

Comments from the Legal Aid Community

to the U.S. Department of Education re:

Proposed Regulations on Borrower Defense, Arbitration, Interest Capitalization, Closed School Discharge, Total and Permanent Disability Discharge, False Certification, and Public Service Loan Forgiveness

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Introduction and Summary

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 on affordability and student protections in the federal student aid program as relates to student loan discharges, interest capitalization, Public Service Loan Forgiveness, and abuse of forced arbitration and class action waivers by schools participating in the Direct Loan program.¹ Our comments are informed by our work as legal aid practitioners, and our experience working with low-income borrowers to navigate the student loan system and student loan discharge programs in particular.

The proposed regulations are of critical importance to the borrowers we represent, and to the millions of low-income borrowers who lack legal assistance across the country. Our clients are often the first in their family to pursue higher education and rely on student loans to access education and career training. Unfortunately, for too many of our clients, the student loans do not pay off as promised or expected, including because of school closures or lies about the value of the program, a disabling condition, a bad job market, or life complications that make repayment harder. For too many low-income borrowers, the loans meant to build a bridge to economic stability or mobility do the reverse, trapping them and their families in snowballing debt. Because the proposed regulations have the potential to ameliorate some of these harms and improve access to critical student debt relief, we urge the Department to finalize the proposed regulations—and strengthen them further as identified in these comments—by November 1 and to implement them early to the extent possible.

Legal aid attorneys have worked to identify discharges our clients are eligible for and to help borrowers navigate the often slow, overly complex, and burdensome processes for accessing those discharges. We have seen firsthand how unnecessarily difficult the processes for accessing relief are, how arbitrary and under-inclusive the standards for eligibility for relief are, and how common servicer misinformation and wrongful application denials are. We have seen how seemingly small details—like requirements for disability discharge signatures to come from doctors, rather than nurses or other healthcare professionals—can stand between vulnerable people and critical relief. We bring that experience and knowledge to these comments, supporting proposals that the Department has made to expand and streamline access to relief, and identifying ways to further improve access where possible. We also note that many of our clients are from communities and life experiences that have historically not had an equal voice in government policymaking, including immigrants, single mothers, people of color, and people who are formerly incarcerated. We cannot speak for them, but in these comments, we aim to

¹ Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 41,878 (July 13, 2022).

share our experiences working with them and the important perspectives they bring to student aid policy.

We also emphasize that for every client we see, there are dozens more borrowers who do not have access to legal assistance and who are unaware of their student loan rights or lack support in navigating the complex relief processes. Many have missed out on discharges that Congress created with their interests in mind, and instead experience default and the adverse financial consequences that flow from it. It is therefore critical that discharge programs meant to relieve borrowers of debts due to disability, school closure, or predatory conduct, or in recognition of the borrower's public service, be readily accessible, and that the Department fully remove administrative barriers to relief by automating discharges to eligible borrowers wherever possible.

Our comments, summarized here, address each of the seven topics of proposed new rules:

1. **Borrower Defense: We support the Department's proposals to expand eligibility for borrower defense relief and to streamline individual and group application processes, and encourage the Department to further improve upon its proposal in several ways.** Among other improvements, we recommend that Department allow legal aid organizations to initiate a group discharge process, allow for consideration of state law claims in initial applications, ensure that the individual process is fair and accessible to unrepresented borrowers by applying a liberal pleading standard and making clear that borrower attestations alone may be sufficient to substantiate a claim for relief, provide full discharges for all granted claims, and provide borrowers an unqualified right to reconsideration of denied claims.
2. **Arbitration: We support the Department's proposal to restore arbitration limits to stop Title IV schools from shirking liability and hiding misconduct.** Predatory schools have used arbitration clauses and class bans to prevent students from asserting their claims in court and from seeking justice on a class-wide basis. Restoring the arbitration limits that were rolled back in 2019 will help ensure harmed students can hold their schools accountable and will deter future misconduct. The Department should further strengthen the proposal by eliminating loopholes that schools have used to try to evade past arbitration limits.
3. **Interest Capitalization: We support the Department's consensus proposal to eliminate interest capitalization in the Direct Loan program where it is not required by statute.** Ending interest capitalization is particularly important for low-income and financially vulnerable borrowers, and for borrowers of color, because such borrowers are the most likely to experience substantial interest accumulation and capitalization as a result of difficulties with repayment and reliance on program flexibilities that penalize them with interest accrual and capitalization. Ending capitalization improves affordability of higher education for all student loan borrowers, and particularly for those with the most limited financial means. We

propose one technical fix to also eliminate interest capitalization in PAYE where it is not statutorily mandated.

4. **Closed School Discharge: We support the Department’s proposal to expand closed school discharge eligibility** by making relief turn solely on whether the borrower completed or did not complete their program at the closed school, and removing inquiries into whether they transferred credits to a comparable program. We also support the Department’s proposal to make automatic discharges available to students regardless of the date of school closure in its final rule, and we commend the Department’s proposal to reduce the time before it effectuates an automatic discharge to a year. To fulfill the intent of the rules, we urge the Department to implement technical fixes to make clear that automatic discharges for eligible borrowers are mandatory and that eligible borrowers who did not accept a teach out shall have their loans discharged automatically within a year after their school closes.
5. **False Certification Discharge: We support the false certification discharge regulatory language that reached consensus during the negotiated rulemaking.** In particular, we support the Department’s proposal to expand relief eligibility and formalize legal aid organizations’ ability to file group claims.
6. **Total and Permanent Disability (TPD): We support the proposed TPD language that reached consensus during the negotiated rulemaking.** The TPD program is vital for the economic security of people with disabilities, who are twice as likely to live in poverty as people without disabilities, and these regulations will allow many more disabled borrowers to access relief. We particularly applaud the proposals to expand the disability determination categories that will be eligible for relief, eliminate the burdensome and unnecessary post-discharge monitoring period which cause many low-income borrowers to lose out on debt relief because of paperwork problems, and allow more types of healthcare professionals to certify borrower’s disability.
7. **Public Service Loan Forgiveness (PSLF): We support the reforms proposed for PSLF, which will address some of the systemic problems with the program.** We particularly applaud the proposal to count pre-consolidation payments made on Direct Loans and Direct Parent PLUS loans toward loan forgiveness, which would allow borrowers to benefit from the program and would ensure borrowers do not unintentionally lose years of progress towards forgiveness by consolidating. We also welcome the proposal to allow more deferment and forbearance periods to count toward forgiveness, including by allowing borrowers to repay the amount they would have owed under income-driven repayment for those periods, and we encourage the Department to consider allowing borrowers to earn PSLF credit for past periods in default using the same framework.

1. Borrower Defense

A. Summary of our position on the borrower defense regulations

Each year, our organizations are visited by thousands of student loan borrowers, as young as 19 and as old as 85, asking us what they can do about the student loan debt they cannot afford after a school promised them a bright future and cajoled them into enrolling but failed to deliver the education or the opportunities it promised. Too often, revenue-focused schools exploit the ways in which our clients are vulnerable, shaming them for being poor, taking advantage of the fact that no one in their family went to college, capitalizing on the personal hardships they experience and at times exploiting their limited English proficiency. Our clients often look to the government that signed off on allowing these schools to receive their federal loan dollars and ask their government-contracted servicers for help. Yet, for years, the federal government has effectively ignored the ways in which predatory schools were harming students, and has let these students struggle under the weight of unmanageable debt. Instead of connecting borrowers with administrative discharges, servicers have put these harmed borrowers in forbearances and deferrals, and our clients' debts have grown. As a result, we have a constant stream of clients whose financial stability is perpetually threatened because they attended a predatory school 5, 10, 15, or 20 years ago. Few, if any, are aware of what a borrower defense is or how they can apply.

Seven years ago, with the fall of Corinthian Colleges, we were hopeful that the Department would recognize the utility in its borrower defense authority to find ways of making things right for our clients and the hundreds of thousands of borrowers like them who were harmed by their schools. Yet, out of fear of providing too much relief to too many students, the Department implemented a process that was confusing, overly complicated, burdensome for harmed borrowers, and easy for political appointees to manipulate. Indeed, the processes in the 2016 and 2019 Rules were not designed to make sure that all of our clients could obtain the relief they deserved, and were estimated by the government to provide relief to only a small fraction of borrowers harmed by predatory school conduct.

Our clients had to wait as the last administration stopped adjudicating applications and attempted to shortchange Corinthian borrowers from getting the relief they deserved using the partial relief authority in the 2016 Rule. Our clients were denied relief—even though their school engaged in misconduct to induce them to enroll—because they did not know how to assert the claims covered in the Department's findings memos, that they had to actually write in their application that they believed their school's lies, or how to apply legal concepts. For clients whose claims were granted, they had to guess when the relief would be implemented, whether the Department would try to repair the harm the predatory loans had caused their credit score, and if they would receive a discharge. For more than seven years, our clients have been living

with the consequences of a relief process that largely ignored their realities and was not rooted in their best interests.

The Department of Education has announced that it is at a turning point, and many of the changes in the proposed rule indicate that the Department has decided to take its commitment to protecting student loan borrowers seriously. There is much we celebrate:

- The proposed rule implements a more expansive relief standard that removes many of the onerous requirements that prevented borrowers from obtaining relief under the 2016 or 2019 Rules and provides all borrowers with refunds, regardless of when they applied.
- The proposed rule codifies actions that the Department will take to ensure that borrowers are not harmed when they apply for relief, like creating a forbearance opt-out system, stopping involuntary collections for borrowers in default, and limiting the amount of interest that can accrue while a claim is pending.
- The Department has taken steps to identify the ways in which schools harm borrowers—and the proposed rule finally recognizes that abusive and deceptive recruitment practices should entitle a borrower to relief.
- The proposed rule expands the group discharge process so that state officials—including state attorneys general and state education oversight agencies, can use their legal expertise to submit claims on behalf of classes of borrowers harmed by the same misconduct at the same schools.
- The Department intends to create a path that provides FFEL borrowers with relief that is commensurate with what Direct Loan borrowers receive.
- The Department has included an adjudication deadline to ensure that the backlog borrowers have experienced over the last seven years will not recur.

And yet, although we are enthusiastically in support of much of this proposed rule, we also urge the Department to close the loopholes which would allow future administrations to withhold relief to deserving borrowers and to close gaps where the proposed regulation threatens to exclude groups of borrowers who have been harmed. In addition to identifying technical fixes, our comments identify places where the Department can make sure that any ambiguities weigh in borrowers' favor so that no harmed borrower is unable to obtain the relief they need.

We highlight the following recommended improvements to the proposed regulations, discussed in depth below, that should be incorporated into the final rule.

- First, the Department should revert to its final position during negotiations and allow legal aids to be third-party requestors that can initiate the group discharge process.
- Second, the Department should ensure that all borrowers with a granted claim are entitled to full relief, including a full discharge, refund of amounts paid, deletion of adverse credit history, and restoration of Title IV eligibility. If the Department insists on providing itself with authority to grant only partial relief to approved claims, the final rule should circumscribe the scope of such authority by only allowing partial relief in limited instances that are clearly defined in regulation.
- Third, the Department should require that individual applications, which are overwhelmingly submitted pro se, are reviewed under a liberal pleading standard and are afforded a presumption of reliance. Additionally, the Department should make clear that a borrower defense claim—group or individual—can be substantiated on borrower attestations or sworn statements alone.
- Fourth, the Department should allow all borrowers—or at a minimum, third-party requestors—to assert state law claims simultaneously with claims under the proposed federal standard during the initial application process.
- Fifth, the Department should strike all references to a materially-complete individual application and should begin forbearance and stopped collections upon receiving the individual’s application
- Sixth, the Department should provide a scrupulous review of claims that are denied commensurate with the level of review that is provided to claims that are granted.
- Seventh, the Department should make recoupment from institutions discretionary instead of mandatory so that fear of harming institutions does not stop the Department from providing borrowers with relief.
- Eighth, the Department should shorten the adjudication deadlines and clarify how the Department will treat loans that become “unenforceable” because the Department failed to meet those deadlines.

We address these issues in detail below, with our comments organized to follow the order of topics in the Department’s discussion of the proposed rule.

B. Ability of FFEL borrowers to assert borrower defense claims

We strongly agree with the Department’s intent to ensure that FFEL borrowers’ rights are in parity with the rights of Direct Loan borrowers, and we commend its desire to provide access for FFEL borrowers to submit a borrower defense.² We are happy to see the language in § 685.401(a), which makes it explicit that Direct loans that paid off FFEL loans are eligible for a borrower defense discharge. However, we encourage the Department to consider four ways to strengthen parity for FFEL borrowers in the final regulations.

²87 Fed. Reg. 41878, 41886 (July 13, 2022).

First, the Department should consider whether a technical fix is needed to the proposed regulatory language to ensure that FFEL borrowers are not definitionally excluded from relief. The proposed borrower defense definition states, “Borrower defense to repayment means an act or omission of the school attended by the student that relates *to the making of a Direct Loan for enrollment* at the school or the provision of educational services for which the loan was provided[.]” (emphasis added). By limiting the definition of borrower defense to the making of a Direct Loan, we are concerned that the provision could be read to exclude claims which pertain to the making of a FFEL loan, even if such FFEL is later consolidated into a Direct Loan. We propose that the Department replace “Direct Loan” in Section 685.401 with “Direct Loan or other Federal student loan that is consolidated into a Federal Direct Consolidation Loan” (as the Department states in proposed subsection 685.401(b)(2)-(5)) to ensure FFEL borrowers have access to relief.

Second, while the proposed language will create a path to relief for many FFEL borrowers, some will still be left out, as some FFEL borrowers are ineligible for consolidation.³ For example, a borrower who has already consolidated their loans into a FFEL Consolidation Loan and who is current on it generally may not consolidate into a Direct Consolidation Loan unless she has additional loans that can be included in the consolidation. Given that consolidation has been encouraged by servicers and the Department at various times, many FFEL borrowers may fall into this bucket. Additionally, FFEL borrowers cannot consolidate if their wages are currently being garnished or if there is a judgment on the loan. Further, a borrower can only consolidate portions of a loan that have not been paid. FFEL borrowers who have paid back all of their loans—either through voluntary payments or through involuntary seizures of their wages or tax refunds—would generally not be eligible for relief at all. Thus, predicating relief on consolidation penalizes those FFEL borrowers who have diligently made payments on their loans. To address these problems and ensure FFEL borrowers have equal access to borrower defense relief, we recommend that the Department promulgate final regulations that make borrower defense discharges available to borrowers with FFEL Loans, including FFEL Consolidation loans, even if they cannot or do not consolidate.⁴

Third, although we were glad to see that the Department intends to include a consolidation application within the FFEL borrowers’ application, which is to be executed only if a borrower’s application is granted, we are concerned about the risk that some borrowers may be left worse off if the resulting Direct Consolidation Loan is not fully discharged and we urge

³ For a discussion of limitations on eligibility to consolidate, *see generally* National Consumer Law Center, *Student Loan Law* § 7.2.2 (6th ed. 2019), *updated at* www.nclc.org/library.

⁴ *See also* Comments from the Legal Aid Community 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, ED-2015-OPE-0103 at 42-46 (Aug. 1, 2016) (“2016 Legal Aid Comment”); 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 at 49-52 (Aug. 30, 2018) (“2018 Legal Aid Comment”).

the Department to ensure that a consolidation will not be automatically effectuated if it would adversely affect the borrower. Consolidation is risky for many legal aid clients under current regulations and should only be used if the relief provided materially improves the borrower's situation, unless the Department also revises rules that make consolidation risky. For example, under current rules—which we urge the Department to amend in the IDR and PSLF rulemakings—consolidation would cause borrowers to lose credit for their pre-consolidation payments made toward forgiveness,⁵ and borrowers consolidating Parent PLUS loans with other federal loans would be ineligible for most income-driven repayment programs.⁶ Further, under current rules, consolidation is one of the few ways borrowers are able to get their loans out of default, but borrowers whose loans are already all consolidated generally lose this option. Given that many borrowers with approved borrower defense claims are also likely to be at high risk of delinquency or default, it is important that they not lose a key option to get out of default.

