to determine whether its assumption that students are best served by teach-outs is correct. Such data should, at a minimum, include identifying prior school closures and their corresponding teach-outs and analyzing data regarding how comparable the teach-out programs were to the closed school programs; the proximity of the teach out institution to the closed school; outcomes for the same cohorts of students at the closed school and the teach-out school, such as cohort default rates, job placement rates, completion rates, licensure rates, repayment rates, gainful employment ratios, debt loads, etc.; and whether the teach-out was subject to any adverse action by a government agency or accreditor and other information regarding the financial stability of regulatory compliance by the teach-out school. It should also compare outcomes for the students who opted for discharges, the students who completed the teach-outs, and the students who did neither.

The Department should not impose the punitive mandatory teach-out provision on students who have been harmed, through no fault of their own, by school closures. Congress passed the HEA's closed school discharge mandate to provide relief and a second chance to students harmed by school closures, not to further harm them by requiring them to enroll in teach-outs that may not be in their best interests.

The Department has provided no evidence that accreditor approval ensures reasonable, accessible, high-quality, and carefully-monitored teach-out plans. The Department claims that because accreditors (and states in some cases) must approve teach-out plans, its mandatory teach-out proposal will ensure that borrowers are offered “reasonable” and “accessible” teach-out plans; that “only students who can be provided a high quality education will not be eligible for a closed school loan discharge under this provision;” that teach-out activities will be “carefully monitor[ed];” and that borrowers will be “ensured protection.”¹⁷⁷ The Department fails to provide any data-based evidence to support its claims, and ignores extensive evidence regarding the real circumstances faced by students when their schools close.

The Department cites to 34 C.F.R. § 602.24(c).¹⁷⁸ This provision states that an accreditor must require a school to submit a teach-out plan upon one of four events.¹⁷⁹ It further requires the accrediting agency to ensure that an approved teach-out plan and institution meet the following few vague requirements:

- (1) The plan “provides for the equitable treatment of students under criteria established by the agency;”¹⁸⁰

¹⁷⁷ 83 Fed. Reg. at 37,289.

¹⁷⁸ *Id.*

¹⁷⁹ 34 C.F.R. § 602.24(c)(1).

¹⁸⁰ 34 C.F.R. § 602.24(c)(2).

- (2) The plan “specifies additional charges, if any, and provides for notification to the students of any additional charges;”¹⁸¹
- (3) The institution “has the necessary experience, resources, and support services to . . .
 - (A) Provide [a] . . . program that is of acceptable quality and reasonably similar in content, structure, and scheduling to that provided by the” closed school; and
 - (B) Remain stable, carry out its mission, and meet all obligations to existing students;”¹⁸² and
- (4) The teach-out institution shows that students will not have to “move or travel substantial distances” and that it will provide students with information regarding additional charges.¹⁸³

Notably, these requirements do not prohibit accreditors from approving teach-outs with major differences from the closed school program, including the imposition of additional charges.

Not surprisingly, these vague requirements have led to weak accreditor teach-out policies. The Department makes a number of claims regarding the strength of accreditor teach-out requirements, none of which are supported by actual accreditor policies, or other evidence or data. As discussed below, most accreditor teach-out policies fail to impose reasonable requirements to address the most important criteria that students consider in deciding whether enroll in teach-outs and which determine whether a student is better served by a teach-out than a discharge. These policies are weak, inconsistent, and often parrot the regulatory provision without additional requirements.

The students most impacted by closures are for-profit school students. These are primarily non-traditional students, including parents, veterans, first generation students, older students, and others, who juggle work, childcare, transportation, housing, and other family responsibilities. Despite their busy lives, they choose to go to school in order to learn skills that will lead to long-term and better paying employment in order to raise the standard of living for themselves and their families.

These students assess teach-outs on a wide variety of individual factors, described below. In the NPRM, the Department did not mention most of these factors. Even when it did, it did not analyze whether and how accreditor requirements ensure that teach-outs meet minimum standards for any of these factors. Nor, for any of the factors, has the Department used data to compare past teach-out plans and their corresponding closed school programs. Without this evidence, the Department’s assumptions that accreditor approval “ensures [student] protection” and “reasonable,” “accessible,” and “high quality” teach-outs are unfounded and contradicted by the experiences of hundreds of past legal services clients.

¹⁸¹ 34 C.F.R. § 602.24(c)(5)(i).

¹⁸² 34 C.F.R. § 602.24(c)(5)(i).

¹⁸³ 34 C.F.R. § 602.24(c)(5)(ii).

Key factors relevant to a teach-out program's value to a student include the following:

Graduate outcomes: Higher education is one of the most important and costliest investments of a lifetime. Students may evaluate graduate outcomes before enrolling in teach-out programs, including job placement rates, licensure rates when applicable, completion rates, cohort default rates, debt loads, etc. Students should not be forced into risky teach-out programs that do not have good outcomes, that are not likely to lead to employment, or that will lead to an unmanageable debt load.

Not one single accreditor requires that graduate outcomes at the teach-out school equal or exceed those of the closed school (as represented to the students). The Department has provided no data or evidence comparing outcomes for students who enroll in teach-outs versus students who do not (either because teach-outs are not offered or because they choose not to participate).

School location: Many low-income students use public transportation or share a car with other family members. Their teach-out decision depends in part on their ability to shuttle between school, home, childcare or children's schools, and their workplace with limited transportation options. This ability is not only based on the commuting distance, but may also be based on considerations such as the availability of public transportation to/from the school, work, home, childcare; the school's location in relation to work, childcare, a child's school, the workplace of the person with whom the student shares a car, etc. Students should not be required to enroll at a teach-out location when they have difficulty traveling there due to personal and family responsibilities.

The Department claims that a "[t]each-out plan that would require extended commuting time for students . . . would not be approved by accreditors, and therefore would not negate a student's access to closed school discharges."¹⁸⁴ 34 C.F.R. § 602.24 and accrediting agencies use vague terms, including "geographic proximity," "reasonable geographic proximity," or a requirement that the teach-out plan does not require students to "move or travel substantial" or "great distances."¹⁸⁵ None of these terms provide any assurance that an individual student will be able to travel to the teach-out school and meet his/her personal obligations in light of the student's transportation restrictions. Nor does the Department provide any data regarding past teach-out plans and their geographic proximity to the corresponding closed campuses.

Course days and times: Because many students juggle school with work, childcare and other commitments, their teach-out enrollment decision is also based in part on the days and hours that classes, clinics, and internships are offered. Students should not be forced to enroll in teach-out programs that do not offer classes and experiential learning requirements on days and at times the students can attend. While 34 C.F.R. § 602.24 vaguely requires that an accreditor

¹⁸⁴ 83 Fed. Reg. at 37,289.

¹⁸⁵ See, e.g., teach-out guidelines of ACCET, ACICS, DEAC, Middle States, ACCJC, and ACCET.

ensure that the teach-out institution has the necessary experience, resources, and support services to provide that the scheduling is “reasonably similar” to that provided by the closed institution, the Department does not analyze accreditors’ scheduling requirements or provide any data regarding past teach-out plan schedules in comparison to corresponding closed school schedules.

Cost: In many circumstances, while a teach-out school does not charge extra for courses that the closed school already received payment for, it often charges for any remaining classes the student must pass to graduate. Students evaluate teach-outs based in part on additional loans they must incur. It is particularly egregious for the Department to force students to participate in teach-outs when doing so forces a student to incur even more expenses and debt. Neither 34 C.F.R. § 602.24 nor most accreditors, however, prohibit the teach-out school from charging more than the closed school would have charged for courses for which the closed school had not received payment. They only require that the teach-out school disclose to the student any additional required tuition or other charges. In addition, the Department provides no analysis of accreditor requirements or any data comparing the costs of past teach-out plans with the costs of their corresponding closed schools.

Comparable program: Students should only be required to enroll in a program that will train them for the same profession as the closed school program. If the program does not offer classes teaching the necessary skills for that profession, a student should not be required to enroll in the teach-out. The Department claims that “[t]each-out plans . . . that do not cover the same academic programs as the closing institution likely would not be approved by accreditors.”¹⁸⁶ Again, the Department provides no data regarding past teach-outs as compared to the corresponding closed school programs, nor does it analyze accreditor requirements regarding the similarity of programs.

Programmatic approval: Students enrolled in programs leading to professions that require licensure or certification choose programs that have the accreditation required to obtain such licensure or certification. If a teach-out program does not carry the necessary accreditation, it will be useless to participating students. 34 C.F.R. § 604.24 does not require that teach-out programs carry programmatic accreditation required for licensure or certification, nor does the Department analyze whether accreditors do so.

Distance education: If students are enrolled in a brick-and-mortar program that closes, they should not have to enroll in an online teach-out program. Brick-and-mortar and online programs offer very different ways of learning, such that many students learn better when they have in-person classes and contacts with instructors, tutors, and other students. Neither 34 C.F.R.

¹⁸⁶ 83 Fed. Reg. at 37,289.

§ 602.24, nor any of the accreditors, expressly require that teach-outs be offered in the same modalities as the closed school program.¹⁸⁷

Other factors that are important to students in evaluating teach-outs are whether the teach-out will require a student to pay for and retake credits already earned at the closed school; whether the teach-out program will take longer to complete; whether the teach-out program offers similar experiential learning opportunities (internships, externships and clinics); whether the teach-out school will provide training on up-to-date technology used by employers; and whether the teach-out school offers similar job placement assistance.

The Department presents no evidence that accretor teach-out requirements assess or provide strict standards regarding any of these factors in approving teach-outs. Indeed, because every student's situation is different, there is no way accreditors could account for every student's individual circumstances.

The Department also claims that “an institution whose financial position is so degraded that it could not provide adequate instructional or support services would similarly not have their teach-out plan approved, thus enabling borrowers at those institutions to have a closed school discharge.”¹⁸⁸ The Department, however, provides no evidence for this assertion—which contradicts the experiences of our clients. The Department also assumes—in the face of well-documented misconduct by some accreditors—that accreditors “carefully monitor teach-out activities.”¹⁸⁹ Again, the Department did not analyze accreditors' financial requirements for teach-out institutions or monitoring procedures, if any. The Department also failed to provide any data on these issues based on past accretor-approved teach-outs.

Instead of providing evidence or data to support its assumptions regarding the benefit of teach-outs to students, the Department references three different school closures that did *not* provide teach-outs. For two of these schools, which are not identified, the Department claims that “it is possible” that teach-outs – “including . . . teach-out plans delivered by other institutions or under the oversight of a qualified third party – would have benefitted students and saved millions of dollars of taxpayer funds.”¹⁹⁰ For one of these schools, Mt. Ida College, the Department acknowledged that the distance between Mt. Ida College and other campuses may have made it “impractical for the student to attend another institution.”¹⁹¹

These examples and assumptions do not provide sufficient justification for the Department's mandatory teach-out proposal. The Department should have provided an analysis, based on data, regarding the reasons these schools did not arrange teach-outs, whether the closed

¹⁸⁷ See Comments submitted simultaneously by New America.

¹⁸⁸ 83 Fed. Reg. at 37,289.

¹⁸⁹ 83 Fed. Reg. at 37,291.

¹⁹⁰ 83 Fed. Reg. at 37,289.

¹⁹¹ *Id.*

schools submitted teach-out plans to their accreditors and what actions the accreditors took if they did not, the additional cost these schools would have incurred to arrange high-quality teach-out plans (including the cost of oversight of a qualified third-party monitor), and whether each accreditor's requirements would have ensured borrower benefit through sufficient standards that address the important factors that students consider in deciding whether to enroll in a teach-out.

Finally, the Department also claims that its mandatory teach-out proposal will benefit students because some teach-out programs must also be state-approved.¹⁹² This justification fails for the same reasons that the accreditor-approval claims do. The Department has not analyzed how many states laws require state agency approval for teach-outs, what requirements state agencies impose in states that do, or whether the states impose strict minimum standards regarding the many important factors considered by students when assessing teach-out plans. The Department also failed to provide data comparing past teach-outs and the closed school programs to which they corresponded.

We therefore strongly oppose the Department's proposal to cut-off borrowers' rights to closed school discharges by forcing them to enroll teach-outs. The proposal is based on unfounded assumptions that are contrary to the experiences of legal services attorneys and clients they have assisted for the past 25 years, and would remove what little hope and agency borrowers have left after they are devastated by their schools' unexpected closures.

The Department should not limit student choice. In the NPRM, the Department states that the purpose of its proposals is to “ensure that students are not subjected to narrowed educational options as a result of unwarranted school closures.”¹⁹³ It also states that it proposals encourage students to “explore[] their options carefully and weigh[] the available information to make an informed choice.”¹⁹⁴

The mandatory teach-out proposal achieves the exact opposite. Instead of encouraging borrowers to make wise choices about their future education after a school has closed, it penalizes them by blindly requiring them to enroll in a teach-out plan, even if the teach-out plan will require the student to incur additional unaffordable loans, is unlikely to lead to employment, is offered at a location inaccessible to the borrower, or fails any other criteria important to the student (described above). Students, and not their failing school or taxpayers, are the ones most hurt by a school closure. They should be afforded the opportunity to decide what is best for themselves and their families.

The Department has not adequately analyzed the potential administrative burdens and costs that could result from the mandatory teach-out proposal. The mandatory teach-out proposal is likely to impose additional administrative burdens and costs on the Department,

¹⁹² Proposed 34 C.F.R. §§ 674.33(g)(4)(i)(B), 682.402(d)(3)(ii)(C) and (iii), and 685.214(c)(1)(i)(C) and (ii).