Fourth, although subsection two within the proposed definition of a “borrower defense to repayment” in section 685.401 makes clear that borrowers will receive a refund of amounts paid towards Direct Loans and Direct Consolidation Loans, it is unclear if the Department will refund amounts paid on FFEL loans *before* they were consolidated. We ask that the Department make clear that borrowers will receive refunds of amounts paid on FFEL loans as well.

C. State Requestors

See section I(E)(i) below.

D. Borrower Defense Eligibility (Effective Date of Regulations, Federal Standard, Substantial Misrepresentations and Omissions of Fact, Aggressive Recruitment, Judgments and Department Actions, State Law Standard, Limitations Period, Exclusions)

The proposed borrower defense eligibility standards are a marked improvement from both the 2019 and 2016 Rules. The proposed rules make important strides in recognizing the ways in which schools' predatory conduct harms borrowers. Further, the proposed rules remove the unnecessary administrative barriers that stand between borrowers and relief under the existing rules. In addition, the proposed regulations avoid inconsistent and arbitrary outcomes between borrowers who were harmed in identical ways by the same school but learned of the misconduct or the availability of relief at different times by removing the 2019 Rules' three-year limitations period. We strongly support each of these changes; they go a long way towards closing the justice gap present in the existing rules.

⁵ 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 (6th ed. 2019), *updated at* www.nclc.org/library.

⁶ 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).

While there is much to commend in the proposed rule's eligibility standards, we are dismayed that the Department intends to only allow borrowers and third-party group application requestors to assert state law claims during the reconsideration process. As we have noted repeatedly in prior comments, the federal standard should be a floor and not a ceiling, as specific states may afford borrowers with stronger protections than even the proposed standard provides. Borrowers in those states should not be deprived of the protections their state has passed, and schools should be held accountable to the state law in those locations.

Below, we provide more detailed support and recommendations for the use of a universal standard, the proposed federal eligibility standards themselves, the inclusion of a state law standard in the initial adjudication process, and exclusions from the standard.

i. A universal standard for all applications makes the borrower defense standard easier to understand for borrowers and allows the Department to create a streamlined system to adjudicate applications.

We strongly support the application of a universal borrower defense standard that applies to all loans, regardless of when the loan was disbursed. As the Department correctly observed, some borrowers borrowed loans that are subject to different relief eligibility standards because of when they were disbursed—meaning each loan they owe is subject to a different rule—which creates confusion about what they must assert and prove when they apply for relief.⁷ Further, differing standards create inconsistent results; borrowers subject to the same conduct from the same school will receive different relief based on when their loan was disbursed. Applying a universal standard that is more generous than the existing eligibility standards fixes these problems.

In addition, countless borrowers are still saddled with debt that is the product of prior deceptive, unfair, or predatory school conduct. By providing a universal borrower defense standard and proposing more generous relief criteria than the prior Rules, the Department is taking an important step toward providing all harmed borrowers with the relief they deserve.

ii. The proposed federal standard is more closely tailored to the ways in which schools harm borrowers.

We strongly support the Department's proposal to include six grounds for a borrower defense claim: substantial misrepresentation, substantial omission of fact, breach of contract, aggressive and deceptive recruitment, a favorable judgment or government action, and violations of state law that fulfill the Department's definition of a borrower defense claim. In addition, we support the Department's proposal to cross-reference section 668 subparts F and R to add clear, non-exhaustive examples of school misconduct that would constitute claims eligible for relief.

⁷ 87 Fed. Reg. at 41887.

The proposed standard encompasses the myriad ways school misconduct can be revealed and holds schools accountable to their promises to students, their obligations to comply with the laws in the states in which they function, and their obligations to the Department when they agree to receive Title IV funds. In addition, by providing a non-exhaustive list of each type of prohibited conduct, the proposed standard allows the Department to be responsive when new forms of predatory school conduct emerge.

Under the current regulations, borrowers are unsure what claims they should raise in their applications—it is unclear what the Department felt was a misrepresentation or what the Department considered to be material. By providing more clear and discrete examples of misrepresentations and aggressive and deceptive recruitment, the proposed rule provides more clarity to borrowers and sends a strong message to schools regarding what types of conduct are prohibited. Further, the proposed rules’ approach to what constitutes a misrepresentation more closely mirrors the varieties of school misconduct we have observed schools use to harm our clients. In particular, we commend the inclusion of borrower defense eligibility based on aggressive recruitment. As we have previously explained in prior comments,⁸ schools engage in predatory recruitment tactics, even in the absence of clear misrepresentations, to pressure—or exploit—legal aid clients into enrolling in schools that do not serve their best interests. Under the proposed standard, borrowers harmed by those predatory practices would now be entitled to relief.

Further, we are grateful to see that the definitions of misrepresentation and aggressive and deceptive recruitment will continue to cover the actions of all the individuals and companies a school may enlist to recruit students, advertise, or educate students. These people and entities act at the behest of the institution, and the institution is rightfully responsible for ensuring that those entities comport themselves honestly and legally.

Below, we describe how each type of claim affects the clients that legal aids serve.

a. Aggressive and Deceptive Recruitment

We are relieved to see that aggressive and deceptive recruitment has been integrated into the proposed eligibility standards for a borrower defense claim, as it fills a major hole that existed in the 2016 and 2019 Rules. As we have noted in prior comments, high-pressure, manipulative, and abusive sales tactics targeted at vulnerable individuals are central to the business plans of predatory schools and violate many states’ unfair and deceptive acts and practices laws, breach of contracts doctrines, and misrepresentation laws.⁹ Including eligibility grounds that encompass these types of practices is essential to ensure that the federal standard in the proposed rule is commensurate with the state-law practices provided by the 1994 Rule.

⁸ 2016 Legal Aid Comment at 17-24; 2018 Legal Aid Comment at 32-36.

⁹ *Id.*

Our clients have frequently been subject to unfair and abusive recruitment tactics that would not qualify for relief under the 2016 or 2019 Rules because there is not a specific, legally-actionable misrepresentation or breach of contract, even though they were exploited and left with debts that they should never have been burdened with. Indeed, the 2012 Senate HELP report began to unearth how ubiquitous these unfair and abusive recruitment practices have been at predatory schools. For example, the report revealed that recruiters were trained to target vulnerable students and were “specifically trained to exploit [their] emotional vulnerabilities.”¹⁰ and were trained to enroll students on the spot instead of allowing them to even speak with a financial aid employee, let alone consider whether enrolling was in their best interest. Low-income students are frequently targeted with a barrage of these predatory practices:

- Clients report that the financial aid process at predatory schools 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.” Another former student at Le Cordon Blue was shown charts by a recruiter to demonstrate how much more he would pay if he waited to enroll.
- Another former student from Katherine Gibbs explained, “I could not afford normal college, and when I told the recruiter that I needed to talk to my parents to see if they could help me, he told me that there most likely wouldn't be a spot open for me if I left and came back. He then told me that I didn't need my parents for their loan. I fell for it and applied right there. I was instantly approved and immediately began classes. I didn't know the questions to ask at the time, and I feel like such a complete idiot.”
- A number of clients have told us about similar tactics used to coerce them to sign loan documents once they were already enrolled. For example, many have told us that New England Art Institute 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.
- Clients with limited-English fluency frequently tell us that schools exploited their limited language ability to get them to quickly sign enrollment forms and loan agreements

¹⁰ 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 58-65 (July 30, 2012) https://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf.

without explaining what they are signing or confirming that they actually wanted to enroll in the school.

Similarly, many of our clients have been harmed by schools that utilized deceptive lead generators to capture their contact information and hound them with calls, texts, and emails until they enrolled. Recent enforcement actions demonstrate ways in which lead generators acquire prospective students' contact information by posing as employers or the military or promising state or federal benefits.¹¹ The school then hounds prospective students until they eventually submit and enroll, even after they request that the school stop calling, emailing, or texting them.

b. Misrepresentations

1. Additions to sections 668.71-74

We support the proposed language clarifying what types of school conduct amount to a misrepresentation, which provides further clarity as to borrower rights and is consistent with the types of harmful misrepresentations we hear about from clients. In particular, we were happy to see the Department specify that borrowers will be able to obtain relief where a school has misrepresented:

- the appropriateness of its courses and programs in relation to the employment objectives it states its programs are designed to meet (proposed § 668.72(g));
- institutional, programmatic, or specialized certifications, accreditation, or approval that it does not actually have (proposed § 668.72 (o));
- the assistance the school would offer in securing externships (proposed § 668.72(p));
- GED assistance (proposed § 668.72 (q));
- the pace of completing a program (proposed § 668.72 (r));
- a student's responsibility to repay loans provided (proposed § 668.73 (e)); or
- licensure passage rates (proposed § 668.74(f)).

Our clients routinely tell us that each of these types of misrepresentations induced them to enroll, and that they did not know that they should be skeptical of what a school employee told them. For example, one student explained that although during recruitment their school “had promised that we would be able to graduate and be ready to test for certification [to work in their field] immediately,” once enrolled “our instructors [] were very open about the fact that they were not teaching us the necessary info to pass the certification test for the state.” In addition, low-income borrowers also explain that schools frequently misrepresent the availability of externships and overstate partnerships with potential employers.

¹¹ See, e.g. *U.S. v. Sunkey Publishing et al*, Case No. 3:18-cv-01444-HNJ (N.D. Ala. filed Sept. 6, 2018); *Fed. Trade Comm'n v. Career Educ. Corp.*, Case No. 1:19-cv-05739 (N.D. Ill. filed Aug. 27, 2019); *Fed. Trade Comm'n v. Expand Inc.*, Case No. 6:16-cv-00714-CEM-TBS (M.D. Fla. filed Apr. 27, 2016).

In addition, we strongly support the proposals' inclusion of misrepresentations related to employment rates.¹² As government enforcement actions have indicated, predatory schools have inflated job placement rate data using many of the methods the Department has identified.¹³ Low-income students rely heavily on job placement information in deciding whether a program is a good investment of their time and money and are severely harmed when the information turns out to be fabricated.

- A former student of one of the Art Institutes stated, “They also claimed that their graduates had a high employment rate, which was around 90%. They really made it seem like it was the real deal, so I decided to apply because I wanted a better life for myself and wanted to pursue a career in the arts.”
- “I received communications from the school about their employment rate and bar passage which seemed high for a startup law school and at the time appeared competitive with other schools in the region. I later learned that this data was misleading and/or falsified to include employment with the school itself by students hired and paid to avoid taking the bar exam for fear of failure and affecting the bar passage rates. I also learned that these numbers included employment for non-legal jobs.”

Including this as a basis for a borrower defense also helps ensure that the Department is holding schools accountable to honestly and transparently disclose job placement rate data.

2. Omissions

We support the proposed list in 668 Subpart F describing the types of omissions that are a misrepresentation, as these types of misconduct frequently cause our clients to enroll in schools that fail to deliver a quality education. Below are a few examples:

- Our clients often have no idea that the “admissions officer” or “enrollment counselor” that they speak to over the phone is not a school employee at all, but a contractor who is attempting to enroll as many students as possible. Upon learning that the “admissions officer” they spoke with was likely not a school employee, they express dismay and

¹² However, we suggest that the Department clarify section 668.74(g)(1)(i) so that it is clear which employment rate calculation methods govern if the school is subject to one method by the state in which it operates and another method by its own internal policy or accreditor.

¹³ See Press Release, *FTC Enforcement Action Leads U.S. Dept. of Education to Forgive \$71.7 Million in Loans for Students Deceived by DeVry University* (Feb. 16, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-enforcement-action-leads-us-dept-education-forgive-717-million-loans-students-deceived-devry>; Press Release, *Attorney General announces \$4.5 million settlement with Westwood College to address deceptive business practices* (Mar. 14, 2012) <https://stopfraudcolorado.gov/about-consumer-protection/press-releases/2012-03-14-000000/attorney-general-announces-45-million.html>;

explain that they would have been more skeptical of what they were told had they known that the person they were speaking with was nothing more than a salesperson reciting a script.

- Students who enroll in online programming expect that the instruction will be offered by the institution branding the program and would not have enrolled had they known that another organization designed the curriculum and provided the instruction.
- We frequently hear from clients who share their employment ambitions with the school during the recruitment process and later discover that the school they enrolled in lacks critical accreditations or professional certifications needed for the student to enter their desired profession. This is particularly common amongst clients pursuing a career in the trades (like electricians, cosmetologists, and others) who are not told that the program they are enrolled in will not qualify them to sit for the professional test or make them eligible to apply for licensure required for employment.
- Our clients are often shocked when they later learn about the employment rates and graduation rates of the schools they've attended. Many express that they would not have enrolled had the school disclosed how few graduates were able to get jobs.
- We routinely hear from clients that the school they enrolled in failed to tell them how much the program cost at all, instead indicating that financial aid or scholarships would cover the cost of attendance when that was not the case.

c. Favorable Judgments

We support the proposed rule's inclusion of favorable judgments—including default judgments—as a basis for a borrower defense claim. The proposed rule is an important improvement from the 2016 Rule, which only included favorable, contested judgments. Contested judgments against schools are exceedingly rare, both because fraudulent schools often fold during litigation, and because litigators seek to resolve class claims before a school runs out of money. Private litigators are reluctant to pursue litigation against predatory schools, wary that they will not be able to obtain meaningful relief for their clients and class members if they obtain a default judgment and the institution quickly files for bankruptcy. Allowing all favorable judgments to establish a borrower defense claim ensures that borrowers will be able to obtain relief as a consequence of litigation, even if the institution ultimately is uncollectible.

d. Claims Based on Prior Secretarial Actions as a Basis for Borrower Defense

We support the proposed language making clear that prior Secretarial actions can establish a borrower defense claim. Integrating prior Secretarial actions into the borrower defense standard allows the Department to provide relief close in time to when it discovers

institutional misconduct via a program review or other oversight authority. In addition, allowing this basis for a claim allows the Department to clear the debts of borrowers harmed by their school, *sua sponte*, without needing to wait for impacted borrowers to submit claims.

e. Breach of contract claims

We agree with the Department that breach of contract claims should be able to establish a borrower defense claim and encourage it to consider “catalogs, bulletins, circulars, and regulations of the institution made available to the matriculant” to constitute contract terms, as it has in the past¹⁴ By including breach of contract claims as a basis for a borrower defense, the Department is holding institutions accountable to their contractual obligations with students and ensuring that the proposed federal standard is as generous to students as the 1994 state law eligibility standard.

iii. State Law Standard

In prior comments and during the negotiated rulemaking, representatives of legal aid organizations and state attorneys general 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 state law.¹⁵ We are glad that the proposed rule recognizes state law as a basis for a borrower defense,¹⁶ but disagree with the proposal to only allow state law to be asserted in the reconsideration process, and not in an initial application. This bifurcated process will needlessly extend the adjudication timeline for borrowers and will increase the complexity and administrative burden that they will have to overcome. It will also create more work for the Department by forcing the Department to first fully adjudicate applications under a federal standard, even where the borrower or a state requestor has presented clear evidence of a state law basis for approval. We therefore ask that the

¹⁴ 81 Fed. Reg. at 39329, 39341 (June 16, 2016).

¹⁵ See 2016 Legal Aid Comment at 4-5, 24-25; 2018 Legal Aid Comment at 22-23, 32-36.

¹⁶ 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, many states have enacted detailed laws with which schools are required to comply for the benefit of students. Some of these laws offer heightened protections than what is covered under the proposed federal standard. See *e.g.*, 940 CMR 31.00, MGL c. 93A § 2 (Massachusetts) <https://www.mass.gov/doc/940-cmr-31-for-profit-and-occupational-schools/download>; National Consumer Law Center, *Student Loan Law Manual* § 14.4.9.3 (6th ed. 2019), updated at www.nclc.org/library (providing specific citations to these types of state laws). 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/>. As a result, the proposed standard must incorporate state law if it is to provide commensurate relief to what is available to borrowers under the 1994 Rule’s standard, 34 CFR 685.206(c).

Department allow borrowers, or at minimum third-party group requestors, to assert state law borrower defense claims at the application stage.

The proposal to restrict when a state law basis for discharge may be asserted and considered is misguided. Under the proposed rules, borrowers and third-party requestors must exhaust the federal standard and have their application denied before the Department will allow them to assert their state law claim during the reconsideration process. This presents too long a delay: an initial adjudication can take up to three years. More troublingly, because the proposed rules do not require the Department to accept a request for reconsideration, and reconsideration decisions are not subject to an adjudication deadline, there is no assurance that state law claims will be considered timely or at all. Borrowers asserting state-law claims would be subject to significant uncertainty and long wait times before receiving an answer.

It need not be so. Allowing borrowers to assert a state law claim is as simple as inserting it as an additional question on the official Department application form, which the Department official tasked with adjudicating the claim could reserve as the last basis to review if, and only if, he or she determined that the borrower was ineligible for full relief under the federal standard. Further, state law has long been integrated into the Department's eligibility standard, reducing the likelihood that integrating a state law standard will impose an administrative burden.

At a minimum, the Department should allow attorneys—individuals intimately familiar with how to research and apply state law—to assert state law claims when requesting group relief. Attorneys general and legal aid attorneys have a deep knowledge of their states' laws and can clearly explain how school misconduct amounts to a violation of state law. Much like a court, Department officials, who will also likely be attorneys, will be able to expediently assess the requestors' citations and legal analysis, and the administrative burden would be minimal.

This approach may in fact reduce administrative burden on the Department as compared to the proposed approach requiring it to first consider and deny on the basis of federal claims, and then enter a reconsideration process for state claims. First, if the Department prefers to consider state law claims only if there is not a basis for approval under the federal standard, it could still do so in the initial adjudication process. Rather than requiring a separate adjudication process, the Department could reserve its internal review of state law claims made within the initial application such that it would only consider them if the federal standard did not result in full relief. Second, the Department may find that in some instances it is *more* efficient to review and approve a group claim based on a requestor's state law claim in the first instance, without reviewing potential federal bases. For example, a state attorney general who has investigated a school for violating state law may be able to present a clear and strong case to the Department demonstrating that the violation of state law also constitutes a borrower defense. Forcing the Department to first attempt to apply federal standards to the results of a state law investigation would be an unnecessary extra burden.

iv. Limitations Period

We applaud the proposal to allow all borrowers to apply for relief (including a refund of amounts paid) regardless of when they attended a predatory school. For decades, the Department has failed to identify predatory school conduct, provide borrowers with relief, or inform borrowers that they have a right to request an administrative discharge of their loans when they believe their school engaged in predatory conduct. As a result, there is a backlog of harmed borrowers who are still struggling under the burden of predatory debt through no fault of their own. We agree that the Department has an obligation to provide relief to these borrowers—whether they apply on their own or are covered by a group application—and support the removal of arbitrary time barriers that would stop them from obtaining full relief.

Further, we agree that it is critical going forward that borrowers continue to have access to the borrower discharge process, and that their rights not be cut-off after some arbitrary amount of time has passed since enrolling. As detailed in our 2018 comments on the prior administration's proposal to apply 3-year time limits to borrower defense applications, such time limits are unfair, contrary to well-established law, and are arbitrary.¹⁷ In our experience, many borrowers do not find out about their right to a discharge or how to apply for many years after leaving school, and barring relief based on time limits would prevent most legal aid clients harmed by predatory school conduct from securing relief for technical rather than substantive reasons.

In addition, we support the Department's proposal to allow all borrowers to receive refunds of amounts paid. Predicating refunds on time limits or questions about when the borrower knew or should have known about school misconduct causes borrowers intense confusion and yields inconsistent and inequitable relief for borrowers harmed by the same misconduct.

v. Exclusions

We commend the Department's intent to initiate this rulemaking to “[address[] the disproportionate impact that student debt has on borrowers of color and low-income students.”¹⁸ To that end, we ask that the Department reconsider its exclusion of relevant federal civil rights laws, such as the Equal Credit Opportunity Act, from potential bases for a borrower defense. The proposed definition of borrower defense would exclude violations based on civil rights violations, even where those violations relate to the making of a federal student loan for enrollment in the school or the provision of educational services for which the loan was provided.¹⁹ This is ill-

¹⁷ 2018 Legal Aid Comment at 15-19.

¹⁸ James Kvaal remarks during morning session of the October 4, 2021 negotiated rulemaking , Transcript at 6 <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/104am.pdf>.

¹⁹ 87 Fed. Reg. at 41897-98.

advised, considering that the overwhelming majority of borrowers submitting borrower defense applications attended for-profit colleges that disproportionately enroll borrowers of color.

Including civil rights claims within the borrower defense definition is particularly important given what we know about some for-profit schools' deliberate efforts to target Black and Brown people with a more expensive and/or inferior product. For instance, a recent article reported that "Corinthian deliberately aimed its deceptive marketing at the Black community. Near the end of its corporate life, Corinthian College spent over \$600,000 for just two weeks of advertisements on BET. This racially biased marketing was reflected in student enrollment at Corinthian-owned schools, which were heavily African American and Latino."²⁰

Two recent lawsuits indicate that schools are continuing to engage in conduct that potentially violates the Equal Credit Opportunity Act (ECOA). In *Britt v. Florida Career College*,²¹ plaintiffs alleged that Florida Career College (FCC) targeted Black students with high-pressure sales tactics and misrepresentations to enroll them into a high-priced, low-value educational program. Plaintiffs alleged that the school intentionally and deliberately targeted Black people in their advertising.²² In another case, *Carroll v. Walden University*,²³ plaintiffs alleged that Walden University engaged in reverse redlining by intentionally targeting Black women to enroll in its Doctorate of Business Administration program and misrepresenting the number of credits it would take to complete the program. Through its alleged misrepresentations about the number of certain credits required to complete the program, the plaintiffs allege that the school overcharged the putative classes nearly \$30 million, in violation of both Title VI of the federal Civil Rights Act and ECOA. Plaintiffs alleged that Walden University focused its local advertising in urban areas with higher concentrations of Black people with advertisements that largely used Black female models.²⁴

While we acknowledge that in these cases the alleged misconduct will satisfy other aspects of the current, proposed federal borrower defense standard, this will not always be the case, and the existence of multiple bases for relief should not preclude a successful ECOA claim from being a basis of relief. This is particularly true given the possibility of a court judgment based only on such a civil rights violation. If such violations were included, that judgment would on its own entitle the borrower to relief under section 685.401(b)(5)(i) of the proposed regulation. Considering that an animating goal of this rulemaking is to reduce the harm student loans cause

²⁰ Genevieve (Genzie) Bonadies, et al.,

For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate, Harvard Law R. Blog (July 30, 2018) <https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/>

²¹ Case No. 0:20-cv-60814-RKA (S.D. Fla. filed April 20, 2020).

²² *Id.*, complaint online here: <https://predatorystudentlending.org/wp-content/uploads/2020/04/Complaint-Britt-v.-FCC-filed-Apr-20-2020>

²³ Case No. 1:22-cv-00051-JMC (D. Md. filed Jan. 7, 2022)

²⁴ *Id.*, complaint online here: https://www.relmanlaw.com/media/cases/1223_1%20-%20Walden%20Complaint.pdf

Black and Brown people, it makes little sense to exclude claims that exist to protect those very same people.

E. Group Process and Group Timelines, State Requestors, Process Based on Prior Secretarial Actions, and Process to Adjudicate Borrower Defense Claims (for groups)

The group discharge process is an essential vehicle for low-income borrowers to obtain relief. We have noted repeatedly in comments to the Department that borrowers are often unaware of their rights to apply for administrative relief. As a result, it is our belief that tens of thousands of borrowers are eligible for and very much need relief, but will not get it without a group process. The proposed rule expands the Department’s authority to provide group discharges by providing new grounds for the Department to initiate a discharge and by allowing third-party requestors to initiate group claims. These changes will go a long way in streamlining relief for borrowers, simplifying the adjudication process for the Department—which will hopefully reduce adjudication delays—and increasing the likelihood that governmental awareness of school misconduct will trigger an assessment of whether relief is warranted. The proposed regulations mark an important step in reducing the justice gap and delays in relief that borrowers have experienced under the prior regulations.

While there is much to commend about the group discharge process, we believe that this proposal could be improved further.

- First, we urge the Department to integrate legal aid organizations²⁵ into the third-party requestor process so that more harmed borrowers will be included in group discharge applications, including borrowers who attended small, low-profile schools, and borrowers in states where officials rarely pursue group discharges due to resource, priority, or political constraints.
- Second, we request that the Department simplify what is required when third-party requestors apply for relief to prevent unnecessary delays in submission of applications.
- Third, we request that the Department make clear that upon receiving a group claim it can expand the group beyond the definition provided by the third-party requestor.
- Fourth, we urge the Department to appraise group members of the status of the group claim so that they can understand and plan for what will happen to their loan.

²⁵ By “legal aid organization” we mean all nonprofit organizations that provide legal services, regardless of whether they receive federal LSC funding. Many of the legal aid organizations that provide student loan services are not LSC-funded.

i. Ensure third-party requestors include legal aids so that all entities that hear about school misconduct from borrowers can submit group applications.

While we are encouraged to see that the Department has proposed a path for third parties to initiate group borrower defense discharges, we are dismayed that the Department proposes to reverse course from its final position during the negotiated rulemaking by excluding legal aid organizations from the state-requestor process. The proposed rule only allows state attorneys general and state agencies to initiate a third-party group application. We strongly believe that the proposal to exclude legal aids was sorely misguided and ask that the Department allow legal aid organizations to participate in the group discharge process.

The third-party requestor process has three significant advantages over a process that is exclusively Department-led: First, by permitting more entities to initiate group proceedings, it increases the likelihood that borrowers harmed by school misconduct but won't know how to obtain relief will have their claims brought before the Department and will have a path to discharge their loans. Second, it streamlines and strengthens the application process for borrowers and for the Department by encouraging third-party requestors to work with borrowers to file fewer, better investigated and developed group applications instead of large numbers of individual, pro se applications. Third, it allows the Department to become aware of evidence of school misconduct in an expedited manner. Further, a robust third-party requestor process better ensures that all schools—regardless of size, profile, or type—may be held equally accountable such that they abstain from the practices described in proposed section 668 subparts F and R.

But by leaving out legal aid organizations, the proposed process is left with significant holes that will disadvantage borrowers—particularly borrowers who attend smaller schools that are less likely to attract government attention, and borrowers in states where state actors do not have the capacity to investigate predatory schools and pursue group discharges or have made political or resource decisions not to do so.

a. Legal aid attorneys are well-equipped to file group discharges

Excluding legal aids from the group process ignores the significant role legal aids have played in assisting the Department to establish borrower defense eligibility findings or group discharges. Indeed, legal aid organizations were central to the establishment of a borrower defense process. Between 1994 and the collapse of Corinthian Colleges, the Department only utilized its borrower defense authority a handful of times. On the heels of Corinthian's collapse, "the Department did not have in place an established infrastructure for accepting, processing, and reviewing large number of such claims from borrowers," and was then faced "almost immediately" with "over 1,000 claims from borrowers for a defense to repayment."²⁶ Legal aid attorneys and organizations like the Debt Collective were critical in resurrecting borrowers' right

²⁶ Joseph Smith, First Report of the Special Master for Borrower Defense to the Under Secretary (Sept. 3, 2015) <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-1.pdf>.

to relief through the BD process.²⁷ In addition, over the last seven years, the Department has frequently solicited legal aids for information about predatory schools.

Moreover, the Department incorrectly implies in the NPRM that legal aids will not submit applications with high-quality evidence and thorough legal analysis. Not so. Attorneys at legal aids zealously investigate school misconduct and assemble robust compendiums of evidence by issuing public records requests, compiling student affidavits, combing through public statements made by school officials, analyzing school websites and marketing materials, and speaking with ex-school employees.²⁸ As a function of their job advocating on behalf of clients, they are well-versed in the application of their states' laws and the nuances of their states' higher education regulatory systems. Importantly, their position on the ground, holistically helping their communities' most vulnerable citizens, means that they are often aware of institutions using predatory conduct against low-income students when government actors are not.

b. Legal aid attorneys can help fill the gap in state borrower defense activity

Adding legal aid organizations to the list of state requestors would significantly strengthen the proposed rule. Legal aids, unlike state attorney generals, are unaffected by changing political tides or by policy imperatives to focus on issues that impact the largest numbers of state residents. Legal aid goals are client-centered and based on who comes to them, meaning that they are as likely to submit an application regarding a small campus or small institution as they are to submit an application against a large, high-profile institution—unlike state attorney generals who often have political and resource incentives to primarily investigate large, high-profile institutions.

We are deeply concerned about the gaps that will exist if only state officials are permitted to initiate the group discharge process. Legal aids in many states have explained that their state attorneys general are uninterested in pursuing matters which involve school accountability or simply do not have the capacity to pursue all instances of school misconduct. In some instances, legal aid attorneys have expressed that their state attorneys general are unwilling to meet with them when they have evidence indicating a school is harming students. Without allowing legal aids to submit group claims, defrauded borrowers in many states will not be served by the group process. This poses particular risk for borrowers who attend institutions that wholly operate

²⁷ See also *Petition to the U.S. Department of Education Demanding Student Loan Debt Relief for Corinthian Students*, Nat'l Consumer Law Ctr. (May 19, 2015), <https://www.studentloanborrowerassistance.org/wp-content/uploads/2015/04/corinthian-petition.pdf>.

²⁸ While zealously advocating on behalf of their clients, legal aid organizations have even collected evidence relevant to borrower defense claims while intervening in school bankruptcy proceedings. See *Dreams Destroyed, How ITT Technical Institute Defrauded a Generation of Students*, Project on Predatory Student Lending (Feb. 2022) <https://static1.squarespace.com/static/62d6e418e8d8517940207135/t/62e1a2ab87017e0158ab20b2/1658954418410/ITT-Report.pdf>.

within a single state, or a few states with similarly lax approaches to school accountability—borrowers for whom legal aid organizations would likely be the only entity willing to compile and submit a group application.

The inclusion of state oversight agencies as state requestors is good but does not make up for the exclusion of legal aid. Unlike legal aid organizations, state oversight agencies often do not solicit complaints or have contact with students. Indeed, few legal aid clients know the names of the agencies charged with higher education oversight in their state or are even aware of their existence. Further, in many states, the poorly funded oversight agencies function like a rubber stamp once paperwork obligations are met, and are reluctant to call into question the institutions they have allowed to operate in their state. Many operate under severe resource constraints, and do not have the funding, expertise, or state authority to pursue borrower defense relief for borrowers. And again, these agencies are often subject to the political whims of elected leadership in their state. As a result, borrowers in some states may be without a champion willing to investigate and request relief.

Similarly, while the Department may argue that it will provide coverage to these borrowers, that argument is unavailing. The Department does not have the capacity to examine every school’s conduct with the scrutiny those borrowers deserve, and smaller institutions will likely fall below the Department’s radar. The Department should enlist the assistance of legal aid organizations—both those that are LSC-funded and those that are not—to ensure that the maximum number of borrowers fall within the reach of a champion willing to initiate the group process.

c. Allowing legal aid attorneys to file group applications improves efficiency

Without access to the group discharge process, legal aids will be forced to generate a variety of individual applications on behalf of every client instead of compiling the information they have unearthed into a single, comprehensive group application. This has compounding negative effects: Legal aids’ ability to optimize the number of clients they can serve will be constrained because of the unnecessary effort that they will need to go through to develop and file many individual applications. And the Department will need to wade through a multitude of individual applications drafted by the same author—as well as pro se applications drafted by other borrowers who attended the same program—causing increased administrative burden for the Department and risking inconsistent adjudication.

ii. Application requirements should be simplified.