¹⁹³ 83 Fed. Reg. at 37,243.

¹⁹⁴ *Id.*

schools, and accreditors. First, in order to determine borrower eligibility for discharges, the Department will have to track teach-outs by accreditor-approval and, in states that require it, state agency-approval. It will have to track this information by closing program and closing campus. Questions the Department should answer include:

- Does the Department do this now? If so, how? If not, how will it do this?
- Who will be required to report this information to the Department? Closed schools? Teach-out schools? Accreditors? State agencies?
- What information does the Department need to adequately track teach-outs?
- How will the Department prevent the improper denial of closed school discharge applications if it lacks sufficient information about whether an accreditor-approved and, when required, a state-approved teach-out was offered?
- How will the Department provide for the transfer of students records?
- What are the costs of these burdens relative to the “savings” the Department estimates will result from the reduction in closed school discharges?

Second, how will the Department treat borrowers who withdraw within 180-days before the school closed? If an accreditor-approved (and if required, state-approved) teach-out is offered, will those students be required to enroll in the teach-out program? Will they be treated differently if they withdraw before or after the teach-out is announced or approved? What if, after withdrawing, the borrower moved; developed a medical or mental condition that prevents him/her from returning to school; entered the military; had a child and is a single parent that does not have the resources to both support the child, pay for child support, and go back to school; or other similar circumstances? And, if there is a possibility that the borrower be rendered ineligible for a closed school discharge if a teach-out program is offered after she has withdrawn within the 180-day window, how will she make an informed decision about how to manage her education and student loans in the event of a school’s decline?

The Department’s teach-out proposal should not be enacted with an analysis and explanation of any of these important questions.

The Department’s analysis of risks, costs and benefits for taxpayers and borrowers is flawed. It appears that the Department’s primary intent is to cut down the number of closed school discharges to save money:

These proposed regulations will encourage more institutions to engage in teach-out plans rather than precipitous closures, which would generate significant savings to taxpayers. Although teach-outs have considerable cost for institutions, these costs will be offset by reducing the number of borrowers who seek and are granted closed school discharges.

The Department expects that the mandatory teach-out provision, along with the elimination of automatic discharges, will reduce closed school discharges by 65%.¹⁹⁵

This cost analysis is incomplete. The Department fails to consider, for example, how forcing borrowers into teach-outs will increase student loan defaults for borrowers who do not participate in the teach-outs or who drop out. It does not consider that borrowers who graduate and cannot repay their loans are likely to default on higher federal debt balances because there are no limits to what teach-outs can charge borrowers in additional fees. It does not estimate the increased costs of collecting from these defaulted borrowers. These numbers will reduce the alleged savings to taxpayers. They also reflect the reality that, despite the Department's claims to the contrary, not all borrowers will benefit from being forced into teach-outs.

In addition, simply reducing a school's liability for closed school discharges will not suddenly mean it has extra money to pay for teach-outs. The Department has provided no data regarding the percentage of closed schools that have been ordered to reimburse the Department for discharges, nor has it provided data on what percentage of these liabilities it has been able to collect. In our experience, closing schools often have few assets and end up in bankruptcy or just disappear – leaving little or no assets for creditors like the Department of Education, students and taxpayers.

The cost analysis is also short-sighted because it does not consider the long-term systemic costs of the mandatory teach-out proposal. Without strong minimum standards regarding all of the issues flagged above and close monitoring by the Department, accreditors, and states, our experience suggests that those borrowers who complete teach-out programs will earn credentials that are no better than those offered by the closing school. The teach-outs are therefore likely to lead to graduates who are unable to obtain the types of jobs for which they trained, greater loan defaults, a lack of skilled workers for the economy, families unable to pay for or access credit necessary to buy houses, cars, consumer goods and basic life necessities, and the ripple effects on the larger economy.

Finally, the Department's focus on the bottom line is not aligned with the purposes of the HEA. The Title IV program was created to ensure that all Americans, regardless of their income levels, are able to access a quality higher education, thereby creating a skilled workforce, a healthy economy, and equal opportunity and upward mobility.¹⁹⁶ In addition, Congress enacted the mandatory discharge provision to ease the financial burdens of borrowers impacted by fraudulent school practices.¹⁹⁷ Thus, reducing taxpayer costs is not the only consideration for the Department—it must also consider whether denying borrowers discharges and forcing them into

¹⁹⁵ 83 Fed. Reg. at 37,301.

¹⁹⁶ Permanent Subcommittee on Investigations, U.S. Senate, "Abuses in Student Aid Programs," Sen. Rep. No. 102-58 at 34 (May 17, 1991).

¹⁹⁷ *Id.* at 37.

teach-outs will serve the larger purposes of the HEA. We believe that, based on our experience with teach-outs and students' needs, it will not. Instead, the Department's proposal will prevent closed school students from accessing quality education by forcing them into substandard teach-out programs that do not lead to employment and cause them to default on their student loans, thus barring them from restarting their higher education in an affordable and high quality program of their choice. This result does not serve borrowers or taxpayers.

The mandatory teach-out requirement is not necessary to encourage schools to arrange teach-outs, and may actually reduce incentives to offer high-value teach-outs. The Department claims that denying closed school discharges when approved teach-outs are offered will “incentivize” and “encourage” more schools to offer teach-outs and increase the number of schools that do so.¹⁹⁸ It claims that this will happen because this provision will “reduce the total liability that would result from having to reimburse the Secretary for losses due to closed school discharges.”¹⁹⁹

But, as the Department acknowledges, the federal regulations already mandate that accreditors require their institutions “have an approved teach-out plan on file and . . . update that plan with more specific information in the event that the institution is financially distressed, is in danger of losing accreditation or State authorization, or is considering a voluntary teach-out for other reasons.”²⁰⁰ The Department has previously stated,

With regard to schools being discouraged from acting responsibly and voluntarily providing teach-outs, as noted above, closing schools are required to provide teach-outs. A school that declines to provide teach-outs . . . would be in violation of the requirements specified in the school's PPA.²⁰¹

If these regulations are not leading to teach-outs, then the Department should find out why accreditor-approved teach-outs are not often offered and whether accrediting agencies are requiring schools to provide teach-out plans. In addition, as noted above, the Department should not assume that schools will have sufficient funds to pay for teach-outs.

Additionally, the proposed regulatory amendment may reduce schools' financial incentives to offer high-value teach-outs. Under current regulations, students are ineligible for closed school discharge if they complete their program of study through a teach-out. By the Department's reasoning, this should provide schools with financial incentive to provide high-quality teach-outs so that their students will choose to complete their program through a teach-out rather than obtain a discharge. What data or other evidence does the Department rely on in concluding that its mandatory teach-out proposal would have the effect of increasing appropriate

¹⁹⁸ 83 Fed. Reg. at 37,268, 37,286, 37,288.

¹⁹⁹ 83 Fed. Reg. at 37,290.

²⁰⁰ *Id.*, citing 34 C.F.R. § 602.24.

²⁰¹ 81 Fed. Reg. at 76,034.

teach-out plans, given that schools will no longer have to develop teach-out plans that actually appeal to students to avoid discharge liability under its proposal?

Ultimately, if the Department is concerned about the lack of quality teach-outs offered by closed schools, it should obtain data to better understand that problem and take action to penalize the schools and/or their accreditors who are breaking the law. The Department should not instead penalize the borrowers who are innocent of any wrongdoing, devastated by school closures, and have no control over school closures or teach-outs.

The mandatory teach-out proposal does not “mirror existing regulations that disallow students who transfer credits [and] finish the program elsewhere to qualify for [a] closed school discharge.”²⁰² Adding this provision is a significant change to long-standing policy, as it removes from students the choice of whether they want to participate in a teach-out or apply for a closed school discharge. Under existing regulations, when students transfer credits and finish a comparable program at another school, they do so of their own volition – they are not forced to do so.

The teach-out proposal impermissibly imposes provisions that would retroactively deny closed school relief to which borrowers are currently entitled. The Department proposes to apply the mandatory teach-out provision for FFEL loan borrowers, even though that program is no longer in existence.²⁰³ It also proposes to apply it retroactively to all Perkins and Direct Loan borrowers, rather than specifying that the regulation only applies to loans disbursed after the effective date of the proposed regulation.²⁰⁴

Retroactive application of the proposed teach-out provision to loans disbursed prior to its effective date, if any, is an unauthorized and impermissible retroactive rule that unfairly impairs borrowers’ rights to a closed school discharge. Under current teach-out regulations, which have been in existence since 1994, borrowers have the right to a discharge if they do not complete their program through a teach-out.²⁰⁵ Indeed, as it has done for other closed schools, the Department’s website notifies former Corinthian students that “if your school ceases providing instruction to complete your program and offers you the option to complete your education at another school, you may refuse the option and still qualify for a federal loan discharge.”²⁰⁶ The website further states that “[t]here is no deadline for applying for a closed school discharge.”²⁰⁷

Because there is no time limit on when a borrower may submit a closed school discharge application, borrowers who did not complete an offered teach-out after their schools closed –

²⁰² 83 Fed. Reg. at 37,286.

²⁰³ Proposed 34 C.F.R. 682.402(d)(3)(ii)(C) and (iii).

²⁰⁴ Proposed 34 C.F.R. §§ 674.33(g)(4)(i)(B) and 685.214(c)(1)(i)(C) and (ii).

²⁰⁵ 59 Fed. Reg. 22,462, 22,477 (April 29, 1994).

²⁰⁶ See Frequently Asked Questions about Corinthian Colleges, Response to Question 10, available at <https://studentaid.ed.gov/sa/about/announcements/corinthian/faq#teach-out>.

²⁰⁷ *Id.* at Question 11.

even if it was in 1987 – still have a right to a closed school discharge. Thus, a Corinthian borrower who relied on the Department’s website, chose not to participate in a teach-out and has not yet applied for a closed school discharge would be irrevocably harmed by the Department’s proposed teach-out provision. This harm is not limited to former Corinthian students, and would cut off the right to a closed school discharge for tens of thousands of harmed borrowers.

A regulation is impermissibly retroactive if it “alter[s] the past legal consequences of past actions,”²⁰⁸ or, put another way, if it would “impair the rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”²⁰⁹ Thus, whether a regulation “operates retroactively” turns on “whether the new provision attaches new legal consequences to events completed before its enactment.”²¹⁰ Specifically, a law is unlawfully retroactive if it imposes a “new disability” on a past event.²¹¹ In *Vartelas v. Holder*, a lawful permanent resident sought to challenge a new immigration “admission” provision that, if applied to his pre-enactment conviction, would take away his right to travel abroad.²¹² The Supreme Court found that the “admission” provision was an impermissible retroactive rule because it attached a “new disability” to conduct done well before the provision’s enactment.²¹³ That is exactly what would happen if the Department applied the teach-out provision to loans disbursed prior to its enactments – thousands of borrowers who previously had a right to a closed school discharge and chose to opt out of a teach-out plan would lose that right.

Moreover, the HEA provisions that establish the Secretary’s general rulemaking power contain no express authorization for retroactive rulemaking.²¹⁴ A statutory grant of legislative rulemaking authority will not generally be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.²¹⁵

We oppose the teach-out proposal as impermissibly retroactive with respect to all loans disbursed before its effective date.

²⁰⁸ *Ass’n of Private Sector Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 196 (D.D.C. 2015), *aff’d sub nom. Ass’n of Private Sector Colleges & Universities v. Duncan*, 640 F. App’x 5 (D.C. Cir. 2016) (internal citations removed).

²⁰⁹ *Ass’n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 356 (S.D.N.Y. 2015) (gainful employment measured by using debt and earnings incurred prior to effective date of new rule); *see also Princess Cruises v. United States*, 397 F.3d 1358, 1366-67 (Fed. Cir. 2005) (stating that retroactive application of a new law is disfavored because it upends settled expectations); *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 280 (1994).

²¹⁰ *Ass’n of Proprietary Colleges v. Duncan*, *supra*, 107 F. Supp. 3d at 356.

²¹¹ *See Vartelas v. Holder*, 566 U.S. 257 (2012) (finding that the IRIRA’s new “admission” provision was retroactive since it attached a new disability (denial of reentry) in respect to past events (plaintiff’s pre-IRIRA offense, plea, and conviction)).

²¹² *Id.*

²¹³ *Id.* at 267.

²¹⁴ *See* 20 U.S.C. 1098a, *et seq.*

²¹⁵ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (invalidating a rule promulgated by the Secretary of Health and Human Service after holding the Medicare Act’s general grant of authority to the Secretary to promulgate cost-limit rules contains no express authorization for retroactive rulemaking).

b. The Department Should Extend the Presumptive Eligibility Period for a Closed School Discharge to Borrowers Attending Within One Year of the Closure Date

We support the Department's proposal to extend the discharge eligibility period for borrowers who withdraw prior to a school closure.²¹⁶ The current presumptive period of 120 days fails to encompass the serious deterioration of the institution and the quality of education during the period prior to closure. However, although we believe that the Department's proposal to extend the eligibility period to 180 days is movement in the right direction, recent closures provide evidence that a school's quality typically deteriorates far earlier than 180 days prior to closure. We urge the Department to extend the presumptive eligibility period to one year.

Based on recent closures, we know there are often signs a school is deteriorating or is at risk of closing at least one year prior to its closure. Schools do not generally close in a vacuum, but often after a sustained period of systemic failures in the administration of the institution identified by state and federal regulators and the Department itself. Trouble with financial responsibility benchmarks, accreditation and other regulatory issues often both reflects and contributes to deteriorating quality of education for students as schools may invest less in instruction, faculty and necessary equipment in these circumstances. Under the current abbreviated eligibility period, students attending these schools have the untenable option of continuing to pay for a substandard education or withdrawing, with the possibility that the school will remain open just long enough to make closed-school discharge unobtainable.

Some recent examples are instructive of the types of decline that precipitate many school closures:

ITT Tech

- The official school closure date for ITT Technical Institute (ITT) is September 3, 2016. Under the current 120-day presumptive eligibility period, non-completing students attending on or after May 6, 2016 are eligible for a closed school discharge.
- Signs of trouble and risk of closure substantially predated this presumptive eligibility period. ITT was participating in the Title IV program subject to a Provisional Participation Agreement beginning in October 2014 due to its financial responsibility failures—two full years before its closure.²¹⁷ ITT was issued a Show Cause Directive by its accreditor in April 2016 which listed a failure to comply with a prior council directive to submit a school closure plan.²¹⁸ ITT also faced public legal investigations and actions

²¹⁶ Proposed 34 C.F.R. §§ 674.33(g)(4)(i)(B), 682.402(d)(1)(i), and 685.214(c)(1)(i)(B).

²¹⁷ Letter to ITT Tech from Department of Education dated August 25, 2016, *available at* <https://www2.ed.gov/documents/press-releases/itt-letter-08252016.pdf>.

²¹⁸ ACIS Show Cause Directive Letter, dated April 20, 2016, https://secure.in.gov/bpe/files/ACICS_Show-Cause_Directive_Letter_to_ITT_Tech_2016-04-20_Unprotected_PDF.pdf.

by state and federal agencies, including a lawsuit by the CFPB in February 2014, and the SEC in May 2015.²¹⁹

Charlotte School of Law (CSL)

- More recently, Charlotte School of Law (CSL) ceased operations with an official closure date of August 10, 2017, and the 120-day closed school eligibility period applies to students who withdrew on or after April 12, 2017.
- On Nov. 14, 2016, CSL's accreditor, the American Bar Association (ABA), placed CSL on probation due to the school's noncompliance with critical ABA standards.²²⁰ These determinations were based on ongoing and chronic failings, including substantial academic issues around the curriculum and bar exam passage rates—indicating the provision of deteriorating or subpar education quality.
- On December 19, 2016, the Department notified the school it was denying its application for recertification to receive Title IV funds and that CSL's participation in the federal student aid programs would end, at which point the school laid off over half of its faculty and many students withdrew.²²¹

The above examples show that a school that has failed for all practical purposes and is demonstrably failing to educate its students effectively can nevertheless remain open for months, subjecting current students to thousands of dollars of debt—debt that their devalued education leaves them unable to pay. Failing schools like ITT and CSL do not tell existing students or the students they target for recruitment that the school is in trouble and facing a loss of accreditation or services. Instead, these schools are perversely incentivized to keep students that they are unable to educate, and to continue to enroll unsuspecting students, in order to maintain solvency. The Department should not force students to remain enrolled in a failing school longer than they otherwise would just to preserve the possibility that they will later be eligible for closed-school discharge. Doing so insures only that students will incur more unpayable debt. As the Department itself determined when it finalized regulations on November 1, 2016:

[I]t is not always in the individual borrower's best interest to continue a program through graduation. In a closed school situation, the value of the degree the borrower obtains may be degraded, depending on the reasons for the school

²¹⁹ Examples of these actions include: *Consumer Fin. Prot. Bureau v. ITT Educ. Servs.*, 14 -cv -00292 -SEB -TAB (S.D Ind.); and *United States Sec. & Exch. Comm'n v. ITT Educ. Servs.*, 15-cv-00758-JMS-MJD (S.D Ind.).

²²⁰ ABA Council Decision, Notice of Probation and Specific Remedial Action: Charlotte School of Law (Oct. 2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/PublicNoticeAnnouncements/2016_november_charlotte_probation_public_notice_authcheckdam.pdf.

²²¹ Letter from Department of Education to Charlotte School of Law (Dec. 19, 2016), <https://studentaid.ed.gov/sa/sites/default/files/csl-recert-denial.pdf>; see also Michael Gordon, "Classes reopen in stripped-down Charlotte School of Law," www.charlotteobserver.com (Jan. 23, 2016).

closure. Borrowers at closing schools may incur unmanageable amounts of debt in exchange for relatively low-value degrees.²²²

There is widespread evidence beyond the two examples we provide above that when a school is rapidly declining in quality or otherwise moving toward closure, it is often in the best interests of borrowers and taxpayers to allow borrowers to withdraw early, cut borrower and taxpayer losses, and allow borrowers to move on to better opportunities.²²³ We therefore propose extending the proposed 180-day period for closed school discharges to one year prior to closure.

c. The Department Should Not Amend or Downsize the List of Exceptional Circumstances It May Consider in Extending the Closed School Discharge Eligibility Period for Borrowers Who Withdraw

We oppose the Department's proposal to delete two exceptional circumstances it may consider in extending the closed school discharge eligibility period.²²⁴ In 2013, the Department and non-Federal negotiators reached consensus on four non-exclusive circumstances that the Department may consider in extending the presumptive discharge eligibility period.²²⁵ These circumstances included:

- The school's discontinuation of the majority of its academic programs; and
- A finding by a State or Federal government agency that the school violated State or Federal law.²²⁶

The Department now proposes deleting these two circumstances.²²⁷ It provides no justification for these deletions except to state, "Generally, the negotiating committee approved of these changes."²²⁸ This statement is false. In addition, the Department has failed to provide any facts, evidence or reasons to justify the repeal of these exceptional circumstance examples. Describing specific types of circumstances that the Department may consider is important, as it puts both borrowers and schools on notice regarding the types of circumstances that may result in an extension of the presumptive eligibility period. Each of the deleted circumstances clearly implicates a degradation in educational value long preceding the closure date. Government agency findings of legal violations necessarily relate to conduct that predated the findings themselves by months or even years, while a school's decision to discontinue the majority of its programs obviously calls into question the quality of those that remain. Both circumstances should be separately designated.

²²² 81 Fed. Reg. at 76,034.

²²³ Other examples include Corinthian Colleges, Inc, Anthem Colleges, Westwood College, ICDC, Career Colleges of America, Marinello Schools of Beauty, and ATI College.

²²⁴ Proposed 34 C.F.R. §§ 674.33(g)(4)(i)(B), 682.402(d)(1)(i), and 685.214(c)(1)(i)(B).

²²⁵ 78 Fed. Reg. 45,618, 45,628 (July 29, 2013).

²²⁶ *Id.*

²²⁷ Proposed 34 C.F.R. §§ 674.33(g)(4)(i)(B), 682.402(d)(1)(i), and 685.214(c)(1)(i)(B).

²²⁸ 83 Fed. Reg. at 37,268.

There is no logical basis for the Department—here without stakeholder input or stated justification—to delete these two obvious examples of exceptional circumstances warranting an extension of the closed school eligibility period. Doing so provides no benefit and will adversely impact students who are already facing the no-win proposition of attending a failing school.

d. The Department Should Not Cut Off Its Discretion to Continue to Suspend Collection and Allow Borrowers Who Inadvertently Submit Incomplete Applications Time to Resubmit by Requiring “Completed” Applications

The closed school discharge application is dense and complicated with legal terms that many borrowers are not familiar with. Although borrowers should be able to respond to plain language queries, the application currently requires borrowers to be versed in the law by requiring them to interpret complex legal concepts such as “teach-out,” “comparable program,” and “core credits.” It does not incorporate plain language tailored to the intended audience – students who were defrauded, primarily by unscrupulous for-profit colleges. In addition, the format of the application is confusing, requiring borrowers to skip to different questions depending on their answers. The “yes” or “no” options on the application are not clearly marked as distinct and placed side-by-side.

As a result, borrowers often inadvertently miss questions and make technical errors. Indeed, student loan servicers have confirmed this problem in discussions with Robyn Smith, Senior Attorney at the Legal Aid Foundation of Los Angeles. They told her that they often cannot recommend a discharge for borrowers because the borrowers missed answering critical questions on the closed school discharge application, even though it is clear from the National Student Loan Data System that the borrowers should qualify for a closed school discharge.

As recently as the fall of 2017, in commenting upon the closed discharge application, legal aid advocates raised concerns regarding the difficulty many of our clients have understanding and filling it out. We recommended that the Department use plain language on all versions of the discharge applications, following best practices for form design and The Plain Writing Act of 2010.

We also encouraged the Department to start a process to test the applications for consumer comprehension and usability, with input on the application and on this testing process from other federal agencies that have extensive testing experience, including the Federal Trade Commission and the Consumer Financial Protection Bureau. As far as we are aware, the Department has not yet tested the closed school discharge application for consumer comprehension, readability, and usability, to ensure all students who attend various institution levels and types are able to comprehend and complete the application.

We also suggested that the Department provide support structures for borrowers who need assistance filling out the discharge application, including a help line, a chat function, a search function, and a frequently asked questions section. Contractors and staff who provide

assistance currently do not appear to be trained on how to advise and assist borrowers with closed school discharge applications, nor does it appear that they are evaluated on this ability through consumer feedback and compliance testing.

At least until the closed school discharge application is tested and revised to greatly reduce inadvertent borrower errors, the Department should delete the word “completed” from the closed school discharge procedural provisions.²²⁹ By requiring a “completed” application, within 60 days of suspending collections or else collection will resume, the Department removes the discretion of itself, guaranty agencies, and servicers to notify the borrower regarding inadvertent errors and allow the borrower additional time to submit a corrected application while collection remains suspended.

e. We Support the Department’s Proposal to Allow Borrowers to Seek the Department’s Review of Guaranty Agency Denials of Closed School Discharge Applications

We support the Department’s proposal to provide for the review of guaranty agency denials of closed school discharge applications for FFEL loans.²³⁰ FFEL borrowers whose loans are held by guaranty agencies should have the same right to challenge an erroneous closed school discharge decision as Direct Loan and FFEL Loan borrowers whose loans are held by the Department. Current FFEL Loan regulations, however, do not provide borrowers with any right to seek review of guaranty agency denials of closed school discharges.²³¹

Even when FFEL borrowers are able to get administrative review, unlike Direct Loan borrowers, their right to seek further review in court is not clear. The Administrative Procedure Act (APA) does not provide for judicial review of decisions by private, non-governmental entities such as guaranty agencies. Nor is there any explicit right to judicial review of guaranty agency decisions in the HEA. As a result, FFEL borrowers whose loans are held by guaranty agencies have no clear way to challenge an erroneous closed school discharge decision from a guaranty agency. Only Direct Loan and FFEL Loan borrowers whose loans are held by the Department may seek judicial review of administrative unpaid refund or closed school discharge denials. The proposed rule will address this arbitrary denial of borrower due process.

The Department’s proposal also aligns with the regulations that allow borrowers to seek judicial review of guaranty agency false certification discharge denials.²³² It will also create parity between the FFEL and Direct Loan programs with respect to the review of initial decisions made on closed school discharge applications.

²²⁹ Proposed 34 C.F.R. §§ 682.402(d)(3), (d)(6)(ii)(G), (d)(6)(ii)(H); and 685.214(c).

²³⁰ Proposed 34 C.F.R. § 682.402(d)(6)(ii)(F).

²³¹ 34 C.F.R. § 682.402(d).

²³² 34 C.F.R. § 682.402(e)(11).

f. The Department Should Not Repeal Automatic Closed School Discharges for Students Who Have Not Re-Enrolled in a Title-IV Eligible Institution Within Three Years of Their Schools' Closures

We oppose the Department's proposal to repeal the 2016 regulation (the "mandatory discharge regulation") that mandates automatic discharges, without applications, for borrowers whose schools closed on or after November 1, 2013 and who "did not subsequently re-enroll in any title IV-eligible institution within a period of three years from the date the school closed."²³³

The mandatory discharge regulation is necessary because the department has rarely, if ever, used its discretion to grant closed school discharges without applications. The Department claims that the mandatory discharge regulation is unnecessary because it already has the discretion to grant closed school discharges without applications under 34 C.F.R. §§ 674.33(g)(3)(ii), 682.402(d)(8), and 685.214(c)(2). However, as far as we know the Department has rarely, if ever, exercised this discretion due in part to its conflicting duty to collection on loans. The Department has provided no data to demonstrate otherwise.

The Department's assumption that borrowers may be harmed by automatic discharges is unsupported by evidence and contradicted by our clients' experiences. The Department attempts to justify its decision to repeal the mandatory discharge regulation by claiming that an institution, state agency, or custodian of records may refuse to provide an official transcript for a borrower whose loan has been forgiven. Based on our experience assisting hundreds of closed school students, this possibility is unlikely, if it is even lawful for schools to do so.²³⁴

We often request student records, including transcripts, on behalf of our clients after a school has closed in order to obtain records necessary to establish their eligibility for a closed school discharge or reimbursement from a state student tuition recovery fund. Typically, student records are stored by a state agency, a third-party custodian of records, a bankruptcy trustee, or, on rare occasions, the closed school's owner. In all the times we have made this request, whether one month or many years after a school closure, none of these custodians has ever asked whether our clients had received a closed school discharge. These entities want to spend as few funds as possible maintaining and providing records, and therefore have no motivation to take the time to determine whether a student has received a discharge.