We request that the Department strike the requirements that a third-party requestor “[p]rovides evidence beyond sworn borrower statements that supports each element of the claim” and “[p]rovides the names and other identifying information of borrowers in the group to the

extent available.” These requirements will unnecessarily limit or delay the filing of third-party applications, delaying Department investigation of group claims and relief for borrowers.

As we explain in section 1(F)(2), borrowers’ sworn statements alone should be permitted to substantiate a borrower defense claim. Further, the requirement that there be evidence beyond sworn borrower statements not just generally, but to support “each element of the claim” is an unusually high standard that is without basis in law. Requiring additional evidence beyond sworn statements to support each element of a claim may mean that the Department will not receive applications for groups subject to predatory recruitment practices at schools that carefully avoid creating paper trails of documentary evidence. Allowing borrower statements to substantiate a group claim will allow for adjudication of more, meritorious group claims and increase Department efficiency, as state requestors may identify common and corroborating testimony from borrowers in a group and organize their sworn statements according to how they satisfy the elements of a borrower defense claim.

In addition, we ask that the Department strike the requirement that state-requestors provide the names and other identifying information of borrowers in the group, or limit the request so that it only applies where a requestor is submitting a program-specific application that only applies to borrowers who attended the school before 2014.²⁹ Requiring a list of names is often unnecessary because the Department has student and borrower data already in its possession with which it can identify group members, and the group discharge process as proposed requires that the Department cross-check group membership to make sure that all borrowers who could be included in the group are. In contrast, some states lack the ability to readily identify students included in a group: Different states have different laws regarding what information a school must provide regarding its student body. As a result, not all state requestors will have access to a complete list of students (with accompanying identification data), and thus this requirement may unnecessarily inhibit them from filing group claims.

iii. Third-party requestors should be permitted to assert state law claims in the first instance.

As we note in section 1(D)(iii) above, we strongly believe that third-party requestors should be permitted to submit state-law claims simultaneously with claims made under the proposed federal standard.

²⁹ During negotiations, the Department expressed that it did not have program data for borrowers who attended their school before 2014. As a result, we propose that the rules require that state-requestors fill this specific gap instead of requiring them to submit this information in all circumstances.

iv. The Department should clarify that it can expand groups beyond what the state-requestor has proposed.

The proposed language in section 685.402(c)(3) notes that the Secretary may consolidate group applications. However, state-requestors will likely only submit information pertaining to their state, even where the evidence they assemble may demonstrate that the challenged practices are company-wide and span locations in other states. In the final rules, the Department should explicitly state that the Secretary may expand the group definition provided by the state requestor if supported by evidence.

v. Borrowers who are group members should be apprised of the status of the group claim.

The proposed regulations inform third-party requestors of the status of their application, but largely leave group members in the dark. Proposed section 685.402(d) specifies that borrowers who have submitted individual applications will receive notice that they are now included in a group, but does not provide the same notice to group members who have not submitted an individual application. Instead, the proposed language specifies only that group members who have not submitted an application will be notified that their loans are in forbearance (or stopped collections), allow them to decline forbearance, and inform them of their right to enroll in an IDR plan. While this notification is needed, it misses critical information: that the borrower's loans are included within a group claim. Failing to tell borrowers that they are included in a group claim will cause borrower confusion and may lead some borrowers already in the group to submit duplicitous individual applications in an effort to secure relief.

We believe this to be an oversight and request that the Department clarify the regulations to explicitly state that the Secretary will inform all group members 1) when the group is formed, 2) once a claim has been pending for a year, and 3) once the Department arrives at a decision. Borrowers should be told why their loans have been put into forbearance and/or stopped collection status and should be apprised of the status of the group claim they are included within.

F. Evidentiary Standard and Forms of Evidence

We support the Department's proposals to continue to use the preponderance of the evidence standard and include the consideration of multiple forms of evidence when assessing whether a borrower should be eligible for relief. The goal in these processes is to provide borrowers with relief if they have been harmed by predatory conduct. As a result, if it appears more likely than not that a borrower was harmed—via evidence provided by the borrower or evidence otherwise in the Department's possession—relief should be granted.

We also support the proposal in sections 685.406 (b) and (c) to continue considering evidence not appended to an application when adjudicating a claim, including evidence

otherwise in the Secretary’s possession and any other relevant information. It is important that the Department take advantage of the wealth of information it and other federal agencies hold about schools’ operations through investigations, lawsuits, criminal proceedings, reports, and other data sources, when adjudicating the merits of any borrower defense claim.

We recommend that the Department make three changes in the final rule to ensure that borrowers can demonstrate they have been harmed by school misconduct. First, we propose that the Department consider other applications raising similar claims when adjudicating individual applications, such that the individual review process mirrors the group claim process. Second, we urge the Department to explicitly state that borrower attestations alone may be sufficient to substantiate a claim for relief. Third, we propose that the Department explicitly state that it will apply a presumption of reliance when assessing individual applications.

i. Consider other individual applications raising similar claims when adjudicating individual claims.

The Department rightly proposes to consider the evidence provided in individual applications when assessing the merits of a group claim. We propose that the Department explicitly state that it will allow, where practicable, the same evidence to be considered when adjudicating an individual application as these additional applications related to the same school may provide corroborating evidence. Looking to other applications pertaining to the same school as a source of evidence is particularly important because, as the Department observed, many misrepresentations are made orally by school employees,³⁰ and, absent a whistleblower, the best available evidence of such misconduct may be the existence of multiple borrower attestations describing the same misconduct. Further, some individual applications may include additional evidence that is probative of other applicants’ claims.

ii. Clarify that borrowers’ attestations alone are enough to substantiate both group and individual claims for relief.

We urge the Department to explicitly state that borrower attestations alone can be sufficient to substantiate a borrower defense claim. The Department rightly recognized in its initial issue paper on borrower defense that “The Department is guided by the principle that a borrower defense application is a form of evidence.”³¹ While proposed section 685.403(b) indicates that an application is a form of evidence, it also states that a borrower must “Provide[] additional supporting evidence for the claims [], if any.” Because unnecessary and impossible requirements to support discharge applications with documentary evidence have been such a barrier for borrowers in the past, we urge the Department to make clear in the final rule that

³⁰ 87 Neg. Reg. at 41883.

³¹ <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/6bdadjudprocess.pdf>

while additional supporting evidence may be submitted, it is not required, and that borrower attestations may be sufficient to substantiate a claim on their own.

First, it is important to recognize that even seemingly simple requests for documentary evidence will pose insuperable barriers for many borrowers with meritorious claims. In our experience, former students often have significant difficulty getting any records from their schools. Records from schools that closed after the student attended are often unobtainable. We have also found that many schools 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.³² 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. Many defrauded borrowers also do not have stable living situations and may not have permanent mailing addresses, a fact which makes it difficult for them to request documentation from their schools be sent to them.

Borrowers rarely possess records or other evidence from the time they were recruited. Students enroll because they trust school officials, and as a result do not make a deliberate effort to save messages and advertisements from the school they enroll in. Many borrowers also receive communication from their school on school portals or email systems that they may be unable to access when they apply for discharge. In addition, many borrowers apply for relief years or decades after they attended their school and they may not have access to digital records that were generated when they attended their school.

Moreover, predatory schools increasingly attempt to avoid leaving a paper trail of their misconduct. For example, schools make their misrepresentations orally instead of in writing, and make every effort to prevent school employees from disclosing school misconduct. As a result, particularly for individual applicants without subpoena powers or discovery rights, borrower attestations may be the only available evidence to demonstrate school misconduct. A borrower's testimony is evidence, and may be sufficient, on its own, to support a claim for relief.

Finally, the Department has access to a wealth of borrower, school, and investigative information with which it can verify or substantiate information pertinent to the borrower's application, without relying on the borrower to produce documentation. This includes FSA data, evidence collected by the Department's enforcement unit, evidence provided by 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, criminal investigations, audits, and other data sources. Indeed, as recognized in the group process, in

³² 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 a number of times as well and was told that records could only be sent by mail. It was not until she came to legal aid and was able to use her attorney's address that she obtained her records.

some cases the Department does not need the borrower to submit any evidence at all—not even an application or statement—to be found eligible for relief. As a result, we recommend that the Department clarify in promulgating the final rule that borrower attestations alone may be sufficient to substantiate a claim for relief.

G. Individual Application Process (Process to Adjudicate Borrower Defense Claims)

The application processes required under the 2016 and 2019 Rules has been too confusing and burdensome for many borrowers to navigate on their own, without the assistance of an attorney. Under the prior regulations, borrowers had to assert reliance, individualized harm, justify how that harm should entitle them to full relief, and effectively had to submit a claim which fell within a Departmental findings memoranda that was not widely available to the public to be approved for relief. We observed that low-income borrowers like the ones we serve were frequently denied relief because they failed to write the “magic words” in their application, even if their application, reasonably construed, made their claim apparent, or if it would have been clear had the application asked the right questions or had the Department asked for clarification. In fact, when the Department began denying claims, denial letters cursorily stated that the borrower “failed to state a claim,” even when the borrower clearly described the false information or material omissions the institutions’ employees made when the borrower had enrolled or was deciding whether to borrow more loans for another semester. To us, it seemed as though the application process was designed to prevent borrowers from obtaining relief instead of being designed to help borrowers access relief they were entitled to.

While the proposed regulations are significantly easier for an individual borrower to satisfy than the unreasonable thresholds created in the 2019 Rule, we are concerned that the proposed rule still contains flaws that will stand between eligible borrowers and relief. We worry that in the individual adjudication process could inadvertently still impose a “magic word” problem upon unrepresented borrowers who are doing their best to raise the alarm that a school harmed them—borrowers who would clearly receive relief had an attorney drafted their application. In addition, the process still seems designed to lopsidedly provide safety checks on the granting of relief with no audits to assess whether denials are being issued appropriately. We propose that the Department include four improvements in its final rule to ensure that borrowers have a fair chance at obtaining relief:

- First, apply a liberal pleading standard to individual applications,
- Second, clarify that a department official will apply a presumption of reliance when adjudicating individual borrower’s claims,
- Third, allow a borrower attestation to prove that a borrower is entitled to relief without requiring supplemental evidence, and

- Fourth, establish parity in the review process by requiring that proposed claim denials are subject to the same level of review as proposed approvals and grants of relief.

i. Mandate that Department officials apply a liberal pleading standard to *pro se* borrowers' applications and clarify that a presumption of reliance applies to individual applicants.

We urge the Department to consider the needs of unrepresented borrowers when designing the individual application adjudication process. In our experience, borrowers who are eligible for borrower defense relief are often, quite reasonably, confused by the borrower defense application process, and are unsure what information they need to include. The process is legalistic, but few borrowers have legal expertise. Many of our borrower defense clients, including Parent PLUS borrowers, have limited or no postsecondary education, some have limited English literacy, and many are distrustful of the student aid loan system and forms that have failed them. Even simpler forms, like the Corinthian College attestation forms or closed school discharge application forms, prove impossible to navigate for many of our clients.

When we work on completing application forms with borrowers, they do not intuit that they must speak to their experience and justify any conclusions; they often default to providing descriptions of the most salient thing that the school did wrong, without explaining how a misrepresentation was false, why the misconduct was problematic, or how the misconduct influenced their decision to enroll or the harm they suffered. They need to be probed further to offer the information that is material to their claim. According to one legal aid attorney,

“I have had several clients who were homeless and had no records. Many clients do not have access to a computer and can't navigate the BD application on their phone. I have had a number of clients with intellectual and learning disabilities; one didn't think she'd ever had an official diagnosis but remembers being in special ed throughout primary and secondary school. Clients like this were easy prey for unscrupulous recruiters and are unable to put the necessary narrative and cause-and-effect argument into written form for a BD application.”

Informed by these experiences, we urge the Department to strengthen the proposed rule in three ways:

First, we urge it to state explicitly that the Department will conform to the uniformly recognized principle that pleadings from *pro se* litigants are to be liberally construed.³³ Requirements that applicants submit legal justification or reasoning, or even know the difference between a breach of contract and a misrepresentation, will stand between defrauded borrowers and critical borrower defense relief.

Second, before the Department denies an individual borrower's application, we ask that the Department provide the borrower with the opportunity to supplement a deficient application.

Third, we urge the Department to presume reliance when deciding individual claims. The proposed eligibility standards allow a presumption of reliance, and the group discharge regulations state explicitly that Department officials will apply a presumption of reliance to group claims. The Department should similarly apply a presumption of reliance when assessing an individual borrower's claims. As noted above, borrowers often do not know that they must articulate a cause-and-effect relationship when submitting an application for relief. As a result, borrowers with meritorious claims will be denied relief because they did not know how to draft an application. To avoid this result, we ask that the Department make clear that it will apply a rebuttable presumption of reliance to individual's applications as well.

ii. Require that decisions to deny borrowers relief are reviewed with the same scrutiny provided to approvals.

We were disappointed to see that the Department's proposed process includes many internal checks designed to prevent incorrectly *granting* relief to borrowers, but no parallel checks to prevent incorrectly *denying* relief to borrowers. For example, relief determinations must be proposed by the Department official determining the claim on its merits and then must be confirmed by the Secretary, and the Department has created partial relief standards as an escape hatch to allow Department officials to prevent borrowers from receiving relief for what it perceives to be minor school violations.

We urge the Department to be as scrupulous when issuing denials as it is when granting relief. Indeed, as revealed in the lawsuit *Sweet v. Cardona*, spurious and unexplained borrower defense denials have been a major problem in the adjudication of individual borrower defense applications.³⁴ To that end, we recommend that the final rules require review and approval of denials of borrower defense applications, just as the proposal requires review and approval of proposed discharges.

³³ 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).

³⁴ *Sweet v. Cardona*, Case No. 3:19-cv-03674-WHA, ECF No. 192 (N.D. Cal. Mar. 18, 2021) (challenging Department's use of *pro forma* denial notices to tens of thousands of class members).

H. Process Based on Prior Secretarial Actions

See discussion in section 1(D)(ii)(d) above.

I. Borrower Status During Adjudication

We support the Department's efforts to ensure that borrowers are not harmed by the adjudication period, including by stopping collections, placing borrowers in an opt-out forbearance, and limiting interest accrual during adjudication. However, we disagree with the Department's proposals to delay the onset of these forms of relief. We propose that for both individual and group applications, forbearance, interest accrual cessation, and stopped collections should begin from the time the application is received.

i. Individual applicants.

The proposed regulations note that only once an application is “materially complete”—a status which is not defined by the regulation—the Department will place the borrower's loans in an opt-out forbearance and stop collections.³⁵ This means that there is an unpredictable lag between when the borrower submits an application for relief and when the borrower is protected from stopped collections and, if applicable, forbearance. During that lag time, we are concerned that borrowers in default may experience seizure of their tax refunds, including their anti-poverty Earned Income Tax Credit, and that delinquent borrowers may fall into default—with confusion about when stopped collections and forbearance begin contributing to the likelihood of those financial disasters. As we propose in section 1(J)(2) of this comment, the Department should strike references to “materially complete” applications and instead begin forbearance and stopped collections as soon as an application for relief is submitted.

In addition, the Department proposes delaying the cessation of interest for 180 days while the Department adjudicates a borrower's application. In the preamble of the NPRM, the Department argues that this delay is necessary to “incentivize” borrowers to “file strong claims,” implying that borrowers may attempt to submit frivolous claims in an effort to temporarily stop interest from accruing.³⁶ In our experience, the Department's fear that borrowers will attempt to game the system is misplaced. Borrowers take submissions to a federal agency seriously, especially when the submission pertains to many borrowers' largest amount of debt and applications are submitted under the penalty of perjury. In addition, the Department has failed to provide evidence that borrowers are providing “weak claims” or using borrower defense as a temporary relief program. Because there is no need to incentivize borrowers to submit strong claims, we propose that the Department stop the accumulation of interest when the borrower submits their claim for relief.

³⁵ Proposed § 685.402(c).

³⁶ 87 Fed. Reg. at 41903.

Further, synchronizing the timing of the cessation of interest accrual with the beginning of the forbearance or stopped collection will make it much easier to communicate to borrowers what their options are and what to expect while they await a decision. In our experience working with borrowers applying for borrower defense, they are often confused by the application process and are uncertain as to what will happen after they apply. Having multiple post-application dates for when different forms of relief will kick in makes that more confusing, is hard to communicate, and will make it harder for borrowers to decide whether to opt-out of the forbearance and what that would mean. If these dates are synchronized, then borrowers can simply be told (including on the application form) that their loans will be placed in an interest-free forbearance and collections will be stopped while their application is pending, unless they choose to opt-out of the forbearance and to continue making payments. This is much easier to explain, and for borrowers to understand.

ii. Borrowers covered by group applications.

For group members, proposed section 685.402 states that the Department will place borrowers in an interest-free, opt-out forbearance and stopped collection only after the Department has decided to form a group. Under the proposed regulations, the decision to form a group may take as long as a year. A year of lag time—longer than the 270 days of nonpayment before a borrower falls into default—is simply too long. In that year, low-income borrowers like our clients will try to continue to scrape resources together to make loan payments, some will default, and borrowers already in default will be subject to months of wage garnishment, lose a portion of their federal benefits, and needlessly lose tax refunds. Instead of imposing a delay, we propose that from the time a group application is submitted, the Department should put all identified group members in an interest-free, opt-out forbearance and stopped collections.³⁷

J. Timeline to Adjudicate Claims

We are glad that the Department has proposed to add a timeline by which it must adjudicate claims. Finally, borrowers will know the maximum amount of time they will need to wait before knowing whether their claim will be granted or denied and how much relief they will (or will not) receive. The imposition of a deadline begins to restore public faith that the borrower defense process is actually a path towards obtaining relief—a faith that has been weakened as thousands of borrowers have waited five years or more for relief.³⁸ Plus, borrowers will find comfort in knowing that if the Department fails to meet that deadline, their loans will be unenforceable.

³⁷ This is the same relief that the Department will provide once it has accepted the group application under proposed section 685.402(d).

³⁸ See *Sweet v. Cardona*, Case No. 3:19-cv-3674, ECF No. 20-26, 20-27, 20-28, 20-29 (N.D. Cal. July 23, 2019) (affidavits of borrowers describing the impact of waiting indefinitely for a decision on their borrower defense application).

While there is much to commend, the timeline proposed—3 years, from request to merit adjudication for a group claim initiated by a third party, and 3 years for a “materially complete” individual borrower’s application—is too long, and for individual borrowers, too vague. We propose that the Department improve the adjudication timelines in three ways: First, that it shorten them; second, that it start the adjudication clock when it receives an individual application (stopping it and restarting it only if it requests that the borrower provide additional information); and third, that the Department define what it means by a loan being “unenforceable” if the deadline is not met.

i. Three years is too long for a borrower to wait for a decision.

While we are encouraged by the Department’s proposal to impose adjudication deadlines, three years of uncertainty about whether a borrower will need to repay a debt or not is too long. As we have seen from our clients, the uncertainty of not knowing whether they will repay a significant debt—in many cases, second only to a mortgage—takes a significant emotional toll. While the three-year deadline may reflect the Department’s current processing time, we cannot ignore that that time is what it is because prior administrations chose to strip the borrower defense unit of its resources and effectively stop the application adjudication process. The current timeline reflects a backlog of claims that should never have accrued in the first place.

We hope that this administration prevents this from happening in the future by requiring the Department to adjudicate borrowers’ claims—both individual claims and group claims—within one year. As the Department has explained, the proposed changes streamline the application process, which in turn should expedite how the Department arrives at decisions. It is more reasonable that borrowers only be expected to wait a year, at maximum, before the Department provides them with a decision.

ii. The adjudication clock should run from the time the Department receives an individual application.

Proposed section 685.406(f)(3) states that the Secretary shall adjudicate “an individual claim [asserted] under § 685.403[] within 3 years of the date the Department determines the borrower submitted a materially complete application.” (emphasis added). The regulations do not define “materially complete” and do not require the Department to request additional information from borrowers whose applications are not “materially complete.” Further, the Department’s obligation to assign a borrower’s application to a Department official only triggers after the Department makes an initial determination that the application the borrower submitted is “materially complete.” It follows that borrowers who submit “incomplete” applications will not receive a merits determination and thus will never receive a decision letter on their application.

Only allowing an adjudication timeline to run when the Department decides it should run opens the door for abuse and slipping timelines, as the Department could use its authority to

determine when a borrower's application is "materially complete" to prevent the adjudication clock from starting. As a result, the adjudication deadline as phrased in proposed § 685.403 could fail to operate as a true adjudication deadline for some borrowers, leaving them perpetually in limbo. This clearly was not the Department's intent³⁹ and should be remedied.

We propose that the Department fix this by beginning the adjudication timeline upon receipt of an application. The Department could consider pausing the adjudication timeline if the Department requests more information from the borrower. Doing so ensures that all borrowers will eventually obtain a decision on their application, even if they need assistance from the Department to make their application "materially complete." This solution strikes an appropriate balance between the borrower's interest in an expedient adjudication while also allowing the Department to take more time to adjudicate applications which require the borrower to supplement what they originally submitted.

We propose making the following amendment to the section 685.403(f)(3):

(3) For an individual claim under §685.403, within 3 years of the date the borrower submits an application to the Department.

(i) If an application is incomplete, the Department will request more information from the borrower and the timeline shall be tolled during the time the Department reasonably requests additional information from a borrower. The timeline will restart when the borrower responds to the Department's request.

If the Department fails to adopt this proposal, at a minimum, we request that the Department define what it means by a "materially complete" application.

iii. The Department should define what it will do once a loan becomes unenforceable.

Should the Department fail to meet its adjudication deadline, the proposed regulations state that loans covered by the claims "shall be deemed unenforceable." However, the regulations fail to define what will follow once a loan becomes unenforceable and it is unclear whether the Department will continue to issue a borrower defense decision if it fails to meet its own adjudication timeline. Thus, failing to explain what the Department will do once a loan becomes "unenforceable" will once again leave borrowers in indefinite limbo.

Being uncertain about how the Department will treat unenforceable loans will have real consequences on borrowers' lives. Borrowers deserve to know what will happen to their outstanding balance and whether the Department will stop reporting the debt to credit bureaus and government systems like CAIVRS (Credit Alert Interactive Voice Response System) used to

³⁹ 87 Fed. Reg. at 41905, 41946.

discern whether borrowers can borrow government loans and mortgages. If the borrower has defaulted or become delinquent, they will wonder whether the Department will delete the adverse credit history associated with an unenforceable loan.

We propose that the Department remedy this problem by amending the regulatory language in section 685.406(f)(7) to the following:

(7) If the Secretary has not yet issued the written decision under paragraph (e) of this section by the dates identified in subparagraph (f)(2) or (3) of this section, then

(i) the outstanding amount of the loans covered by undecided claims shall be discharged;

(ii) the Secretary will request that credit reporting bureaus and CAIVRS remove all adverse credit history related to the loans covered by the undecided claims; and

(iii) the Department will still provide the borrower with a written decision on their application.

Our proposed language provides clarity about what will happen to borrowers if their application is not resolved on time and their loans are deemed unenforceable and ensures that the administrative delay will not harm borrowers' financial wellbeing and ability to acquire other forms of credit. It also ensures that the Department will still issue a decision on borrowers' claims, which would still be necessary to address whether the Department must provide the borrower a refund of amounts paid.

K. Decision Letters

The proposed rules do not go far enough to provide borrowers—whether they are individual applicants or are members of a group application—with the information they need after the Department has rendered a decision. We suggest that the Department strengthen the final rules to make written decisions clear and actionable to borrowers when granting full approvals, partial denials, and full denials.

If a claim is fully approved, the Department should provide borrowers with information regarding when the debt will be discharged, when the Department will request that adverse credit history is deleted (including on CAIVR), and when the borrower can expect a refund (if applicable). Borrowers will decide when to make major decisions based on when this relief is provided.

If a claim is fully denied, the Department should provide borrowers with enough information to determine whether they should attempt to request reconsideration. Proposed section 406(e)(2)(ii) does not do so. While the notice informs borrowers that they can request reconsideration, it only discloses “the evidence upon which the decision was based.” While this information is important, it is insufficient to allow the borrower to determine whether they have “new evidence” as is necessary to request reconsideration.⁴⁰ As a result, we request that the Department develop ways to allow borrowers to review the evidence it considered when deciding borrowers’ claims.

If a claim is partially denied, the Department should also provide borrowers with enough information to determine whether to request consideration, and the proposed regulations fall very short here. Under proposed section 406(e)(1), borrowers who receive a partial denial will only receive a decision stating the “Secretary’s determination and any discharge provided under § 685.408 on the basis of that claim.” This would not allow a borrower to determine why their claim was only partially approved and whether to request reconsideration. As with full denials, the Department should inform a borrower receiving a partial approval/partial denial of what information the Department considered when making its relief determination and provide the borrower with information about how to request reconsideration. Further, the notice should provide the borrower with an anticipated date that relief granted will be effectuated.

Lastly, as we noted above in section 1(E)(v), group members should receive letters informing them of the formation of a group and the decision the Secretary renders on that application.

L. Borrower cooperation during subsequent proceedings

In the proposed section 685.410, borrowers must “reasonably cooperate with the Secretary in any proceeding under this subpart” to obtain a discharge. We urge the Department to make clear that it will not withhold a discharge simply because a borrower does not respond to a communication, particularly when a claim has already been approved, and to make clear that it will not reinstate a borrower’s loans after they have been provided relief. Many low-income borrowers do not have stable housing and frequently change addresses, phone numbers and email addresses. Further, their lives are often extremely busy as they navigate working multiple jobs, caring for children and extended family members, and planning how to afford their families’ necessities. And after a borrower’s claim is granted or they receive a discharge, borrowers will often move on and will not keep their contact information current on studentaid.gov or watch for Department communications. They should not be punished with loss of a discharge.

⁴⁰ Proposed section 685.407(a)(1)(iii) allows borrowers to provide evidence not previously provided when requesting reconsideration.

M. Borrower Defense to Repayment Post Adjudication: Reconsideration Process

The proposed reconsideration process is a marked improvement from the processes described in prior regulations.⁴¹ By allowing borrowers to have their loans in forbearance and stopping the accrual of interest during the pendency of adjudication, the Department will not place borrowers who exercise their reconsideration rights in a worse position. In addition, we support the Department’s proposal to allow both individuals and third-party group requestors to request reconsideration. We recommend that the Department take two steps to strengthen the reconsideration process. First, the Department should clarify that reconsideration is a borrower’s right and allow individual borrowers to explain why the decision rendered was wrong and request review of a decision by a second Department official. Second, we recommend that the Department broaden third-party requestors’ bases to request reconsideration.

i. Provide borrowers with an unqualified right to reconsideration

We ask that the Department provide borrowers who are denied full relief with the right to request that a second Department official evaluate whether the first adjudicator made errors when assessing the borrower’s facts or applying the law. Providing borrowers with the right to reconsideration increases the likelihood of a just and expedient outcome, as the borrower can assert how the initial Department decision mistook fact or law and can receive a second review. The proposed language is unnecessarily narrow; the Secretary must “accept[] [a request] for reconsideration,” indicating that the Secretary has the discretion to deny requests for reconsideration, and the regulatory language notes that the borrower can only request reconsideration where they assert an administrative or technical error or a state law claim, or where they submit new evidence. Under the proposed language, if a borrower believes the Department official adjudicating their claim made an error interpreting their facts or law, they will be forced to challenge the Department’s decision in court—a process that will be more burdensome for the Department and the borrower.

Instead, we recommend that the Department provide borrowers with a mandatory right to request reconsideration of prior decisions, without limitation. While the expanded eligibility requirements provide more clarity on what claims will be granted for relief, the decisions still involve a layer of subjectivity, particularly with regards to whether misrepresentations were material. In addition, the Department’s proposed partial relief tests invite a large amount of subjectivity. The proposed partial relief standards note that claims “that did not involve the educational service provided” or “did not involve the outcome of the borrower’s education”—claims that may involve ineligibility for licensure in the profession the borrower is training for or

⁴¹ The 2019 did not include a reconsideration process. The 2016 rules provide a reconsideration process for claims made under the 1994 state law standard and the 2016 federal law standard. The 2016 Rules allow a borrower to request that the Secretary reconsider a decision to deny or partially deny the borrower’s claim if they could submit new evidence in support of that claim. If the Secretary accepts the request for reconsideration, the Secretary provides the borrower with an opt-out forbearance and stops collections.

the employment rate of graduates—are not automatically eligible for full relief, even though they may have been the reason the borrower ultimately decided to enroll in the institution. Borrowers should have the right to request reconsideration of these types of subjective assessments by a second unbiased Department official to make sure that the right decision was reached.

ii. Broaden third-party requestors’ ability to request reconsideration to allow the submission of new evidence.

In addition, the proposed regulations provide third-party group discharge requestors with a narrow basis for reconsideration: only if they request the application of a state standard, explain why the state standard is more generous than the federal standard, and articulate how the state law should lead to a borrower defense. This limitation threatens to create perverse results. First, as we have noted above, state requestors should be permitted to assert state law claims during the initial adjudications. In states where state law is more expansive than the federal standard, borrowers will be harmed by years of additional waiting, as the state requestor will need to wait for a partial or full denial before being permitted to assert the state law claim.

In addition, narrowly limiting the grounds to request reconsideration incentivizes state requestors to delay applying for relief, which will ultimately leave borrowers in repayment—and for defaulted borrowers, involuntary collections—for longer than necessary. For example, if a third-party requestor discovers relevant evidence to their group application after a decision has been rendered, they will not be able to use that evidence to request that the Secretary reconsider his or her decision. Limiting reconsideration in this way incentivizes third-party requestors to wait to initiate a group application until they are convinced they have uncovered all the evidence that exists, even if they have enough evidence to show that borrowers are being harmed by their school. While the state requestor exhausts every investigative path before submitting an application, the predatory school in question will continue to profit off of borrowers’ federal aid and taxpayer dollars will be wasted. To remedy this perverse incentive, the Department should allow third-party requestors to request reconsideration on the basis of new evidence.

N. Amounts to be Discharged/Determination & Partial Relief

The proposed relief provisions are, in many ways, a marked improvement from both the 2016 and 2019 Rules. We applaud the Department’s proposal to refund borrowers’ amounts paid, regardless of when the borrower applied for relief, and we are encouraged to see that the Department proposes to apply a presumption of a full discharge to all granted claims. However, we are concerned that the proposed regulatory language increases burden and provides the Department with too much discretion to issue inconsistent and unfair relief determinations as compared to providing full discharges for all granted claims, or more narrowly constraining limited circumstances where partial relief may be awarded. We believe improvements are warranted so the Department will restore borrowers’ faith that the borrower defense process is fair and yields consistent results.

i. The Department should not authorize partial relief, or, at a minimum, should more narrowly tailor the availability of partial relief

Although the proposal to presume full relief is an improvement, we are troubled by the Department's continued inclusion of a partial relief rule, as it can be manipulated to deprive borrowers of critical relief. We urge the Department to instead provide full federal loan discharges to all borrowers with meritorious borrower defenses, consistent with its practice of providing full discharges for school closure or misconduct in falsely certifying loans.

a. Full relief is appropriate, and even full discharges will never fully remediate the harm a borrower experiences as a result of school misconduct.

As an initial matter, it is important to recognize that even full loan discharges via a successful borrower defense will never fully remediate the harm predatory school conduct causes a borrower. The extent of the injury borrowers suffer after being lured into enrolling into schools and taking out substantial debt on the basis of false promises or abusive and unfair recruiting tactics generally exceeds their federal student loan debt for many reasons:

- First, 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 2012 Senate HELP 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.⁴²
- Second, our clients also suffer significant consequential economic damages as a result of the time and other costs of attending predatory schools, including lost wages for our many clients who quit jobs or reduced their hours to attend school, and other economic opportunity losses and childcare expenses.
- Third, 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;⁴³ and other financial hardship stemming from the loan obligations.