Even if there is a remote possibility that a custodian of closed school records might refuse to provide an official transcript to a borrower who has received an automatic discharge, borrowers do not typically seek to transfer credits or obtain a job based on those credits three or more years after their school has closed. In our experience, the vast majority of closed school

²³³ 34 C.F.R. § 685.214(c)(2)(ii).

²³⁴ See VIII(d), *supra*, noting absence of legal authority for withholding transcripts based on loan discharges.

borrowers who are able to transfer their credits do so within several weeks to several months after a school closes. Immediately upon a school closure, the closed school as well as state agencies may bring in other schools to market their programs to impacted students. It is also within the first few weeks after a closure that other schools reach out to students and that students actively search for a new school to accept their closed school credits. Beyond this, very few students transfer their closed school credits.

In addition, closed school credits that are not backed up with a credential are very unlikely to lead to employment. If a borrower has not found employment based on those credits soon after the school has closed, he is unlikely to find such employment three or more years later.

Moreover, in 2016, the Department concluded that too few borrowers would choose to opt out of an automatic closed school discharge to justify the administrative burden of an opt-out procedure.²³⁵ The Department has not provided any reason to question this conclusion. The overall benefit to the vast majority of borrowers would far outweigh the very remote possibility that a borrower would prefer to opt out just in case a custodian of closed school records refused to provide an official transcript.

The Department also claims that automatic discharges should not be granted because there could be tax implications for borrowers. Currently, the Department does not send borrowers who receive discharges IRS Form 1099c. As a result, our clients do not pay taxes on closed school discharges. Even if the Department sent borrowers these forms, closed school discharges are not necessarily taxable under the disputed debt doctrine or for borrowers who are insolvent under the IRS standards.

The Department's assumptions that borrowers would prefer to refuse an automatic discharge and its benefits (refunds, removal of credit history, removal of the possibility of wage garnishment, federal benefit offsets, and income tax refund seizures) in order to avoid tax consequences or face the remote possibility that a custodian of records could refuse to provide them with a transcript are unfounded and unrealistic.

The Department's assumptions regarding the reasons that low percentages of students apply for discharges are not only unsupported by any data, they are contrary to previous Department findings and evidence presented by legal services organizations. Currently, after a school closes, the Department or guaranty agency is required to provide discharge applications to borrowers who appear to have been enrolled at the time of the school's closure or to have withdrawn within 120 days prior to closure.²³⁶ This often happens one to six months after the school has closed. Then, the Department or guaranty agency must refrain from

²³⁵ 81 Fed. Reg. at 76,038.

²³⁶ 34 C.F.R. §§ 674.33(g)(8)(v) (Perkins); 682.402(d)(6)(ii)(H); 685.614(f).

collecting on the loans obtained to attend the closed school for sixty days. If the borrower does not apply for a discharge during that time, the Department or guaranty agency is required to resume collection on his/her loans if the loans are not still within the 6-month grace period.

In the 2016 NPRM, the Department observed that despite this requirement, “[m]any borrowers eligible for a closed school discharge do not apply.”²³⁷ This statement was based on Departmental data. In 2014, the Department stated that it receives closed school discharge applications from only 6% of eligible borrowers.²³⁸ Then, in the 2016 NPRM, the Department stated, “for the period between 2011 and 2015 there were 43,268 students attending closed schools, of which 9,606 students received a closed school discharge.”²³⁹

The Department concluded that these low numbers were due in part to lack of effective outreach,²⁴⁰ and stated that it was “concerned that borrowers are unaware of their possible eligibility for a closed school discharge.”²⁴¹ It also stated, “in some instances, the closing school might inform borrowers of the option to complete their program through a teach-out, but fail to advise them of the option for a closed school discharge.”²⁴² Indeed, in order to address this lack of effective outreach and ensure that accurate information is provided to borrowers, the Department enacted two additional closed school discharge notification requirements in 2016. First, the Department required that the loan holder provide the borrower with another discharge application and information about how to obtain a discharge “[u]pon resuming collection of any affected loan.”²⁴³ Second, the Department amended the PPA regulation to require that whenever a closing school submits a teach-out plan to an accreditor after the Department has initiated an action to terminate Title IV eligibility or other specified event, it must also provide closed school discharge applications and related disclosures to students.²⁴⁴

Now, the Department has reversed its conclusions, hypothesizing that “[i]t could be that the number of closed school discharges is relatively low (as compared with the potential pool of borrowers eligible) because most institutions provide a teach-out opportunity that allows the borrower to complete his or her program.”²⁴⁵ This statement and the Department’s decision to repeal the automatic discharge provision are completely unsupported by any data from the Department.

Our experience suggests that the low application response rates do not reflect lack of demand, but rather lack of awareness of the right to discharge or how to seek it. Non-profit legal

²³⁷ 81 Fed. Reg. at 39,369.

²³⁸ Paul Fain, *Best of a Bad Situation?*, Inside Higher Ed (Dec. 9, 2014), available at www.insidehighered.com.

²³⁹ 81 Fed. Reg. at 76,065.

²⁴⁰ Paul Fain, *Best of a Bad Situation?*, Inside Higher Ed (Dec. 9, 2014), available at www.insidehighered.com.

²⁴¹ 81 Fed. Reg. at 39,369.

²⁴² *Id.*

²⁴³ 34 CFR §§ 674.33(g)(8)(vi) (Perkins), 682.402(d)(6)(ii)(I) (FFEL), and 685.214(f)(5) (Direct)).

²⁴⁴ 34 C.F.R. § 668.14(b)(32).

²⁴⁵ *Id.*

services organizations have a constant influx of borrowers whose schools closed as many as 30 years ago and who have no idea that they are eligible for a discharge. We have also helped many borrowers impacted by more recent closures. Even these borrowers, who receive information regarding discharge rights from state agencies or the Department, are confused by contradictory information from multiple sources. First, when schools announce that they are closing, they currently have no obligation to inform their students about their loan discharge rights and options. As a result, schools often provide students with no information about closed school discharges, provide inaccurate information, or emphasize transfer or teach-out options while burying information about discharge options.

As an example, Westwood College provided the attached letter to students when it closed.²⁴⁶ The letter emphasized students' transfer options without mentioning discharge options until the second page. In addition, it provided inaccurate information by stating, "If you apply for and receive a Federal discharge, you will **forfeit** any Westwood credits earned and these credits **will not** be transferable to a partner school." In fact, students may transfer credits to a different program at a different school and still be eligible for a closed school discharge.²⁴⁷

Similarly, ICDC College in California closed and arranged for a teach-out with a distance education provider, including for brick-and-mortar students.²⁴⁸ In its letter to students, it emphasized the teach-out, did not even mention students' rights to closed school discharges of their federal loans, and provided confusing information to them about the state tuition recovery fund at the end of the letter. Many of the students that the Legal Aid Foundation of Los Angeles assisted were unhappy that they could only complete a teach-out through an online program and did not know they could instead seek a closed school discharge.

Second, after a school closes, students are overwhelmed by and confused about which notifications are legitimate and which are not. For example, many of our Corinthian Colleges clients received payment statements from their servicers while receiving emails from the Department regarding closed school discharge and defense-to-repayment options. At the same time, they were being bombarded with calls, letters, and emails from fraudulent debt collection companies offering "debt forgiveness" for Corinthian borrowers for a fee, some even representing they were from the Department of Education. Many other closed school borrowers we represent have also been bombarded with similar fraudulent solicitations. As an example,

²⁴⁶ Letter from Lou Pagano, Chief Operating Officer, Alta Colleges, to Westwood students (Jan. 25, 2016), attached to these comments as Attachment 3.

²⁴⁷ See 34 C.F.R. § 685.214(c)(1)(i)(C); www.studentaid.gov/closedschool ("Q. I transferred credits from a closed school and enrolled in a completely different program of study at a new school and completed the new program. Are the previous loans from the closed school dischargeable? A. Yes, because the program of study at the new school is completely different than that of the closed school, for which the loans were intended.").

²⁴⁸ Letter from Rene C. Nunez, Vice-President Compliance/Student Relations, ICDC College, to ICDC students (May 20, 2016), attached to these comments as Attachment 4.

many of the closed school clients of the Legal Aid Foundation of Los Angeles from Marinello Schools of Beauty received the attached solicitation.²⁴⁹

Finally, students face aggressive solicitations by other for-profit schools. Many closed schools host “school fairs” where all or most of the attendees are other for-profit schools who do not provide any information about closed school discharges. For example, Corinthian’s Heald College invited for-profit schools onto its closing California campuses to recruit. These schools aggressively pushed students to transfer credits rather than seek closed school discharge. Many former Heald students transferred to other suspect for-profit schools because of this misinformation, exchanging their discharge eligibility for a valueless degree and unknowingly exposing themselves to still more debt and predatory practices. DeVry College, which our clients have told us was ubiquitous in its on-campus recruiting during Heald’s closure, was itself sued by the FTC for predatory practices less than a year later.

Due to these problems, the Department amended the closed school regulations in 2016 to provide for automatic closed school discharges to eligible borrowers who had not re-enrolled in any Title IV-eligible institution within three years from the date of the school closure. The Department has not provided sufficient reasoning or facts to justify its repeal of this provision.

The Department’s claim regarding taxpayer savings is not supported by the evidence. The Department claims that it will reduce transfers from the Department to students by \$96.5 million, “primarily due to elimination of automatic closed school discharges.”²⁵⁰

The Department, however, has not provided data requested by legal aid negotiator Abby Shafroth on November 15, 2017, to back up this claim. Ms. Shafroth requested data reflecting the number of students who attended schools that closed and who, based on the criteria regarding 120 days of closure, were presumptively eligible for a closed school discharge for the last five years, and, of those, the number that applied for closed school discharges.²⁵¹ She also asked that the Department separately report the Corinthian numbers due to the special, increased outreach that the Department conducted.²⁵² The Department has not provided this data.

In addition, the \$96.5 million figure does not take into account the fact that closed school students who do not complete their educations are likely to be in default. In the 2016 NPRM, the Department cited to several studies showing that “students left with debt but no degree [are] at greater risk of default. Research has consistently shown that students who do not complete their programs are among the most likely to default on their loans, leaving them worse off than when

²⁴⁹ Solicitation re Marinello Schools of Beauty debt forgiveness, attached to these comments as Attachment 5.

²⁵⁰ 83 Fed. Reg. at 37,289.

²⁵¹ See Transcript of Borrower Defense Negotiated Rulemaking Meeting (Washington, DC Nov. 15, 2017) at 176-178, available at <https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html>.

²⁵² *Id.*

they enrolled.”²⁵³ To more accurately calculate the savings, if any, to taxpayers, the Department should report the percentage of the population identified above in default on their federal loans and the cumulative amount defaulted balances; the likely cost of collection efforts; and the percentage of the same population with an income-driven repayment plan whose monthly payments result in negative amortization, along with cumulative balance on their loans.

These calculations are likely to significantly reduce any savings to taxpayers from repealing the mandatory discharge regulation.

The Department does not analyze the cost of repealing the mandatory discharge provision. The Department also failed to engage in any analysis of the cost of repealing the mandatory discharge regulation to taxpayers, borrowers, and the larger economy. In the 2016 NPRM, the Department observed that “[b]orrowers who ultimately have their loans discharged will be relieved of debts they may not have been able to repay and that debt relief can ultimately allow them to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for daycare. They also will be able to return into the higher education marketplace and pursue credentials they need for career advancement.”²⁵⁴ The Department, however, does not analyze the cost to borrowers and their communities of losing these benefits due to the proposed repeal of the mandatory discharge provision. Had it done so, it is likely that accurately calculated taxpayer savings, if any, would be far outweighed by the significant economic benefits of the mandatory discharge regulation for borrowers, their communities, employers, and the economy at large, as well as the benefit to taxpayers of achieving the goals of the HEA.

XII. False Certification Discharges

We oppose the Department’s proposed false certification discharge regulations unless amended. The Department’s proposal to bar a borrower from receiving a false certification discharge whenever the borrower has signed a written attestation that he/she had a high school diploma essentially negates any benefit from the proposal to remove the “ability to benefit” requirement. Despite the evidence of rampant documentation falsification at institutions that commit false certification violations, the Department has proposed an attestation provision, which will incentivize enable predatory schools to defraud both students and taxpayers while denying relief to injured borrowers. The Department’s proposal conflicts with the broad statutory mandate to grant false certification discharges and raises serious due process concerns by creating a blanket restriction that denies false certification discharges whenever a school produces an attestation of high school status allegedly signed by a borrower without consideration of individual facts or evidence.

²⁵³ 81 Fed. Reg. at 76,051.

²⁵⁴ 81 Fed. Reg. at 39,391.

Additionally, we oppose the Department’s proposal to use the disbursement date rather than the origination date to indicate when a borrower was falsely certified. The Department’s proposal conflicts with the plain language requirements of the HEA and its underlying regulation, which require an institution to certify an individual’s eligibility to borrow before it “receives” financial aid through a disbursement.

Furthermore, we object to the Department’s proposals to remove, without any reasoned explanation, the procedural updates and clarification of the Department’s authority to grant discharges without an application for satisfactory academic progress (SAP) fraud as provided in the 2016 Final Regulations. The Department seeks to rescind these provisions without addressing any of its prior justifications for the rules in violation of administrative law.

Finally, at least until the false certification discharge application is tested and revised to reduce inadvertent borrower errors, the Department should delete the word “completed” from the false certification discharge procedural provision. By requiring a “completed” application within 60 days of suspending collections or else collection will resume, the Department removes the discretion of itself, guaranty agencies, and servicers to notify the borrower regarding inadvertent errors and allow the borrower additional time to submit a corrected application while collection remains suspended.

a. The Department Should Not Preclude False Certification Discharge Whenever a Borrower Has Signed an Attestation of High School Graduation

We oppose the Department’s proposal to bar a borrower from receiving a false certification discharge whenever the borrower has signed a written attestation that she had a high school diploma.²⁵⁵ The Department has justified this “attestation prohibition” on three grounds: 1) to ensure that students who cannot obtain an official high school transcript or diploma will have a reasonable opportunity to pursue postsecondary education; 2) to allow a school to rely on an attestation when the borrower is unable to obtain an official high school transcript or diploma; and 3) to prohibit students who intentionally misrepresent their high school status by signing an attestation from subsequently seeking a false certification discharge.²⁵⁶ While these objectives appear reasonable, the proposed regulation will create a loophole easy for predatory schools to exploit and exclude the most deserving students from discharge relief.

The Department does not cite a single example of a borrower who manipulated the false certification discharge process by deliberately misleading a school about his high school diploma or GED status. The Department presents this non-existent strawman in order to ignore widespread and well-documented patterns of abuse by predatory for-profit schools—rushing vulnerable students through enrollment without explaining documents, lying to them about their

²⁵⁵ Proposed 34 C.F.R. § 685.215(c)(a)(ii).

²⁵⁶ 83 Fed. Reg. at 37,289-90.

eligibility, giving them no time to review the documents that they are instructed to sign, and forging signatures. Instead of protecting borrowers and taxpayers, the Department has proposed an easily manipulated regulation that creates a road map for predatory schools to defraud both students and taxpayers while denying relief to injured borrowers.

The Department ignores the fact that the regulation is unnecessary. According to the 2018-2019 Federal Student Aid (FSA) Handbook, the Department allows schools to accept alternative documentation of high school graduate status if a student cannot provide official documentation to verify her high school completion status.²⁵⁷ In other words, students who are unable to obtain their high school diploma or transcript can already provide alternative documentation and pursue postsecondary education under the existing FSA Handbook guidelines. Thus, the limited number²⁵⁸ of students that the Department believes will benefit from the proposed attestation provision—students who graduated from high school but cannot obtain a transcript or diploma—already have an avenue to federal financial aid eligibility. Indeed, the Department has provided no evidence that any student has been prevented from obtaining federal financial aid because of his inability to obtain a high school diploma or transcript. The attestation exception is therefore unnecessary, unfounded and ill-advised. The Department should not enact a useless rule that will provide no borrower benefit, while barring large numbers of borrowers harmed by a common for-profit school abusive practice from receiving discharges.

The Department should not adopt the attestation exception in light of widespread evidence, including the Department’s own findings, that for-profit schools manipulate borrowers into unknowingly attesting that they have high school diplomas. Students at predatory schools do not typically prepare their own financial aid applications or documents. Instead, recruiters and financial aid representatives fill out the documents for students and instruct them to sign. This can lead to students unknowingly signing documents that contain false or inaccurate information. Since most of these forms are completed electronically,²⁵⁹ a borrower need not even be present to review or sign the financial aid documents before they are submitted. An institution could electronically sign an attestation of high school graduate status on behalf of a student and the proposed regulations would completely preclude a borrower from challenging such a falsification and seeking a discharge. Given the Department’s long history of weak oversight of schools’ compliance with student eligibility regulations, it is unlikely that the Department would be able to protect students from these fraudulent documentation practices.²⁶⁰

²⁵⁷ Federal Student Aid Handbook, December 2017, at AVG-90.

²⁵⁸ 83 Fed. Reg. at 37,290.

²⁵⁹ See Federal Student Aid Handbook, December 2017, at AVG-5 (“most students use *FAFSA on the Web* to apply for federal student aid...”).

²⁶⁰ See Attachment 6(A), United States Government Accountability Office, GAO-09-600 (August 2009), Report to the Chairman, Subcommittee on Higher Education, Lifelong Learning and Competitiveness, Committee on Education and Labor, House of Representatives, Stronger Department of Education Oversight Needed to Help

Furthermore, the types of institutions that commit false certification also often utilize high-pressure sales tactics, where students are pressured to enroll immediately and provided large stacks of documents to sign with limited time to review.²⁶¹ The attestation exception creates a dangerous loophole where predatory schools could require non-high school graduate students to sign an attestation of high school graduate status without explaining the consequences on financial aid eligibility or relief. Under the proposed rule, a student who unknowingly signs an attestation that misrepresents his or her eligibility would be permanently disqualified from seeking a false certification discharge. This could result in denying relief to precisely the kinds of defrauded students that the false certification regulations were designed to benefit.

We have seen numerous examples of schools falsifying attestations of high school graduate status without a borrower's knowledge. We have attached 28 borrower declarations, all of which were submitted in support of false certification discharge applications.²⁶² In these declarations, borrowers have attested that:

- they were rushed through enrollment;
- they were pressured to sign a large stack of documents with limited or no time to review them;
- the school had filled in or prepared most of these documents and the borrowers did not know their contents;
- they could not read or understand many of the documents because they were not written in their native languages; or
- the school inserted false information regarding the borrower's high school graduation status without the borrower's knowledge.

In addition, none of these borrowers knew that they were required to have a high school diploma or GED to obtain financial aid or that there was an ability-to-benefit test exception until July 1, 2012 – they relied on whatever the school told them regarding high school graduation status. Until these borrowers sought legal assistance for student loans they were unable to pay, none of these borrowers had heard of a false certification discharge or knew that they could be eligible for a discharge.

As an example, Housing and Economic Rights Advocates (HERA) is currently representing a borrower who was falsely certified by a school that had forged an attestation of high school completion. Will²⁶³ enrolled at Colorado Technical University Online (CTU) in 2005. At the time, he did not have his high school diploma or GED and sent his incomplete

Ensure Only Eligible Students Receive Federal Student Aid; *see also* Attachment 6(B), Senate Report 102-58 (1991), Abuses in Federal Student Aid Programs.

²⁶¹ *See* Attachment 6(C).

²⁶² *Id.*

²⁶³ The names of clients have been changed for confidentiality. The Department and/or guaranty agencies should have copies of these applications in their possession.

transcript to CTU. The CTU recruiters told him that his failure to complete high school would not be an issue and asked him to electronically sign confirmation of his basic information in order to apply for federal student loans. Will did not review what he signed or know that CTU had inserted false high school graduation information. CTU never administered an ability to benefit (ATB) test, but charged more than \$20,000, including \$15,000 in federal student debt.

Will did not realize he had the right to discharge his loans based on CTU's misconduct until years after he left CTU. When he applied for false certification discharge, his application was denied because CTU falsely claimed that he had "attested to graduating from high school on his attestation forms and Enrollment Agreements." When Will actually obtained these forms however, he realized that he had never seen them before, and that CTU had simply marked "Electronic Signature on File" on the signature line.²⁶⁴ Will's student loan servicer ignored his sworn statement that he gave his accurate educational history to CTU in favor of CTU's unsupported statement that it had his electronic signature on file. HERA is currently assisting Will to prepare a false certification appeal. His experience reveals that, while their benefit to students is uncertain, student eligibility attestations give bad acting schools and recruiters an obvious road map for evading eligibility requirements while shifting blame to unwitting students.

We have also seen examples of schools that misrepresent a borrower's education on the FAFSA application, which is similar to a high school attestation because it requires borrowers to certify their education status to determine financial aid eligibility. For example, the Legal Aid Foundation of Los Angeles previously submitted the false certification discharge applications for 20 non-English speaking students whose for-profit school falsely certified on their FAFSA applications that they had high school diplomas.²⁶⁵ In fact, none of these students had earned a valid high school diplomas, all had reported this to the school, none had completed their own FAFSA forms, and the school instructed all of them to sign off on all their loan documents without allowing them time to review the documents. Many of them could not even read the loan documents because they could not read English.

Schools may also take advantage of the attestation exception by directing students who have not earned high school diplomas to fraudulent online diploma mills. These businesses typically administer an online multiple-choice test for a fee, and then provide a fake transcript and high school diploma that the school uses to qualify the students for federal aid.²⁶⁶ These fraudulent companies could convince students who have not earned high school diplomas that they obtained a valid high school equivalent and then have the student sign the attestation. The students typically do not discover this type of fraud until after they stop attending the school and

²⁶⁴ A copy of the high school attestation and enrollment agreement that was "electronically signed" by the borrower is included in Attachment 6(D).

²⁶⁵ These declarations are included in Attachment 6(C).

²⁶⁶ See Press Release, Fed. Trade Comm'n, FTC Action Halts Online High School Diploma Mill That Made \$11 Million Selling Worthless Diploma to Students (Sept. 19, 2014).

try to find work or attempt to enroll in another postsecondary education program; the “attestation exception” would unjustly preclude these borrowers from obtaining relief.

For example, the Legal Aid Foundation of Los Angeles represented three students who were falsely certified by Marinello Schools of Beauty (Marinello). In 2013, Lydia, Lizette, and Leonard inquired about enrolling in Marinello’s cosmetology and barbering program at various Marinello campuses. Although none of these individuals were eligible for federal financial aid because they had not completed high school, Marinello promised that they could earn valid high school diplomas through the school’s partnership with Parkridge Private School. Marinello arranged for all three to obtain Parkridge high school diplomas, which Marinello then used to certify their federal student aid eligibility. Since they had enrolled after July 2012, the ability to benefit option was not available.

In February 2016, Marinello announced that it would be closing its chain of beauty schools after several campuses lost eligibility to receive federal financial aid. The Department of Education’s had found that Marinello’s Parkridge program was a scam to provide fake high school diplomas to its students in order to improperly certify their eligibility for financial aid.²⁶⁷ Lydia, Lizette, and Leonard did not learn that their Parkridge diplomas were invalid or that they had a right to discharge until after the Department took action against Marinello. The Legal Aid Foundation of Los Angeles submitted an application for false certification loan discharge on behalf of all three individuals. After an initial denial and lawsuit²⁶⁸, the Department granted discharges for all three individuals.

Other examples of schools falsifying student eligibility through fraudulent diploma mills include:

- FastTrain College allegedly enrolled 1,300 students who had not graduated from high school and were ineligible for federal aid by misrepresenting to the government that these students were high school graduates.²⁶⁹ The school told these students that they did not need a diploma or that they could earn one while attending college.²⁷⁰

²⁶⁷ See Ashley A. Smith, “More For-Profits in U.S. Crosshairs,” <https://www.insidehighered.com/news/2016/02/02/education-department-denies-federal-aid-two-profit-chains> (February 2, 2016); see also Attachment 6(E), a copy of the five denial of recertification letters from Department of Education to Marinello Schools of Beauty.

²⁶⁸ See Press Release, *Lawsuit Filed Challenging U.S. Department of Education’s Refusal to Discharge Loans of Students Defrauded by California-Based Marinello Schools of Beauty*, available at <http://lafla.org/news/press-releases/lawsuit-filed-challenging-u-s-department-of-educations-refusal-to-discharge-loans-of-students-defrauded-by-california-based-marinello-schools-of-beauty/>.

²⁶⁹ See David Halperin, “For Profit-College Owner, Who Used Strippers as Lure, Goes on Trial,” www.huffingtonpost.com (Oct. 20, 2015).

²⁷⁰ *Id.*

- Keiser University recruiters allegedly directed at least 74 students to obtain diplomas from an online diploma mill in 2010.²⁷¹
- The proliferation of online high school diploma mills has led to a number of law enforcement actions against the companies that run them.²⁷²

It is important to note that the Department itself has found that schools engage in all of the above practices, manipulating borrowers into unknowingly attesting that they have a high school diploma or GED when they do not. The Department granted all the false certification discharge applications corresponding to the attached declarations, except for one that is currently being appealed. In addition, the Department has conducted investigations about multiple schools engaging in these illegal practices, including Marinello, FastTrain, and Kaiser. These examples are just the tip of an iceberg – it is likely many for-profit schools employ these practices to prey on vulnerable borrowers who are not familiar with federal financial aid eligibility requirements. In light of this evidence, the Department has no reasonable basis upon which to conclude that the attestation exception is necessary.

Removing the attestation exception will not create a significant budget impact. The Department determined that only a small number of false certification discharges are granted annually, thus affecting a small percentage of institutions.²⁷³ In 2016, the Department also concluded that the number of false certification discharge applications submitted annually was unlikely to increase.²⁷⁴ The Department has now reversed this position. It claims that, due to the removal of the ability-to-benefit exception and the increased likelihood of high school graduate status attestations, the frequency and cost of false certification discharge applications will rise.²⁷⁵

There is no basis or evidence to support the Department’s reversed position. The ability-to-benefit option was eliminated as of July 2012. Yet, over the last six years, the Department has reported no increase in attestation enrollments and accompanying false certification discharge requests. The Department’s claim that such false certification discharge applications will increase is an entirely baseless assumption that is unsupported by evidence.