⁴² 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.”).

⁴³ Persis Yu, National Consumer Law Center, *Voices of Despair: How Seizing the EITC is Leaving Student Loan Borrowers Homeless and Hopeless During a Pandemic* (July 2020) <https://bit.ly/Road-to-Relief-Student-Debt> (describing how tax offsets impact student loan borrowers).

- Fourth, 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 do not include this type of injury in its relief determinations.

Under states’ 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.⁴⁴ We recognize that section 455(h) of the Higher Education Act specifies that 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 an inadequate remedy. Given this, we urge the Department to provide full discharges for approved borrower defense claims, just as the Department exclusively provides full discharges for approved false certification and closed school discharges.

b. History demonstrates that the discretionary authority to issue partial relief can be manipulated to deprive harmed borrowers of the relief they are entitled to.

In our comments on past rules, legal aid attorneys warned that allowing partial relief for approved borrower defense claims would inevitably result in “unfair and inconsistent outcomes” and “inadequate” relief.⁴⁵ That is exactly what has happened, and may happen again under the proposed rules.

The last seven years are instructive: Using the partial relief authority under the 2016 Rule, Secretary DeVos twice attempted to stop harmed borrowers from receiving fair, consistent, and adequate relief. First, she tried to stop Corinthian Colleges borrowers with approved borrower defenses from receiving the full relief that the prior Administration had determined they should receive.⁴⁶ Second, to reduce borrower relief amounts broadly, she attempted to

⁴⁴ See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §12.3.3 (10th ed. 2021), 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 laws] is the frustration experienced by consumers having to run around to straighten out unfair or deceptive trade practices”).

⁴⁵ See 2016 Legal Aid Comments at 36-40,

⁴⁶ See Amended Complaint, *Calvillo Manriquez v. Cardona*, Case No. 3:17-cv-07210-SK, ECF No. 33 (N.D. Cal. Mar. 17, 2018).

implement a poorly contrived partial relief policy, which the Department noted “includ[ed] mathematical impossibilities such as requiring average earnings for a group of borrowers to be below \$0.”⁴⁷

This abuse of partial relief caused tremendous harm to our clients. The uncertainty around relief caused our clients anxiety and distress, as they could not predict what would happen to their loans even if their claims were granted. The amount of relief each borrower would receive appeared to be mostly a matter of shifting political winds. Further, it made many borrowers distrustful of the borrower defense process, and question the value of applying. And at the most practical level, “partial” relief was often meaningless: for low-income borrowers whose IDR payments, wage garnishments, or Social Security offsets were insufficient to cover even the interest accruing every month on their loan, a partial reduction in their balance owed did them little good. It did not meaningfully change their student loan burden or remedy the harm they suffered.

c. Allowing for partial relief imposes unnecessary risk and burden to harmed students.

Although the Department intends that “the circumstances in which a borrower has an approved claim but receives a partial discharge would be limited,” we are concerned that the proposed test to rebut the presumption of full relief is sufficiently amorphous to threaten the value of the presumption. A future administration could twist the meaning of “educational services” or “the outcomes of a borrower’s education” to deprive harmed borrowers the relief they are entitled to. Given what has happened over the last seven years, our concern is warranted.

While the Department worries that, in theory, borrowers may submit claims that would be eligible under the proposed standards but would not merit full relief, we urge it to remember that the proposed eligibility rules already exclude trivial claims and condition approval on a finding that the borrowers’ school broke the law or engaged in other harmful conduct.⁴⁸ Further, to date, the Department has yet to approve any borrower defense claims for which partial relief would be appropriate. Fear of a small number of theoretical borrowers with approved applications receiving a “relief windfall” should not justify creating a rule which risks delivering insufficient relief to the type of severely-harmed borrowers who have actually had borrower defense claims approved.

Further, schools will not be treated unfairly if full relief is applied for all granted claims. As the Department has explained in its NPRM, schools will have the opportunity to challenge the

⁴⁷ 87 Fed. Reg. at 41909.

⁴⁸ To qualify as a borrower defense, the proposed standard requires that the institution made a substantial misrepresentation or omission. For the misrepresentation or omission to be substantial, section 668.71 requires that a person would reasonably rely on the statement or omitted information. The requirement of reasonableness inherently omits trivial misrepresentations or omissions from qualifying for relief in the first place. Similarly, as discussed above, each of the grounds that constitute aggressive and deceptive recruitment cause borrowers significant harm.

amount of liability they face from a granted borrower defense claim via the program review process the Department has specified.⁴⁹

- d. If the Department insists on maintaining its partial relief authority, it should only rebut the presumption of full relief where “the approved borrower defense claim relates to an easily quantifiable sum” related to books or materials or, at a minimum, should clearly and expansively define “educational services” and “the outcomes of a borrower’s education.”**

If the Department maintains partial relief authority, then we urge it to more closely tailor the availability of partial relief to the circumstances in which it envisions the standard will apply to reduce the risk that the limited authority will be abused. We recommend that the Department only allow the authority to apply to easily quantifiable sums that are related to books, supplies, and materials, as described in proposed section 685.408(b)(1). If the Department envisions other types of claims for which it believes partial relief would be appropriate, it should list them with the same level of specificity the Department applied in that section.

If the Department opts to keep 685.408(b)(2) and (3), which permit partial relief for claims that do not involve “the educational services provided” or “the outcomes of the borrower’s education,” then it should, at a minimum, define those terms clearly and expansively in the final regulations. The explanation of the Department’s intent at 87 Fed. Reg. 41,910 is helpful, but the regulatory language itself is sufficiently vague to invite uncertainty and the risk of problematic future application.

- e. The Department should allow borrowers to respond and provide additional evidence before a final partial relief decision is rendered.**

We further urge the Department to include language specifying that if the Department grants partial relief, it must explain in writing the basis for its determination and how it calculated the proposed amount of relief. It should then provide the borrower with the opportunity to respond and to submit evidence or argument in support of further relief. This is important because borrowers will generally not—and should not be expected to—address the details of how to quantify the harm they experienced in their original application. An explanation of the basis for the decision of partial relief and how the amount was calculated will allow the borrower to narrowly respond with any additional evidence or argument relevant to that calculation. The Department should then be required to consider the borrower’s response in making a final determination awarding partial relief. This would ensure the borrower is afforded a reasonable opportunity to respond to evidence that the Department relies upon in rebutting the presumption of full discharge and in calculating the amount of relief, and would improve the accuracy of the Department’s calculations.

⁴⁹ 87 Fed. Reg. at 41912.

ii. The Department should make clear that it will restore Title IV eligibility and delete adverse credit history reporting for borrowers who receive a full discharge.

Borrowers frequently come to legal aid organizations seeking help because they want to return to school, are worried about trying to obtain a car loan, or want to see if they will qualify for a mortgage. Under the prior standards, the decision to delete adverse credit history was discretionary, leaving borrowers in a state of limbo and unsure whether a borrower defense application would actually advance their goals. The language in proposed section 685.408(i) is an improvement, but leaves uncertainty around who will receive credit fixes or have their Title IV eligibility restored, stating “The Secretary affords the borrower such further relief [such as a restoration of Title IV benefits or the deletion of adverse credit history] as appropriate under the circumstances.” We request that the Department clarify that these forms of relief are mandatory when a borrower is provided with a full discharge. We propose that section (i) is replaced with the following language:

(i) For borrowers who receive a full discharge, the Secretary will also

(1) Determine that the borrower is not in default on any loan and is eligible to receive assistance under title IV of the Act.

(2) Fully restore the borrower’s lifetime Pell grant eligibility.

(3) Update or delete adverse reports the Secretary previously made to consumer reporting agencies regarding the borrower's Direct Loan.

(j) For borrowers who receive a partial discharge, the Secretary will afford the borrower such further relief as appropriate under the circumstances.

O. Recovery from Institutions (Borrower Defense to Repayment—Recovery from Institutions & Time Limit for Recovery from the Institution)

In its 2016 Rule, the Department separated the adjudication of an individual borrower’s application for relief from the question of whether to undergo a recoupment process against the school,⁵⁰ and only imposed mandatory recoupment where it opted to initiate a group discharge against an open school.⁵¹ Similarly, the 2019 Rule made recoupment discretionary for all claims.⁵² Yet, despite expressing an intent to further decouple borrower relief from institutional

⁵⁰ See 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]”).

⁵¹ See 34 CFR § 685.222(h)(5)(i) (“The Secretary collects from the [open] school any liability to the Secretary for any amounts discharged or reimbursed to borrowers”).

⁵² 34 CFR § 685.206(e)(16)(i).

recoupment in the preamble of the NPRM,⁵³ the proposed language in 34 CFR 685.409 reduces the Department’s discretion to elect not to pursue school recoupment for borrower defense discharges, makes recoupment proceedings mandatory for new loans unless “(1) The cost of collecting would exceed the amounts received; or (2) The claims were approved outside of the limitations period in paragraph (c) of this section.”⁵⁴ Elsewhere in the NPRM, the Department explains that schools will be able to use the program review process to challenge the amount of liability they are subject to. It states, “The Department proposes to separate the process of reviewing and approving borrower defense applications from the recoupment process. As part of that change, the Department would handle the process of recoupment through the same existing procedures we currently use to assess program review liabilities.”⁵⁵

While we support the Department’s proposal to separate the borrower defense process from the school recoupment process in all cases, we are concerned that the Department’s recoupment proposal in 34 CFR 685.409(a)-(b) would too narrowly constrain the Department’s discretion to forgo recoupment when in the best interest of students or borrowers.

By requiring that the Department seek complete recoupment from schools and school owners in all but a few narrow circumstances, the proposed regulations will inadvertently constrain how much relief the Department will be willing to provide borrowers.⁵⁶ Mandatory recoupment threatens to shift the Department’s focus from whether borrowers have been harmed by a school’s unlawful conduct—including conduct that may have ended, or have been the result of an “innocent mistake”—to how liability will impact the school which committed the violation. We fear Department officials will be reluctant to grant borrower defense relief when doing so might result in school liability that would push it towards closure. Additionally, if the Department is required to pursue recoupment, and knows schools will fight such recoupment, Department officials will reasonably predict that granting borrower defense claims will create substantial additional administrative, legal, and resource demands on the Department – decreasing the likelihood that meritorious claims will be granted or that group processes will be pursued. In contrast, if the Department maintains more discretion to decide when to pursue recoupment, the Department can more confidently grant borrowers relief wherever they are eligible, knowing that it can decline to pursue full recoupment where doing so would harm current students or tie up scarce Department resources better spent elsewhere—including investigating and resolving more borrower defense claims.

⁵³87 Fed. Reg. at 41912.

⁵⁴ Proposed 34 CFR § 685.409(a).

⁵⁵ 87 Fed. Reg. at 41912.

⁵⁶ Indeed, Department officials may attempt to use the partial relief rules proposed in 34 CFR § 685.408 to reduce the amount of relief provided to deserving borrowers.

In addition, it pits unrepresented borrowers 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.

While we strongly support the Department's efforts to hold schools accountable for harming students, we believe the Department should retain its discretion to determine when to use borrower defense recoupment and remind it that it has other authorities to use to accomplish this goal in instances when recoupment may not be in borrowers' or students' best interests. For example, the plain language of proposed Subparts F and R provide the Department with an independent basis for the Department to fine institutions for engaging in misconduct⁵⁷ or discontinue institutions' participation in the federal aid program. By using the full range of its authorities to hold schools accountable, the Department can more effectively pursue both borrower relief and school accountability.

2. Arbitration

We applaud the Department's proposal to reinstate the condition that schools that wish to receive Title IV funding must agree not to use arbitration clauses and class action waivers to avoid accountability for borrower defense. This condition is consistent with the FAA and the federal policy in favor of arbitration, *see California Ass'n of Private Postsecondary Sch. v. DeVos*, 436 F. Supp. 3d 333, 344 (D.D.C. 2020), vacated as moot, No. 20–5080, (D.C. Cir. Oct. 14, 2020). In addition, it advances the Department's and the public's interest in transparency, institutional accountability, and borrowers' rights.

We also support the proposed language in 34 C.F.R. §§ 685.300(g) and (h), which would require the Secretary to publish arbitral and judicial records in a centralized database accessible to the public. These provisions are crucial to ensure regulators and law enforcement as well as prospective students, current students, borrowers, and the public at large have access to information regarding all legal claims filed against schools receiving Title IV funding that could be the basis for borrower defense, and that reveal potentially significant school misconduct.

However, we believe that the proposed rule should go further to protect borrowers, the Department, and the public. One significant weakness of the proposal is illustrated by the actions taken by Florida Career College ("FCC") and its parent, International Education Corporation. In *Britt v. IEC Corp.*,⁵⁸ plaintiffs representing a putative class of students at FCC asserted borrower defense claims, including violations of the Florida Deceptive and Unfair Trade Practices Act, breach of contract, and racial discrimination under the Equal Credit Opportunities Act and Title VI of the Civil Rights Act. Although the 2016 regulations were still in effect when the lawsuit

⁵⁷ Proposed 34 CFR § 668.71(a)(4). 34 CFR § 668.84 allows the Secretary to impose a fine of \$62,689 per violation on institutions that violate the Higher Education Act or any regulatory authority therein.

⁵⁸ No. 20-60814-cv (S.D. Fla. filed April 20, 2020).

was filed, the defendants moved to compel arbitration; the district court denied the motion without prejudice to refiling. After the 2016 regulations were repealed on July 1, 2020, FCC renewed its efforts to compel arbitration. The defendants pointed to language qualifying the notice that it sent in “compliance” with §§ 685.300(e) and (f): “These provisions are included pursuant to U.S. Department of Education regulations at 34 C.F.R. § 685.300(e) and (f), respectively, *and shall apply to your arbitration agreement with Florida Career College for any period during which these regulations are in effect.*”⁵⁹ They argued that, because the 2019 Rule had taken effect, the waiver was no longer valid—despite the Eleventh Circuit’s holding, in *Young v. Grand Canyon University, Inc.*, 80 F.3d 814, 816 n.1 (11th Cir. 2020), that the 2020 repeal was not retroactive. The district court agreed, and the case was compelled to arbitration on September 13, 2021.⁶⁰

The *Britt* plaintiffs and their counsel vigorously disagree with this result, and they filed motions for reconsideration and for interlocutory review that are still pending before the district court. Nevertheless, this scenario shows the lengths that some schools will take to exploit any ambiguity in the Department’s regulations.

To prevent such a situation from arising under the proposed rule, the Department should revise §§ 685.300(e) and (f) to make it clear that institutions must provide the required notices verbatim and without qualification. The Department should also clarify that a school’s failure to provide notices with the exact language in the regulation—and, of course, failure to provide any notices at all—will violate that school’s program participation agreement. Finally, the Department should commit to taking immediate enforcement action against any school that tries to circumvent §§ 685.300(e) and (f) by altering, delaying, or failing to provide the required notice.

We also note one superficial issue that can be easily corrected. The Department has taken steps to clarify the definition of “borrower defense claim” in § 685.300(i), but some confusion remains. As the Department saw in *Young v. Grand Canyon Univ., Inc.*,⁶¹ such confusion risks entangling borrowers’ claims in unnecessary, obstructionist motions practice. This could be avoided by changing “*Borrower defense claim* means an act or omission that is or could be asserted as a borrower defense” to “*Borrower defense claim* means **a claim based on** an act or omission that is or could be asserted as a borrower defense.”

⁵⁹ *Id.* at 2021 WL 4147714, at *3 (emphasis added).