Moreover, in 2016, the Department enacted a regulation that would broaden false certification discharge eligibility to borrowers who lacked a high school diploma or GED and enrolled after July 1, 2012, when the ability-to-benefit option was repealed.²⁷⁶ In the NPRM, the Department concluded that this updated regulation was unlikely cause a significant budget

²⁷¹ Scott Travis, Controversial High School Diplomas Create Turmoil at Keiser University, Sun Sentinel (Sept. 3, 2010).

²⁷² See, e.g., Holly K. Hacker, Dallas-Forth Worth Schools Accused of Being “Diploma Mills,” The Dallas Morning News (Aug. 18, 2015); Fed. Trade Comm’n, Press Release, FTC Action Halts Online High School Diploma Mill That Made \$11 Million Selling Worthless Diplomas to Students (Sept. 19, 2014); Jorgen Wouters, School’s Out for Texas Diploma Mill, www.dailyfinance.com (Oct. 22, 2010).

²⁷³ 81 Fed. Reg. at 76,059.

²⁷⁴ *Id.* at 76,060.

²⁷⁵ 83 Fed. Reg. at 37,291.

²⁷⁶ 81 Fed. Reg. at 76,082.

impact.²⁷⁷ Its data indicated that false certification discharges represent a very low share of discharges granted to borrowers.²⁷⁸ The Department did not determine it was necessary to propose any type of regulation, similar to the proposed attestation exception, to prevent borrowers from submitting fraudulent false certification discharge applications or to save significant potential costs.

The Department has now reversed this position, without any data or evidentiary justification for doing so. It has presented no evidence that would justify saving potentially minor costs at the expense of denying student loan discharges to defrauded borrowers.

In addition, the Department's narrow focus on bottom line costs does not comport with the purpose of the HEA. The HEA demonstrated the federal government's commitment to equalizing college opportunity for needy students by providing, among other things, need-based grants and financial aid. Higher education has long been an important and necessary pathway to individual success and economic gains for society. Despite the expanded accessibility to higher education that the federal student loan program afforded, Congress recognized that increased safeguards were required to ensure that federal dollars were providing access not only to more education, but also to quality education. The false certification discharge provision of the HEA were enacted to restore the integrity of the federal student loan program and to in better align the program with the student-centric aim of the HEA. The Department has completely missed the purpose of the HEA by raising cost-saving arguments to justify its proposed regulations that would reduce relief for harmed borrowers.

Furthermore, there is no evidence that reducing the number of false certification discharges will save costs for taxpayers. Many falsely certified borrowers are in default on their federal student loans and they cannot afford the loan payments. These defaulted borrowers cannot return to pursue their education and receive further financial aid that would enable them to increase their earning potential. In other words, many of the falsely certified borrowers are collection-proof. The Department has not provided evidence that it has successfully collected against borrowers who later apply for false certification discharge, or that the amount that such borrowers have repaid is greater than the cost of collection, which taxpayers also pay for, to support its proposal to reduce false certification discharges in order to save costs.

The attestation exception conflicts with the broad statutory mandate to grant false certification discharges and raises serious due process concerns. The HEA established a broad statutory mandate that the Department “shall” grant a discharge whenever a student’s eligibility to borrow has been falsely certified “by the eligible institution” or “as a result of a crime of identity theft.”²⁷⁹ Thus, the statutory language clearly states that the basis of false certification discharge is school misconduct, and specifically its false certification of a student’s

²⁷⁷ *Id.* at 76,060.

²⁷⁸ *Id.* at 76,059-60.

²⁷⁹ 20 U.S.C. § 1087(c)(1).

eligibility. The statutory language clearly (and presciently) contemplates that bad-acting schools may manipulate the certification process to their own profit and to the detriment of students. To better align the proposed false certification regulations with the authorizing statute and to protect borrower's due process rights, we urge the Department to remove the attestation exception.

The attestation exception contravenes the statutory language by making a borrower ineligible for a false certification discharge, even though her eligibility was falsely certified through a school's fraudulent manipulation of a high school diploma attestation. By doing so, the proposed rule assumes the validity of a borrower's attestation and forecloses on a borrower's ability to present evidence that he/she did not knowingly sign a false attestation—for example where the signature is obtained through duress, misrepresentation, or deceitful and illegal business practices. Rather than providing Congress's intended remedy for borrowers harmed by school misconduct, the Department has proposed a road map for abuse by bad acting schools. A school need only to produce an attestation form, no matter how dubious, to insulate themselves from Department oversight and bar any remedy for borrowers.

Before they are subjected to collection on a disputed debt, borrowers are entitled to due process.²⁸⁰ “To comport with due process, the federal government and its agents may not deprive a person of property without, at a minimum, giving [them] notice of the reasons for a proposed deprivation and some opportunity to respond to the substance of the allegations before a final deprivation occurs.”²⁸¹ The Department's proposed rule, with respect to a borrower's right to apply for and obtain a false certification discharge, violates this fundamental protection.

The attestation exception creates a blanket restriction that denies false certification discharges whenever a school produces an attestation of high school status allegedly signed by a borrower. There is no consideration of individual facts or evidence—for example, whether the school had knowledge of a borrower's ineligibility and fraudulently submitted an electronic FAFSA containing a false high school diploma attestation without the borrower's knowledge. It essentially allows a school to rebut a borrower application for false certification discharge through the provision of an attestation form, but does not give a borrower any “opportunity to respond to the substance of the allegations” implied by the “attestation exception,” namely that the borrower, and not the institution, is the party responsible for false certification.

This shortcoming is exacerbated by the Department's decision to excise procedures it enacted in 2016 to provide more transparency and fairness for borrowers. The 2016 regulation requires that, in evaluating a false certification discharge application, the Department must consider evidence submitted by the borrower and other evidence in the Department's possession including evidence from state authorities, other federal agencies, test publishers, independent test

²⁸⁰ See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁸¹ *Williams v. Texas Tech Univ. Health Sciences Ctr.*, 6 F.3d 290, 293 (5th Cir. 1993) (citing *Eguia v. Tompkins*, 756 F.2d 1130, 1139 (5th Cir. 1985)), *cert. denied*, 510 U.S. 1194 (1994).

administrators, and school records.²⁸² It also requires the Department to provide additional information regarding reasons for denying discharge applications, so that borrowers can submit appeals with meaningful evidence and arguments that address and rebut the basis for denials.²⁸³ The proposed rule, however, not only shifts the entire evidentiary burden to the borrower, it also denies them the ability to rebut adverse evidence submitted by schools, or even to know the evidence supporting their denial in the first.

With respect to false certification discharge, the proposed rule gives borrowers no opportunity for remedy at all in instances falling under the attestation exception. As such, the attestation exception to the proposed false certification rules amounts to an unconstitutional denial of due process.

The Department also proposes to retroactively apply the attestation exception to all Perkins and Direct loan borrowers, rather than specifying that the regulation only applies to loans disbursed after the effective date, if any, of the proposed regulation.²⁸⁴ This retroactive application of the proposed attestation exception to loans disbursed prior to its effective date, if any, is an unauthorized and impermissible retroactive rule that unfairly impairs borrowers' rights to a false certification discharge.

The attestation exception provision contradicts existing law that broadly mandates a false certification discharge whenever an institution falsely certifies a borrower's eligibility for federal financial aid.²⁸⁵ Nowhere in the current or prior false certification regulations has a borrower's right to relief been foreclosed based on an attestation of high school status. Thus, as described above, the Department has granted false certification discharges when a borrower unknowingly attested that he/she had a high school diploma due to school fraud. In fact, this is one of the many fraudulent methods that schools have employed in order to falsely certify student eligibility and avoid administering ability-to-benefit tests.²⁸⁶ A borrower who had been defrauded by such methods may currently seek a false certification discharge under the current regulation. This would be precluded if the Department enacts the attestation exception.

A regulation is unconstitutionally retroactive if it "alter[s] the past legal consequences of past actions,"²⁸⁷ or, put another way, if it would "impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to

²⁸² 81 Fed. Reg. at 76,082 (Nov. 1, 2016).

²⁸³ *Id.*

²⁸⁴ Proposed 34 C.F.R. §§685.215(c)(1)(ii).

²⁸⁵ *Id.*

²⁸⁶ See *infra* discussing XII.a discussing CTU's false certification through a forged high school attestation.

²⁸⁷ *Ass'n of Private Sector Colleges & Universities v. Duncan*, 110 F. Supp. 3d 176, 196 (D.D.C. 2015), *aff'd sub nom. Ass'n of Private Sector Colleges & Universities v. Duncan*, 640 F. App'x 5 (D.C. Cir. 2016) (internal citations removed).

transactions already completed.”²⁸⁸ Thus, whether a regulation “operates retroactively” turns on “whether the new provision attaches new legal consequences to events completed before its enactment.”²⁸⁹ Specifically, a law is unlawfully retroactive if it imposes a “new disability” on a past event.²⁹⁰ In *Vartelas v. Holder*, a lawful permanent resident sought to challenge a new immigration “admission” provision that, if applied to his pre-enactment conviction, would take away his right to travel abroad.²⁹¹ The Supreme Court found that the “admission” provision was an impermissible retroactive rule because it attached a “new disability” to conduct done well before the provision’s enactment.²⁹² The proposed attestation exception, which would impose a “new disability” (loss of false certification discharge rights) based on past conduct (a signed attestation), does not simply impair a borrower’s right to relief: it completely eliminates a borrower’s eligibility for discharge.

Moreover, the HEA provisions that establish the Secretary's general rulemaking power contain no express authorization of retroactive rulemaking.²⁹³ A statutory grant of legislative rulemaking authority will not generally be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.²⁹⁴

For all the above reasons, we oppose the Department’s false certification discharge proposals unless the Department withdraws its proposed attestation exception.

b. The Department Should Use the Origination Date and Not the Disbursement Date to Determine When an Institution has Falsely Certified a Borrower’s Eligibility

We also oppose the Department’s proposal to use the disbursement date rather than the origination date to indicate when a borrower was falsely certified.²⁹⁵ As discussed above, the HEA authorizes a loan discharge if an institution falsely certifies a borrower’s eligibility for

²⁸⁸ *Ass'n of Proprietary Colleges v. Duncan*, 107 F. Supp. 3d 332, 356 (S.D.N.Y. 2015) (gainful employment measured by using debt and earnings incurred prior to effective date of new rule); *see also Princess Cruises v. United States*, 397 F.3d 1358, 1366-67 (Fed. Cir. 2005) (stating that retroactive application of a new law is disfavored because it upends settled expectations); *Landgraf v. U.S. Film Prods.*, 511 U.S. 244, 280 (1994).

²⁸⁹ *Id.*

²⁹⁰ *See Vartelas v. Holder*, 566 U.S. 257 (2012) (finding that the IRIRA’s new “admission” provision was retroactive since it attached a new disability (denial of reentry) in respect to past events (plaintiff’s pre-IRIRA offense, plea, and conviction)).

²⁹¹ *Id.*

²⁹² *Id.* at 267.

²⁹³ *See* 20 U.S.C. 1098a, *et seq.*

²⁹⁴ *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (invalidating a rule promulgated by the Secretary of Health and Human Service after holding the Medicare Act's general grant of authority to the Secretary to promulgate cost-limit rules contains no express authorization for retroactive rulemaking).

²⁹⁵ Proposed 34 C.F.R. § 685.215(a)(1)(i).

federal financial aid.²⁹⁶ 20 U.S.C. § 1091 details the requirements for student eligibility to receive federal financial aid.²⁹⁷

A school's certification of a borrower's eligibility, which is the basis for a false certification discharge, is separate from and occurs prior to the disbursement of the student loan. The financial aid process has a specific order of separate steps: (1) the school certifies a loan, (2) then submits a loan origination package which includes the loan certification to the Department, (3) then the loan is disbursed. Thus, only after an institution certifies the student's eligibility for federal financial aid and submits a loan origination package is a loan disbursed.

The Department cites only one reason to support its abrupt switch to the disbursement date. The Department claims that a borrower could be a senior in high school at the time the loan was originated with the expectation that the borrower will have graduated high school by the time of enrollment.²⁹⁸ Since a loan can be originated months before a borrower enrolls, the Department maintains that using the disbursement date would be a more accurate indicator that a school falsely certified a borrower's high school graduation status. This is incorrect. An institution cannot legally certify a loan for someone who is not eligible for federal financial aid *at the time of certification*. According to 34 C.F.R. § 668.32(b), a student enrolled in high school or elementary school is *not* eligible for federal student aid. The student must have a high school diploma or GED to be eligible.²⁹⁹ Therefore, while an institution may *admit* a high school senior, it cannot legally certify that student's eligibility for federal student loans until after the student has graduated from high school.

In addition, the Department's scenario demonstrates how changing the student eligibility certification date to disbursement would encourage predatory schools to engage in false certification. An institution could target students still enrolled in high school, have them sign enrollment agreements promising to pay tuition, admit them, and promise that the tuition will be paid with federal financial aid. Then, if the student drops out of high school – either the school will have to falsely certify his/her eligibility or the student will be on the hook for paying for the classes he/she has already taken. Because low-income students who drop out of high school are unlikely to be able to pay hefty school tuition and fees without federal financial aid, a rule that allows certification upon disbursement will incentivize schools to falsely certify such students in order to continue receiving revenue. The Department proposal would essentially allow a school to “provisionally” certify a borrower's eligibility and encourage fraud.

This proposal is in direct conflict with the HEA. 20 U.S.C. § 1091(a) states that a student must meet the eligibility requirements in order to “receive” financial aid. Thus, per the plain

²⁹⁶ *Id.*

²⁹⁷ *See* 20 U.S.C. § 1091(d).