⁶⁰ *Britt v. IEC Corp.*, No. 20-60814-cv, 2021 WL 4147714, at *1 (S.D. Fla. Sept. 13, 2021) (“Because the now-excised regulations—which conditioned federal aid on the school’s waiver—are no longer in effect, FCC’s waiver has expired, and the parties are bound by their original agreement to arbitrate.”)

⁶¹ 980 F.3d 814 (11th Cir. 2020).

3. Interest Capitalization

We strongly support the Department’s proposal to eliminate interest capitalization for Direct Loans in instances where it is not required by statute. These instances include when a borrower enters repayment, exits forbearance, or defaults; annually after periods of negative amortization under the alternative and ICR plans; and when a borrower who is repaying under Pay as You Earn (PAYE) or REPAYE fails to recertify income on time or chooses to leave the plan. This proposal earned the consensus support of the negotiated rulemaking committee for good reasons: it reduces added costs and barriers to repayment for student loan borrowers, and particularly for the borrowers who face the greatest challenges in repayment.

While we support the consensus proposed regulations, we do address one technical error below that we urge the Department to correct in its final rule: The NPRM fails to include the elimination of capitalization when a borrower in PAYE no longer has a partial financial hardship, despite the Department’s statement to the committee—immediately prior to the consensus vote—that it would include elimination of capitalization in this instance.

A. Benefits of Eliminating Interest Capitalization for Low-Income Borrowers and Borrowers of Color

Capitalization increases the debt burden on low-income and financially vulnerable borrowers by compounding the cost of borrowing to access higher education. Ending capitalization to the extent legally possible improves affordability of higher education for all student loan borrowers, and for those with the most limited financial means in particular.

Ending interest capitalization is particularly important for low-income and financially vulnerable borrowers, and for borrowers of color, because such borrowers are the most likely to experience substantial interest accumulation and capitalization as a result of difficulties with repayment and reliance on program flexibilities that, perversely, penalize them with interest accrual and capitalization. Distressed borrowers are the most likely to experience forbearances, delinquencies and default, negative amortization in income-driven repayment plans, and difficulties recertifying for income-driven repayment—all of which lead to outsized accrual of unpaid interest that is then capitalized in many of these instances. As the Department found in its own longitudinal data, borrowers from low-income backgrounds and Black borrowers were substantially more likely to owe more 12 years after entering college than borrowers from higher income households and White borrowers, and were also substantially more likely to experience interest capitalizing forbearances.⁶²

Interest capitalization harms legal aid clients. Legal aid attorneys have worked with many low-income borrowers who are confused and devastated to find out that they owe much more than they originally borrowed, even after years or decades in repayment or collection. Even for

⁶² 87 Fed. Reg. at 41,952.

the small number of low-income borrowers who are able to access and stay in IDR long-term, and thus may be on track to have the extra capitalized interest canceled after 20 to 25 years in the program, capitalization has strong negative impacts. Our personal experience working with clients is consistent with qualitative research finding that balance growth is psychologically distressing and de-motivating, contributing to many borrowers' skepticism that the student loan system has set them up to fail.⁶³ Further, borrowers whose balances increase experience worrisome debt-to-income ratios and often negative net worth long after leaving school, hindering their ability to build financial security for themselves and their children. Many of our low-income clients experience default well before reaching IDR forgiveness, and thus are subject to collection of the entire inflated balance, including significant accrued and capitalized interest. For these borrowers, capitalized interest often means that they and their families have less money to survive on – it means more money is taken from their social security checks, Earned Income Tax Credit payments in tax refunds, and garnished paychecks.

Eliminating unnecessary interest capitalization is also important to reducing racial inequities in the student loan program. A growing body of research reflects that Black borrowers are disproportionately burdened by the federal student loan system, including because Black borrowers—who are burdened by higher debt-to-income ratios and have less access to intergenerational wealth—experience substantially more balance growth than White borrowers.⁶⁴ For example, the Department highlighted BPS data in this NPRM, finding that 52 percent of Black borrowers who had not consolidated their loans had a higher principal balance 12 years after they entered school versus what they originally borrowed—compared to 22 percent of White borrowers. Additional independent research has found that overall, 75% of student loans in Black-plurality census tracts exceeded the amount originally borrowed, compared with 51% of student loans in White-plurality census tracts,⁶⁵ and that 20 years after starting college, Black borrowers still owed 95% of the principal borrowed, whereas white borrowers only owed 6%.⁶⁶ Eliminating capitalization of interest where not statutorily mandated will not solve the

⁶³ The Pew Charitable Trusts, *Redesigned Income-Driven Repayment Plans Could Help Struggling Student Loan Borrowers* (2022), <https://www.pewtrusts.org/en/research-and-analysis/reports/2022/02/redesigned-income-driven-repayment-plans-could-help-struggling-student-loan-borrowers>; J.B. Mustafa and J.C.W. Davis, *Jim Crow Debt: How Black Borrowers Experience Student Loans* (The Education Trust, 2021), https://edtrust.org/wp-content/uploads/2014/09/Jim-Crow-Debt_How-Black-Borrowers-Experience-Student-Loans_October-2021.pdf; The Pew Charitable Trusts, *Borrowers Discuss the Challenges of Student Loan Repayment* (2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/borrowers-discuss-the-challenges-of-student-loan-repayment>.

⁶⁴ J Geiman & Alpha S. Taylor, *Disproportionately Impacted: Closing the Racial Wealth Gap through Student Loan Cancellation, Payment Reforms, and Investment in College Affordability* (National Consumer Law Center and Center for Law and Social Policy, June 2022), https://www.clasp.org/wp-content/uploads/2022/06/2022_Disproportionately-Impacted.pdf.

⁶⁵ Laura Beamer & Eduard Nilaj, *Student Debt and Young America* (Jain Family Institute, Feb. 2021), https://hef.jfiresearch.org/millennial-student-debt/student_debt_young_america/.

⁶⁶ Laura Sullivan, Tatjana Meschede, Thomas Shapiro, and Fernanda Escobar, *Stalling Dreams: How Student Debt is Disrupting Life Chances and Widening the Racial Wealth Gap* (Institute on Assets and Social Policy, Sep. 2019), <https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf>.

disproportionate burden of student loan debt for Black borrowers, but will reduce some of the excess costs imposed on Black borrowers going forward.

B. Reframing the “Cost” of Eliminating Interest Capitalization

The Department has correctly identified that the only potential “cost” of the proposed elimination of interest capitalization is the “transfer of benefits from the Federal government to the eligible borrower, primarily forgone revenue from payments on the higher balance and resulting increase in interest due to elimination of the capitalizing events listed above.” This is better understood as the reduction of unwarranted inflation of costs for those who rely on student aid to access higher education, and a reduction in using interest capitalization to raise government revenues.

We additionally wish to note that there is no reason for the Department to capitalize interest other than as a way to extract additional revenues from student loan borrowers. In particular, in our experience working with borrowers, capitalizing interest is not an effective method of influencing borrower behavior, such as reducing reliance on forbearances, decreasing default, or increasing on-time IDR recertification. Borrowers that we work with, like the vast majority of borrowers, are not aware that forbearances, missed recertification, or default trigger capitalization. Many do not know what capitalization means and how it impacts their overall costs of borrowing. Further, attempting to avert these capitalization events through borrower education is destined to fail. Borrowers often rely on forbearances, or miss recertification deadlines, because they are already too overwhelmed by the student loan system, or are not receiving the information they need from servicers, and as a result, are struggling to access and maintain their best financial options. Attempting to address the problem by having servicers explain further penalties for failures to successfully navigate the program would be ineffective.

C. Technical Error: Section 685.209(a)(2)(iv)

In finalizing the proposed regulations, we urge the Department to correct an apparent technical error in proposed Section 685.209(a)(2)(iv), which deals with interest capitalization in PAYE. The corrected language should delete all of Section 685.209(a)(2)(iv), and thus eliminate interest capitalization when a borrower is determined to no longer have a partial financial hardship in PAYE. This is consistent with the Department’s representation of the consensus language for this provision to the rulemaking committee and its stated intention to eliminate interest capitalization where not required by the HEA.

The language in the NPRM amending Section 685.209(a)(2)(iv) mirrors the written proposed language circulated for vote by the rulemaking committee at the final meeting, which leaves in place capitalization in the event of loss of PFH. However, the Department made an oral correction to that language immediately prior to the final committee vote on the proposal that resulted in consensus. As confirmed by the transcript from December 6, 2021, ED negotiator

Jennifer Hong informed committee members that there was a “technical error” in the circulated language whereby ED had intended to delete “everything under 209,” including the “line there that wasn't deleted regarding partial financial hardship.” The Department had incorrectly left in the provision in Section 685.209(a)(2)(iv)(A)(1) capitalizing interest when a borrower in PAYE no longer had a PFH, contrary to the Department’s intent and prior discussion with committee members (Tr. at 28-29). In response to a question from the legal aid negotiator Persis Yu, Ms. Hong further confirmed that the Department’s “intention is that [P]ay [A]s [Y]ou [E]arn will not capitalize when the borrower ceases to have a partial financial hardship.” (Tr. at 30).

We urge the Department to correct this technical error that departs from the consensus regulations by deleting Section 685.209(a)(2)(iv) from the final regulations.

4. Closed School Discharge

We support the Department’s closed school discharge proposal and applaud the Department’s intent to expand access to relief to more borrowers harmed by their schools’ closure. We particularly commend the Department’s proposals to remove the “comparable program” exclusion, vastly expand eligibility for automatic discharges and shorten the waiting period before such discharges, and increase the “lookback periods” specifying which borrowers who withdrew prior to closure are eligible for relief. Further, we strongly support the proposal to extend automatic relief eligibility to encompass students who attended schools that closed before 2014.

While we strongly support many of the proposed amendments, we recommend that the Department strengthen its proposed regulations further in four ways:

- (1) Implement technical fixes to clarify that all borrowers will be eligible for relief under the new regulations and that eligible borrowers who do not enroll within a teach out program shall have their loans automatically discharged within one year of the school’s closure,
- (2) Make the extension of eligibility timeframes mandatory instead of discretionary;
- (3) Require that closing schools inform the Department of their imminent closure contemporaneously with when they announce the closure publicly and provide borrowers with ED-specified notices informing them of their rights;
- (4) Remove language penalizing borrowers who fail to cooperate with the Department after a closed school discharge has been granted.

Additionally, we recommend a technical amendment to correct an incorrect cross-reference in § 685.214(a)(1).

A. Support for removal of “comparable program” exclusion and the closure of the degree stacking loophole

We strongly support the Department’s proposal to amend the discharge eligibility standard to render all borrowers who were not able to complete their program because their

school closed eligible for relief, regardless of whether they transferred one or more credits to a comparable program. This change was long overdue, as the statutory language mandates that the Secretary provide a complete discharge to all borrowers who are “unable to complete the program in which the student is enrolled due to the closure of the institution.”⁶⁷ Further, with this unnecessary restriction removed, the Department can automate relief, as the Department will no longer need to determine whether or not a borrower transferred credits from the closed school to a new program. Given the extremely low closed school discharge individual application rate, we cannot overstate how beneficial this change will be for borrowers.

Legal aids have observed that the “comparable program” exclusion has barred borrowers who were harmed by their school closure from obtaining much-needed relief.⁶⁸ We are glad that the Department has now recognized that borrowers who re-enroll after their schools close are still harmed by the school closure.⁶⁹ They are often unable to transfer all of the credits (or any credits) from the closed school, and must borrow additional semesters’ worth of debt to complete a new program. According to a 2019 GAO study, only 4% of students were able to transfer credits from for-profit schools between 2004 and 2009.⁷⁰ Only 4% of for-profit students were able to transfer their credits to public schools, and even then, they were unable to transfer 94% of the credits they obtained. Even for-profit students transferring to another for-profit school lost an average of 83% of their credits.⁷¹

In addition, we are pleased that the Department heeded legal aid negotiators’ calls to amend the eligibility standards to address the situation where a school manipulates students pursuing a bachelor’s degree into first enrolling in diploma or associate degree programs as mandatory prerequisites, a practice termed “degree stacking” or “credential stacking.” In these circumstances, loans obtained to fund the first semesters of college are not eligible for discharge under current regulations because they are treated as funding a completed program, even though the borrower was unable to complete their desired degree due to school closure. For example, as the legal aid negotiators explained in a memorandum to the Department,⁷² ITT Tech was notorious for degree stacking. Admissions representatives would tell students it was enrolling them in a bachelor’s degree program, but would then require students to complete an associate degree program before enrolling them in the bachelor’s degree program, with the associate degree credits counting towards the bachelor’s degree. When ITT closed, students pursuing

⁶⁷ 20 U.S.C. § 1087(c)(1).

⁶⁸ Robyn Smith, *Revisiting Relief for Students Harmed By School Closures* at 127-28 (Nov. 2020) <https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf>

⁶⁹ 87 Fed. Reg. at 41922-24.

⁷⁰ U.S. Gov’t Accountability Off., GAO-17-572, *Higher Education: Students Need More Information to Help Reduce Challenges in Transferring College Credits* (Aug. 2017).

⁷¹ *Id.*

⁷² Joshua Rovenger & Persis Yu, Memorandum to the Department of Education (Oct. 21, 2021) <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/2021-10-21csdmemo.pdf>.

bachelor's degrees in stacked programs appeared to have completed an associate degree, rendering the associated debt ineligible for a closed school discharge, even though they had enrolled in a bachelor's degree program and had been unable to complete it due to the school's closure. The Department's proposal will prevent this injustice.

B. Support for increasing access to automatic discharges and technical fixes to ensure automatic discharges are provided to all eligible borrowers within a year of school closure.

We strongly support the Department's efforts to increase access to automatic closed school discharges. Below, in Section B(i), we explain the basis for our support generally and as applied to schools that closed before 2014 in particular. In Section B(ii), we explain the basis for our support for the Department's proposal to move from providing automatic discharges three years after a school closes to within one year of the closure. In Section B(iii), we identify technical fixes to the proposed regulatory language to fulfill the Department's stated intent of ensuring that going forward, all eligible borrowers receive automatic discharges within a year of school closure. In Section B(iv), we identify technical fixes to the proposed regulatory language to fulfill the Department's stated intent of making automatic discharges non-discretionary for eligible borrowers.

i. Improving access to automatic discharges—including for students who attended schools that closed before 2014—will change the lives of many low-income borrowers who would otherwise not know they are eligible for relief

The Higher Education Act (HEA) contains a broad closed school discharge mandate. It says: "If a borrower who received, on or after January 1, 1986, a loan made, insured, or guaranteed under this part and 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 . . . then the Secretary *shall* discharge the borrower's liability on the loan . . ." (emphasis added).⁷³ Yet, for far too long, the Department's regulations contained barriers that prevented borrowers who were unable to complete their program when their school closed from obtaining debt relief. These barriers included a "comparable program" exclusion, which resulted in borrowers who even transferred one credit to a "comparable" program being ineligible for relief which was the basis for an unnecessarily narrow automatic discharge provision which only provided relief to borrowers who did not enroll in any new program after a three year wait period. We strongly support the Department's proposal to remove these barriers.

⁷³ 20 U.S.C. § 1087(c)(1).

From the beginning of 2014 through the end of 2018, close to half a million students were blind-sided by the sudden closure of over 1,200 college campuses.⁷⁴ Of those campuses, 88 percent were operated by for-profit colleges.⁷⁵ The students whose lives were upended were overwhelmingly women, low-income Pell-Grant recipients, and people of color.⁷⁶

These students are not alone, and abrupt for-profit school closures are not a new malady. Since the HEA was first amended to make financial aid available to for-profit postsecondary schools, hundreds of thousands of other students have been displaced by school closures.⁷⁷ Unfortunately, as we have noted in past comments to the Department⁷⁸ and as the 2021 GAO report confirmed,⁷⁹ many borrowers harmed by school closures are wholly unaware of their eligibility for relief or how to access it. The GAO report found that even in the best case scenario, when students eligible for a closed school discharge are sent a notice or application, only half of eligible borrowers apply on their own,⁸⁰ and many ultimately default on their debt.