²⁹⁸ 83 Fed. Reg. at 37,270 .

²⁹⁹ *See* 34 C.F.R. § 668.32(e).

language of the statute, a school must certify that a student is eligible before it “receives” financial aid through a disbursement. 20 U.S.C. § 1087(c) refers to the false certification of a student’s “eligibility to *borrow*.” Again, the eligibility to borrow must be determined before money is actually disbursed. Finally, the HEA gives financial aid administrators discretion to refuse to certify loans in certain circumstances, which again must happen before disbursement.³⁰⁰ There is no other way to read the plain language requirements of the HEA and its underlying regulation. Thus, the Department does not have authority to impose a regulation that allows discharges only when eligibility is falsely certified “at the time of disbursement.”

In *Jordan*, a federal court agreed with this interpretation.³⁰¹ The court agreed that an institution determines a borrower’s “ability to benefit” and eligibility for financial aid at the time of certification, not at a later date.³⁰² The court affirmed that defining a false certification “is based solely on whether the student met the objective criteria for certification *before being admitted*.”³⁰³

For all of these reasons, the Department should not add the words “at the time of disbursement” to the end of § 685.215(a)(1)(i). It does not have the authority to do so under the HEA and it has not provided any reasonable facts to support its conclusion that tying student eligibility certification to the date of disbursement is necessary. The Department should instead revise § 685.215(a)(1)(i) by tying the applicable alternative eligibility requirements to “the time of certification.”

c. The Department Should Not Rescind the Regulation That Explicitly Allows It to Grant Discharges to Borrowers Whose Satisfactory Academic Progress was Falsely Certified

We object to the Department’s proposal to rescind § 685.215(c)(8)(d) of the 2016 Final Regulations, which provided that the Department may grant false certification discharges, without an application, based on evidence that a school had falsified the Satisfactory Academic Progress (SAP) of its students. The Department’s only basis for removing the proposed regulation is that FSA program review already evaluates an institution’s implementation of their SAP policy.³⁰⁴

The Department’s reasoning is flawed. While the FSA program review impacts institutional eligibility to participate in the Title IV program. Findings of SAP misconduct through an FSA program review do not result in debt relief for defrauded borrowers. Even if there is a mechanism to oversee an institution’s compliance with the SAP policy, §

³⁰⁰ See 20 U.S.C. § 1087tt(c).

³⁰¹ See *Jordan v. Sec’y of Educ. of the United States*, 194 F.3d 169 (D.C. 1999).

³⁰² *Id.* at 171.

³⁰³ *Id.* (emphasis added).

³⁰⁴ 81 Fed. Reg. at 39,378.

685.215(c)(8)(d) is necessary because it would make clear that the Department may grant discharges to borrowers' whose SAP is falsely certified.

The Department enacted this provision in 2016 because it believed it would be helpful to put schools on notice that if the Department discovers a school has falsified SAP, it has authority to independently grant false certification discharges to affected borrowers at that school.³⁰⁵ This regulation is necessary, given that SAP fraud that is endemic to predatory institutions that see students only in terms of profit, provide them no educational benefit, and burden unprepared students with unmanageable debts.³⁰⁶ Despite its prior conclusions and evidence recognizing SAP fraud as an actionable method of false certification, the Department now proposes to rescind this provision without providing any factual basis for its repeal of the 2016 Final Regulations. This an improper rescission of a rule without a reasoned explanation.³⁰⁷

We urge the Department not to repeal § 685.215(c)(8)(d), as it is necessary to clarify that students whose schools falsely certified their satisfactory academic progress (SAP) may receive automatic discharges. This important because the Department has proven to be overly cautious when it comes to forgiving debts of deserving borrowers. The Department has informed us that it rarely, if ever, uses its settlement and compromise authority³⁰⁸ to forgive the debts of students harmed by for-profit school fraud. It has ignored requests to forgive the debts of students harmed by SAP fraud in specific cases.³⁰⁹ And it tends to interpret its authority to forgive debts narrowly, especially if that authority is not spelled out in a regulation. This provision is therefore necessary to bolster the Department's comfort in granting discharges for borrowers whose SAP is falsely certified.

We further urge the Department to amend the false certification discharge regulation clarify that students may also apply for a discharge on this basis, rather than force them to wait for the Department to grant discharges without applications. While there are often False Claims Act and government cases involving false certification of SAP, many students also know when

³⁰⁵ 81 Fed. Reg. at 76,082.

³⁰⁶ See, e.g., *U.S. ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494 (8th Cir. 2016) (allowing former employees of for-profit school to proceed with FCA claim based on allegations that school altered student grade and attendance records); *United States ex rel. Sobek v. Educ. Mgmt., L.L.C.*, 2013 WL 2404082 (W.D. Pa. May 31, 2013) (FCA claims based on allegations that EDMC violated satisfactory academic progress regulations, misrepresented graduate placement rates, and misled students regarding the existence of accreditation for its nursing programs).

³⁰⁷ See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (holding that when an agency changes course by rescinding a rule, it has an obligation to supply a reasoned analysis for that change).

³⁰⁸ See 34 C.F.R. § 33.46.

³⁰⁹ See PR Newswire, "Education Management Reaches Comprehensive Agreements with Attorneys General in 39 States and U.S. Department of Justice" (Nov. 16, 2015), available at <https://www.prnewswire.com/news-releases/education-management-reaches-comprehensive-agreements-with-attorneys-general-in-39-states-and-us-department-of-justice-300178964.html>. EDMC agreed to a \$95.5 million civil settlement with the Department of Justice for violating federal financial aid regulations, such as inflating student's academic progress. The settlement agreement did not provide for any federal debt relief for borrowers.

their academic progress was falsified by schools. But they do not receive any relief due to False Claims Act cases. Information provided by students in discharge applications would also allow the Department to identify bad-acting schools and prevent abuse of Title IV funding. The Department should therefore amend § 685.215(c) to provide a means for students to individually apply for discharge when their SAP is falsely certified by their school.

d. The Department Should Maintain § 685.215(d) as Set Forth in the 2016 Rule

We object to the Department's proposed revision to § 685.215(d) and ask the Department to return to the language provided in the 2016 Final Regulations.

The Department should reinstate the 2016 language for § 685.215(d)(3). In 2016, the Department updated the false certification discharge procedure regulation to make clear that if the Department made an adverse determination on a borrower's false certification discharge claim, it should explain the reasons and evidence it relied upon, as well as consider additional information from the borrower.³¹⁰ The Department stated that this change would provide more transparency to the process for granting false certification discharges and was generally supported by all the members of the negotiating committee.³¹¹ Now, the Department proposes to rescind this change without providing any explanation for going against unanimous support and making the false certification discharge process less transparent.

The Department's proposal also removes language specifying the types of evidence that the Department must consider when reviewing a false certification discharge claim, including evidence provided by the borrower and information from other federal agencies, state agencies, independent test administrators, and school records within its possession. Again, the Department has not provided any explanation for rescinding this regulation.

This requirement is necessary. Unfortunately, we have often seen the Department deny borrower false certification discharge applications with form denials that fail to address any of the evidence that an individual provides or that the Department possesses. For example, the Legal Aid Foundation of Los Angeles submitted false certification of ability-to-benefit discharge applications that contained over 170 pages of evidence on behalf of five former Corinthian students. Four of five of the applications were approved, but one was denied with a two-page letter stating that the Department "has reviewed information from entities responsible for overseeing the school's compliance with ability to benefit regulations, and has found no documentation of any violation during the time period of your enrollment. Therefore, your application for loan discharge has been denied."³¹² The letter goes further to state that "in the event that the supporting evidence submitted with your discharge application is insufficient for

³¹⁰ Proposed § 685.215(d)(3).

³¹¹ 81 Fed. Reg. 39,379 (June 16, 2016).

³¹² See Attachment 6(F), a redacted copy of a false certification discharge denial letter.

processing and/or approval, standard collection activity with resume.”³¹³ With this letter, the Department summarily denied the claim without addressing any of the evidence submitted by the borrower’s individual evidence or addressing the evidence in its possession from other borrowers who had been falsely certified by Corinthian. It does not even appear that the Department had considered the borrower’s evidence given that it had not yet even determined whether the supporting documentation was sufficient for approval. Furthermore, without an description of the evidence relied upon by the Department to deny a discharge, the borrower has no ability to rebut the Department’s findings with additional evidence.

The Department should modify 685.215(d)(2) to delete the requirement to submit a “completed” application. The false certification discharge application is dense and complicated with legal terms that many borrowers are not familiar with. Although borrowers should be able to respond to plain language queries, the application currently requires borrowers to be versed in the law by requiring them to interpret complex legal concepts. It does not incorporate plain language tailored to the intended audience – students who were defrauded, by unscrupulous for-profit colleges. In addition, the format of the application is confusing, requiring borrowers to skip to different questions depending on their answers.

As recently as the fall of 2017, in commenting upon the false certification discharge application, legal aid advocates raised concerns regarding the difficulty many of our clients have understanding and filling it out. We recommended that the Department use plain language on all versions of the discharge applications, following best practices for form design and The Plain Writing Act of 2010.

We also encouraged the Department to start a process to test the application for consumer comprehension and usability, with input on the application and on this testing process from other federal agencies that have extensive testing experience, including the Federal Trade Commission and the Consumer Financial Protection Bureau. As far as we are aware, the Department has not yet tested the false certification discharge application for consumer comprehension, readability, and usability, to ensure all students who attend various institution levels and types are able to comprehend and complete the application.

We also suggested that the Department should provide support structures for borrowers who need assistance filling out the discharge application, including a help line, a chat function, a search function, and a frequently asked questions section. Contractors and staff who provide assistance currently do not appear to be trained on how to advise and assist borrowers with false certification discharge applications, nor does it appear that they are evaluated on this ability through consumer feedback and compliance testing.

³¹³ *Id.*

At least until the false certification discharge application is tested and revised to reduce inadvertent borrower errors, the Department should delete the word “completed” from the false certification discharge procedural provision.³¹⁴ By requiring a “completed” application within 60 days of suspending collections or else collection will resume, the Department removes the discretion of itself, guaranty agencies, and servicers to notify the borrower regarding inadvertent errors and allow the borrower additional time to submit a corrected application while collection remains suspended.

XIII. Rehabilitation Costs and Subsidized Loan Limits

We support the Department’s proposals to amend the regulations to clarify restrictions on collection costs and interest capitalization during rehabilitation and to reflect the Department’s policy regarding the impact that discharge has on the Direct Subsidized Loan limit.

The rehabilitation amendments reflect longstanding Department policy, limit agencies from collecting outsized fees from borrowers who promptly and successfully rehabilitate their loans, protect borrowers from improper and potentially expensive capitalization, and would ensure that borrowers are not charged more simply because their loan is held by a guarantee agency.

The Direct Subsidized Loan limit amendment would similarly clarify and reflect existing Department policy, which restores borrowers’ eligibility for subsidized loan benefits when their subsidized loans are discharged and appropriately ensures that low-income borrowers are able to make full use of the subsidized loan benefits as intended.

XIV. Deterrence and Accountability

Finally, we remind the Department that effective deterrence of misconduct requires real accountability. The Department’s proposal focuses on holding students accountable for their purported choices, but fails entirely to hold schools accountable for their conduct. Indeed, by the Department’s own projections, it would discharge only a small percentage of loans made due to unlawful misrepresentations, and would recover only a fraction of that sum from schools.³¹⁵ At the same time, the regulations would give schools the green light to insulate themselves from liability for misconduct by abusing forced arbitration clauses and class action bans. As advocates who work with borrowers who have been harmed by the misconduct of predatory schools, we are deeply concerned that the proposed rule will result in more predatory conduct harming more student borrowers—and by extension their families, their communities, taxpayers, and society at large.

³¹⁴ Proposed 34 C.F.R. § 685.215(d)(2).

³¹⁵ 83 Fed. Reg. at 37242, Table 5.

XV. Further Questions on the Department’s Proposed Regulations

After reviewing the Department’s proposed rule, legal aid attorneys are left with many questions about the meaning, justification, and impact of the proposed regulatory amendments, as well as questions about the associated impact analysis. We have collected questions from legal aid attorneys about the proposal in the Appendix to these comments.³¹⁶ We request that the Department consider the questions in this Appendix, as well as those in the body of the comments above, in developing any final regulations in this rulemaking, and respond to these questions in its Federal Register notice establishing any such final regulations.

We also urge the Department to consider evidence uncovered by the Consumer Financial Protection Bureau that calls attention to the ways in which “the actions of this administration will hurt families ripped off by predatory for-profit schools,” as referenced in the recent resignation letter by the Consumer Financial Protection Bureau Assistant Director and Student Loan Ombudsman.³¹⁷

XVI. Conclusion

Thank you for consideration of these comments. We welcome any opportunities to work with the Department in preserving and strengthening protections for borrowers. If you have any questions about these comments, please contact Abby Shafroth (ashafroth@nclc.org), Eileen Connor (econnor@law.harvard.edu), Robyn Smith (rsmith@lafla.org), or Noah Zinner (nzinner@heraca.org).

³¹⁶ Appendix of Questions Regarding Proposed Regulatory Amendments and Associated Impact Analysis.

³¹⁷ Letter from Seth Frotman, Ass’t Director & Student Loan Ombudsman, Consumer Financial Protection Bureau (CFPB), to Mick Mulvaney, Acting Director, CFPB (Aug. 27, 2018), *available* at https://www.nclc.org/images/pdf/student_loans/Frotman_Letter.pdf.

APPENDIX

Questions Regarding Proposed Regulatory Amendments and Associated Impact Analysis

Appendix to Comments from the Legal Aid Community to the Department of Education re: Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations, Docket ID ED-2018-OPE-0027 (Aug. 30, 2018)

§ 682.402

1. How does the Department's impact analysis of its proposed rescission of the automatic closed-school discharge provision of the 2016 final regulations take into account the actual application rate of eligible students under current closed-school discharge provisions?
2. Has the Department considered the data requested by non-federal negotiators during the rulemaking concerning the actual application rate, specifically:
 - a. Data for the past five years reflecting the number of students who attended schools that closed and who, based on the criteria regarding being enrolled but not having completed at the time of closure or within 120 days of closure, were likely eligible for closed school discharge during that time;
 - b. Of those likely eligible, how many attended a school operated by Corinthian?
 - c. Data for the past five years reflecting the number of applicants for closed-school discharge;
 - d. Data showing the number of students applied for a closed-school discharge who attended a school operated by Corinthian.
3. What data has the Department considered in assessing the impact of extending the eligibility period from 120 to 180 days?
4. The Department proposes to exclude from eligibility any student who attended a closed school and would otherwise be eligible, if the school "provide[d] the borrower an opportunity to complete the program of study through a teach-out plan approved by the school's accrediting agency and, if applicable, the school's State authorizing agency."
 - a. How does this provision apply to students who were "on an approved leave of absence or withdrew from the school" at the time the school offered a teach-out program? If an accreditor-approved (and if required, state-approved) teach-out is offered, will students who withdrew within the 120 or 180 window prior to closure be ineligible for closed school discharge? Will they be treated differently if they withdraw before or after the teach-out is announced or approved? What if, after withdrawing, the borrower moved; developed a medical or mental condition that prevents him/her from returning to school; entered the military; had a child

and is a single parent that does not have the resources to both support the child, pay for child support, and go back to school; or was subject to other circumstances that made reenrollment and completion of the teach-out impracticable or impossible?

- b. The Department states that this exclusion is meant to “encourage schools that are closing to go through an orderly closure, which includes offering appropriate teach-outs to their students.” (at 37245). Currently, borrowers are ineligible for discharges if they take and complete their program through a teach-out, which should already provide schools with incentive to offer appropriate teach-outs that their students will choose to pursue.
 - i. What data or other evidence does the Department rely on in concluding that this further exclusion would have the effect of increasing appropriate teach-outs, given that schools will no longer actually have to develop teach-out plans that appeal to students to avoid discharge liability?
 - ii. What data does the Department have reflecting the percentage of closed schools that have actually been ordered to reimburse the Department for closed school discharges, and what percentage of such liabilities the Department has actually collected?
- c. This provision forces students to accept any teach out offered by a closing school. The Department states that students should be encouraged to complete their education. The only assurance that the teach-out plan is an adequate substitute is that it “must be approved by the accreditor and, if applicable, the State authorizing agency to ensure that the institution or its teach-out partner institution continues to provide educational and student support services that meet the accreditor’s and agency’s standards.” (at 37286).
 - i. What is the basis for the Department’s view that accreditors will only approve adequate teach-out plans?
 - ii. How is this proposal consistent with the Department’s emphasis, throughout this NPRM, on student autonomy regarding their choice in attending a post-secondary institution?
 - iii. Many accreditors approve both distance learning and physical campuses. But some students would not choose an online-only program. Would the Department foreclose closed-school discharges to students who were offered an online-only teach out?
- d. What percentage of schools that closed in the past five years offered a teach-out plan? Has the Department considered the impact of this proposal in relation to this information?

- e. How does the Department plan to assess whether a student was offered a teach-out, and has the Department accounted for the associated administrative burden in its impact analysis?
 - i. Will the Department rely on the accreditor?
 - ii. Will the Department conduct any independent review of whether the school offered the teach out plan, and whether the teach-out plan was followed by the partner institution?
 - iii. Will the Department allow a borrower to establish eligibility for a closed-school discharge despite the fact that the school had in place an accreditor-approved teach-out plan, when the borrower’s individual circumstances would preclude him or her from completing the program of study through the teach-out?

§ 685.206(c)(1)

- 5. Regardless of what language the Department elects for Paragraph (d)(2), will the Department interpret the language in § 685.206(c) to limit borrowers with “a Direct Loan first disbursed prior to July 1, 2019” to raising borrower defenses *only* in proceedings listed in (i)-(iv)?
 - a. Where is the Department’s “pre-2015 interpretation” of this provision set forth?
 - b. Where is the Department’s “2015 re-interpretation” set forth?
 - i. How is the “2015 re-interpretation” consistent with the Department’s statement in 2016 that “[a]s explained by the Department in 1995...the Direct Loan borrower defense regulations were intended to continue the same treatment for borrowers...that existed in the FFEL Program—which allowed borrowers to assert both claims and defenses to repayment, without regard as to whether such claims or defenses could only be brought in the context of debt collection proceedings”?
 - c. The regulatory language states that the proceedings to collect “include, but are not limited to” the enumerated proceedings. What, if any, other circumstances does the Department consider “a proceeding to collect”?
 - i. Is a demand for repayment from a servicer a “proceeding to collect”?
 - ii. Is a demand for repayment from a private collection agency a “proceeding to collect”?
 - iii. Is litigation to collect on a defaulted student loan a “proceeding to collect”?

- d. The regulatory language proposed by the Department as “Alternative A for Paragraph (d)(2) (Defensive)” provides that “[i]n any proceeding to collect on a Direct Loan first disbursed on or after July 1, 2019,” the borrower may assert a claim (borrower defense). The proposed regulatory language (“These proceedings include the following:”) differs from existing language in § 685.206(c)(1) (“These proceedings include, but are not limited to, the following:”). What is the reason for the difference?
 - i. Does the Department have the authority to amend the language of § 685.206(c)(1) and apply this language to loans disbursed prior to July 1, 2019?
 - ii. In light of this difference, is Alternative A “parallel to the current regulation,” as claimed (at 37252)?
6. What regulations or guidance does the Department use in resolving borrower defenses in “[c]onsumer reporting proceedings under 31 U.S.C. 3711(e)”?
- a. How does the Department implement 31 U.S.C. § 3711(e)(2), which requires the head of any executive agency to provide, prior to disclosing information to a consumer reporting agency, “on the request of a person alleged by the agency to be responsible for the claim, for a review of the obligation of the person, including an opportunity for reconsideration of the initial decision on the claim”?
 - i. What is the “filing deadline[e] established for the different proceedings in which a borrower defense claim may be raised,” (at 37260) that applies to consumer reporting agency reporting proceedings referenced in (c)(1)(iv)?
 - ii. What is the statutory or regulatory source of the Department’s statement that the timeframe is “30 days for consumer reporting” (at 37299), and does this deadline restart at every instance of reporting?
 - b. How many such requests has the Department received and processed?

§ 685.206(c)(2)

7. The Department proposes to alter the existing text of this provision. The current text provides:

If the borrower’s defense against repayment is successful, the Secretary notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to...

The proposed § 685.206(c) reads:

If a defense to repayment discharge is approved, the Secretary determines the amount of financial relief to be provided and notifies the borrower that the borrower is relieved of the obligation to repay all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay. The Secretary affords the borrower such further relief as the Secretary determines is appropriate under the circumstances. Further relief may include, but is not limited to....

- a. On what authority does the Department rely to alter this provision and apply the altered regulatory language to loans first disbursed prior to July 1, 2019?
- b. What notice did the Department provide to the public that it intended to alter this regulation and apply it retroactively to loans first disbursed prior to July 1, 2019?
- c. What explanation has the Department provided in the NPRM for this change?
- d. What is the effect of this change?
 - i. What, if anything, is the difference between “a borrower’s defense against repayment” (current) and “a defense to repayment discharge” (proposed)?
 - ii. What does “amount of financial relief” mean? Is this different than “all or part of the loan and associated costs and fees that the borrower would otherwise be obligated to pay”?
 - iii. Can the Secretary “approve” a borrower defense discharge and subsequently “determine” that the “amount of financial relief to be provided” is zero?

§ 685.206(c)(3)

8. The Department “propose[s] to rescind the statute of limitations provisions of the 2016 final regulations” that apply to recovering funds from school. (at 37264). The 2016 final regulation would have allowed the Secretary, for borrower defenses granted for loans first disbursed prior to July 1, 2019, to bring “an appropriate proceeding” to recover from a school within the longer of three years from the last award year during which the student attended, or the expiration of the statute of limitations applicable to the student’s claim under state law.
 - a. State law applies concepts such as tolling and discovery to statute of limitations governing claims that would give rise to a borrower defense. Why is the Department rescinding this provision, given that it would enable the Secretary to recoup more money from institutions whose actions create taxpayer liability? What impact will this have on the overall budget impact of the rule?
 - b. With respect to recoupment proceedings following borrower defense discharges for loans disbursed on or after July 1, 2019, the Secretary observes that “the

Department does not have a basis for recovery against a school until a borrower defense to repayment has been approved,” (at 37264) and proposes to limit recoupment proceedings to five years from the date of determination on the borrower defense. Why does this logic not apply to borrower defenses granted for loans first disbursed prior to July 1, 2019?

§ 685.206(d)(1)

9. The Department’s 1995 Notice of Interpretation (60 F.R. 37769) clarified that the act or omission of a school, in order to serve as the basis for a borrower defense, must “directly relat[e] to the loan or to the school’s provision of educational services for which the loan was provided.” The Department states that the term “provision of education services” is “open to interpretation,” (at 37254) despite the regulatory history and “well-developed bodies of State law that explain this term,” and thus provides a definition: “The term ‘provision of educational services’ refers to the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student’s educational program.”
 - a. The term “provision of educational services” only appears in the sections of the proposed regulation that apply to loans first disbursed on or after July 1, 2019. If the Notice of Interpretation itself is insufficiently clear, shouldn’t the Department apply this clarification to existing loans as well?
 - b. What does “educational resources” mean?
 - c. Inserting this “clarification” into proposed (d)(5)(iv), borrower defense is only available to a borrower who (among other things) establishes that a school made a misrepresentation “that directly and clearly relates to the making of a Direct Loan...for enrollment at the school or to the provision *of the educational resources provided by the institution that are required by an accreditation agency or a State licensing or authorizing agency for the completion of the student’s educational program.*”
 - i. Accrediting agencies, state licensing agencies or authorizing agencies may require schools to maintain certain licensure passage or job placement rates in their programs, but these are not “requirements for the completion of the student’s educational program.” Doesn’t this language exclude borrower defenses on the basis of misrepresentations about job placement and exam passage rates? If not, why not?
 - ii. Is a particular attribute or representation regarding transferability of credits a “requirement for the completion of the student’s educational program”?
 - iii. Only subparagraph (J) of proposed (d)(5)(iv) refers to “educational resources”—is this the only provision that could serve as the basis of a misrepresentation regarding the provision of educational services?

§ 685.206(d)(2) Alternative A

10. How would this proposal apply to a student who has multiple loans from attendance at the same program, not all of which are subject to any (or the same) proceeding to collect on a Direct Loan identified in this proposed paragraph? Is the student limited to asserting a borrower defense only to the loan subject to the specified collection proceeding? If so, how does the Department justify the inefficiencies and inequities this would cause in requiring repeated assertion, processing, and adjudication of the same borrower defense?
11. What assumptions does the Department use in its regulatory impact analysis that reflect the current volume of borrowers who object or otherwise request hearings in relation to the collection proceedings enumerated in Alternative A?
 - a. What percentage of borrowers who are sent a notice file an objection or request a hearing by the applicable deadline stated in the notice for tax refund offset proceedings?
 - b. For what percentage borrowers who file an objection or request a hearing in relation to a tax refund offset proceeding after the applicable deadline stated in the notice does the Department provide a hearing?
 - c. What percentage of borrowers who are sent a notice file an objection or request a hearing by the applicable deadline stated in the notice for administrative wage garnishment?
 - d. What percentage of borrowers who are sent a notice file an objection or request a hearing by the applicable deadline stated in the notice for salary offset proceedings for federal employees?
 - e. What percentage of borrowers who are sent a notice file an objection or request a hearing by the applicable deadline stated in the notice for consumer reporting agency reporting proceedings?

§ 685.206(d)(2) Alternative B

12. What evidence has the Department considered that supports the idea that imposing a statute of limitations on “affirmative” claims would deter “frivolous” claims?
 - a. Has the Department detected any frivolous claims in its review of 160,000 borrower defense applications? If so, how does it define frivolous claims, and how does it take into consideration that borrower defense claims submitted between 2015 and 2018 might reflect reasonable confusion regarding the standard and/or the evidence needed to support a claim, which were in development and in flux during that period?
 - b. How would the Department prevent borrowers from submitting “affirmative” claims outside of the time limitation, thereby necessitating the need for review (and attendant administrative burden)?

13. What evidence has the Department considered that supports the idea that a heightened evidentiary standard might be necessary to deter frivolous or unwarranted claims for relief?

§ 685.206(d)(5) Alternative B

14. Both subparagraphs (i) and (ii) of proposed (d)(5) (Alternative B) refer to defensive claims under (d)(2)(ii) (Alternative B, presumably). What is the portion of this subparagraph that governs affirmative claims under (d)(2)(i) (Alternative B)?