The Department's proposal to eliminate the restrictions on automatic discharges for schools that closed before 2014 will ensure that borrowers who have been suffering the longest finally obtain relief. For years, legal services organizations have had a constant influx of borrowers whose schools closed from two to thirty-five years ago—with some attending school as long as 1986. All are low-income, most are Black, Latinx, or other people of color, and most have experienced years of financial hardship caused by defaulted federal loans. Most have no idea that they are eligible for a discharge, while others have been unable to obtain a discharge without the assistance of an attorney. Many have suffered from the punitive consequences of defaulted federal loans for years, if not decades. The Department's failure to provide widespread and automatic closed school discharges to these borrowers has systematically removed wealth from economically disadvantaged families and communities, including communities of color, through the collection of burdensome and invalid debt, often through seizures of wages, tax refunds, and federal benefits.

⁷⁴ Michael Vasquez & Dan Bauman, *How America's College-Closure Crisis Leaves Families Devastated*, Chron. of Higher Educ. (Apr. 4, 2019), available at <https://www.chronicle.com/article/how-americas-college-closure-crisis-leaves-families-devastated/>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See, e.g., David Whitman, The Century Found., *Vietnam Vets and a New Student Loan Program Bring New College Scams* (Feb. 13, 2017), available at <https://tcf.org/content/report/vietnam-vets-new-student-loan-program-bring-new-college-scams>.

⁷⁸ 2016 Legal Aid Comment at 50-58.

⁷⁹ U.S. Gov't Accountability Off., GAO-21-105373, *College Closures: Many Impacted Borrowers Struggled Financially Despite Being Eligible for Loan Discharges* (Sep. 30, 2021) <https://www.gao.gov/products/gao-21-105373#:~:text=Key%20Takeaways,road%20for%20a%20student's%20education>.

⁸⁰ *Id.* Previously, Department officials reported that only 6% of borrowers who attended a closed school submitted an application for relief. Paul Fain, *Best of a Bad Situation?*, Inside Higher Ed (Dec. 9, 2014), <https://www.insidehighered.com/news/2014/12/09/feds-respond-criticism-bid-ccmc-buy-most-cornithian>.

A 2019 GAO report underscored what legal aid organizations have observed. Out of 80,000 borrowers who received discharges after their schools closed between 2010 and 2020, three quarters (73%) of these borrowers were in financial distress with respect to their federal loans, with 52% (17,472) in default and 21% (7,056) were delinquent by 3 or more monthly payments.⁸¹ Indeed, of those who fell into default and received an automatic discharge, more than half did so within a year and a half of their school closing.⁸²

There are likely hundreds of thousands of borrowers whose schools closed between 1986 and November 1, 2013, who continue to suffer from the burden of loan repayment and the consequences of defaulted student loans. We are glad the Department has indicated it will grant these borrowers automatic discharges, and encourage it to make it more clear in its regulations. Borrowers with debts from schools that closed before 2014 have suffered far longer than the borrowers whose schools closed more recently and are equally deserving of automatic relief.

Further, we are grateful for the Department's intent to automatically discharge the debts of borrowers, regardless of whether they transferred credits to a new institution after their school closed. The current rule includes a presumption that borrowers are ineligible for relief unless they prove that they did not transfer even a single credit to the same or similar program. This presumption is deeply flawed. Very few for-profit school students are ever able to transfer credits after a school closure and, even if they do, they typically only transfer a few. This presumption has meant that students who are able to transfer a small number of credits are then obligated to repay both the debt borrowed to attend the closed school and the open school, even though the student almost certainly still needed to repeat classes and spend extra time and debt trying to complete their academic goals. By removing this presumption, the Department is ensuring that borrowers who were harmed by a closed school receive more equitable treatment.

Lastly, as discussed below, we support the Department's intent to reduce the waiting period before an automatic discharge takes effect from three years to one year or less. Making relief turn on whether the borrower completed their program at their closed school (or via teach out) makes sense. Reducing the wait period will reduce the time borrowers spend in limbo, struggling to repay their debt.

Taken together, the proposals to expand eligibility for automatic discharges may increase the degree-completion and job placement rate of borrowers who attended closed schools. Legal aid clients frequently say that they simply ran out of money and could not afford to complete their degree, or that their defaulted debt from a closed school preventing them from re-enrolling

⁸¹ See also U.S. Gov't Accountability Off., GAO-21-105373, *College Closures: Many Impacted Borrowers Struggled Financially Despite Being Eligible for Loan Discharges* at 14-15 (Sep. 30, 2021) <https://www.gao.gov/products/gao-21-105373#:~:text=Key%20Takeaways,road%20for%20a%20student's%20education>

⁸² *Id.*

and getting a second shot at education. In addition, borrowers who attended closed schools often state that their job search was negatively impacted by the reputational harm that occurred after their school closed and that there was no one to help them when they began their job search. By discharging these borrowers' debts, the Department increases the likelihood that these borrowers will re-enroll in another institution and benefit from the open school's relationship with employers and its career services department.

While institutional commenters may argue the Department's proposed improvements to the closed school discharge program do not sufficiently encourage borrowers to complete their program or accept a teach out, those arguments fail. As we have noted in past comments,⁸³ teach-out programs are not always the best option for students. When aware of their options, students often decide that it is better to opt for discharge over participating in a teach-out, including for the following reasons:

- The teach-out school has lower job-placement rates than the original institution, has a worse reputation in the industry in which the student wishes to work, or otherwise has a reputation for offering low-quality education or job placement that makes it unlikely the program will provide sufficient financial gains to afford the student's loans or justify the total financial and opportunity costs.
- The teach-out program will not offer the type of education experience students signed up for and want, such as in-person classes, externship programs, or hands-on training. For example, a recent teach-out only offered online programs to students whose closing institution had provided in-person education in physical classrooms.⁸⁴
- The teach-out program is not reasonably accessible to an individual student due to differences in schedule or location and accessibility by public transit.
- The teach-out program may not offer a sufficiently comparable program or programmatic accreditation needed to work in the field the student desires.
- 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.
- 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 are appropriately skeptical that they may not have the skills or knowledge necessary to obtain or keep the job for which they were trained and to pay for the loans.

⁸³ See e.g. Comments from the Legal Aid Foundation of Los Angeles and the National Consumer Law Center to the Department of Education re: Proposed Regulations on Student Assistance General Provisions, Docket ID: ED-2018-OPE-0076 at 8-9 (July 12, 2019).

⁸⁴ See discussion of ICDC teach-out, *infra*.

- Some students prefer not to continue their education at all. We often hear from students that, because the school experience and closure 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.

The Department’s intended changes, in combination with the improvements we suggest below, strike an appropriate balance and allows students to have the freedom to choose what option is best for them when their school closes.

ii. We support the Department’s proposal to reduce the 3-year waiting period for automatic discharges to a maximum of 1-year.

The 2016 Rules mandated that the Department automatically discharge, without applications, the loans of 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.”⁸⁵ The 2019 Rules amended this regulation to only apply to borrowers whose schools closed between November 1, 2013 and July 1, 2020.⁸⁶ We support the Department’s proposal to restore automatic discharges and to move from a three-year waiting period to a one-year maximum waiting period for three reasons.

First, as we have discussed in much of the prior testimony provided in response to Department proposals, very few closed school students are able to obtain closed school discharges through the application process and many default before obtaining relief. Reducing the automatic closed school discharge wait period will reduce the time borrowers spend struggling to repay dischargeable debt and will help avoid unnecessary defaults. As the Department has admitted based on its own data, “[m]any borrowers eligible for a closed school discharge do not apply.”⁸⁷ In 2014, a Department official noted that only 6% of borrowers impacted by a school closure typically apply.⁸⁸ In 2016, the Department stated that for the period between 2011 and 2015, only about one-fifth, or 20%, of eligible borrowers whose schools closed received a discharge.⁸⁹ At that time, the Department was “concerned that borrowers are unaware of their possible eligibility for a closed school discharge.”⁹⁰ Indeed, in May 2019, Department data showed that low percentages of eligible borrowers from each of the following schools, all of which closed in the prior 7 years, had received closed school discharges: ITT Tech – 34%; Charlotte Law School – 47%; Education Corp. of America – 16%; Vatterott College –

⁸⁵ 81 Fed. Reg. 75,926 (Nov. 1, 2016).

⁸⁶ 34 C.F.R. § 685.214(c)(3)(ii).

⁸⁷ 81 Fed. Reg. 39,329, 39,369 (June 16, 2016).

⁸⁸ Paul Fain, *Best of a Bad Situation?*, Inside Higher Educ. (Dec. 9, 2014)

<https://www.insidehighered.com/news/2014/12/09/feds-respond-criticism-bid-ecmc-buy-most-corinthian>

⁸⁹ 81 Fed. Reg. 75,926, 76,065 (Nov. 1, 2016) (“there were 43,268 students attending closed schools, of which 9,606 students received a closed school discharge.”).

⁹⁰ 81 Fed. Reg. at 39,369.

19%; and Dream Center Educ. Holdings – 28%.⁹¹ While they

Second, providing automatic discharges within one year from the date of school closure will help to ensure impacted students are promptly made aware that they may again seek financial aid to pursue a fresh start with postsecondary education. When loans for a closed school are discharged, a former student can get a clean slate, free of student debt associated with a failing school, and with restored student aid lifetime eligibility. Borrowers are often motivated to re-enroll in another school shortly after their school's closure and a prompt discharge will allow them to do so.

Third, while institutional commenters may oppose the reduction of the automatic discharge waiting period to one year; there is *no* rational basis to maintain a three-year waiting period if the Department also adopts its proposal to repeal the credit-transfer eligibility restriction. The three-year waiting period was predicated on the provision barring discharge eligibility for borrowers who transfer one or more credits to a comparable program.⁹² The idea was that if a student did not re-enroll in an institution within three years of the date of school closure (through a teach-out or otherwise), the student was eligible for a discharge because she did not transfer any credits to a comparable program and would presumably not be able to do so after that time period. Students who re-enrolled in three years, however, were still required to apply for relief and show that they did not transfer credits or complete their program through a teach-out.

Now that the Department proposes to repeal the credit-transfer restriction, there is no need to wait more than a short period of time after a school closure to grant automatic discharges. The only reason to delay automatic discharge at all is to allow students time to enroll in teach-out. Teach-outs, which are extremely rare, are typically offered before or immediately after a school closes. We know of no circumstances in which a teach-out was newly offered one year or more after a school closure. Thus, one year is a sufficient amount of time to wait to grant automatic discharges. During this time, students will either enroll in a teach-out – in which case they become ineligible for an automatic discharge unless they do not complete it. Or they will forego a teach-out altogether, in which case they should be granted an automatic discharge as soon as possible. There is no reason to require these borrowers to apply for a discharge. The Department can assess, from its own data, who did not complete their education and who did not enroll in and complete a teach-out. Further, one year will provide the Department with sufficient time to identify which loans should be discharged.

⁹¹ U.S. Dep't of Educ., Responses to Questions Submitted by Sen. Patty Murry: Post-Publication QFR Responses for Sen. Appropriations Comm. 1 (May 16, 2019)

<https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHShearing.pdf>.

⁹² 81 Fed. Reg. 75926, 76038 (Nov. 1, 2016).

iii. We urge the Department to make technical fixes to ensure eligible borrowers who do not enroll in teach-outs receive automatic discharges within one year after school closure.

We strongly support the Department’s proposal to provide automatic discharges within one year after the date of closure for eligible borrowers, and suggest a technical fix to ensure that the final regulations conform to the Department’s intent.

As proposed, § 685.214(c)(2) clearly provides non-discretionary, automatic loan discharges for borrowers who accept but do not complete teach-outs “within 1 year of the borrower’s last data of attendance in the teach-out program.” Proposed § 685.214(c)(2), however, does not address automatic discharges for borrowers who do NOT accept a teach-out. While proposed § 685.214(c)(1) could be read to provide automatic discharges for these borrowers without any waiting period, it does not set a maximum time limit in which the Department must grant such students an automatic discharge.

This is inconsistent with the Department’s stated intention and description of its proposal throughout the NPRM. For example, in its Executive Summary section, the Department states “The Department proposes to clarify and streamline the eligibility requirements for closed school discharges by providing more automatic discharges for borrowers within one year of their college closing,” and in the discussion of its closed school proposed regulations it states “the proposed regulations would reduce the time frame for a borrower to qualify for an automatic closed school discharge from three years to one year after the school has closed.”⁹³

Consistent with the Department’s stated intention of providing automatic discharges for borrowers within one year of their school closing, we recommend that the Department add a new section 685.214(c)(3) as follows:

(3) If the borrower does not accept a teach-out plan performed by the school or a teach-out agreement at another school, approved by the school’s accrediting agency and, if applicable, the school’s State authorizing agency, or none is offered, then the Secretary discharges the loan within one year of the school closure date.

Taken together, proposed §§ 685.214(c)(2) and (c)(3) will ensure that eligible borrowers harmed by school closures will receive timely automatic discharges.

⁹³ 87 Fed. Reg. at 41,921.

- iv. **The Department should revise its proposed regulatory language to make clear that automatic discharges are not discretionary and shall be based on the correct eligibility criteria.**

It is our understanding that the Department intends to provide automatic, non-discretionary closed school discharges for all borrowers who meet the new eligibility criteria according to its (or a contactor or guaranty agency's) records under proposed section § 685.214(a), rather than merely authorizing automatic discharges and leaving to the Secretary's discretion whether to provide them. However, we are concerned that the proposed regulatory language could be construed to provide the Department (and guaranty agencies) with discretion as to whether to pursue and grant automatic discharges.

With respect to Direct Loans, proposed § 685.214(c)(1) provides,

If the Secretary determines, based on information in the Secretary's possession that the borrower qualifies for the discharge of a loan under this section, the Secretary discharges the loan without an application from the borrower, if the borrower did not complete [a] teach-out

With respect to FFEL Loans, proposed § 682.402(d)(8)(i) provides,

A borrower's obligation to repay a FFEL Program loan may be discharged without an application from the borrower if the- . . . (B) Secretary or the guaranty agency, with the Secretary's permission, determines that the borrower qualifies for a discharge based on information in the Secretary or agency's possession. The Secretary or guaranty agency discharges the loan without an application from the borrower if the borrower did not complete [a] teach-out.

The underlined language in each of the above proposals could be construed to mean that an automatic discharge is only required if the Secretary or guaranty agency decides to review its records to make a determination that a borrower is eligible. This could create a dangerous loophole and risk the possibility that a future administration will simply not make eligibility determinations, upending this administration's efforts to assist borrowers. Making these discharges mandatory will provide borrowers with important legal rights and will provide them with certainty that these discharges will be effectuated.

Further, this proposed language, as written, could actually weaken the language within existing regulations, which make automatic discharges mandatory for eligible borrowers whose schools closed between November 1, 2013 and July 1, 2020. Because this language will replace the existing rule, borrowers covered by the existing regulation but who have not yet received

their automatic discharge could then be left to rely on the discretion of the Secretary to receive the discharge they are currently entitled to.

We are also concerned that the proposals fail to ensure that borrowers need not submit or attest anything in writing. Section 685.214(c) proposes automatic relief, “without an application,” for a “borrower [who] qualifies for the discharge of a loan under this section.” However, the eligibility criteria in subsection (d) are tied to a borrower *stating* that he meets all the criteria of subsection (d). Similarly, § 682.402(d)(8)(i) proposes automatic relief “without an application,” but does not refer to any eligibility criteria.

To rectify these issues, we propose the following amendments:

§ 685.214(c)(1) If ~~the Secretary determines~~, based on information in the Secretary’s possession, ~~that~~ the borrower qualifies for the discharge of a loan under this section, the Secretary discharges the loan without an application *or any statement* from the borrower,

(d) (1) Except as provided in paragraphs *(c) and (h)* of this section, to qualify for discharge of a loan under this section

§ 682.402(d)(8)(i) A borrower’s obligation to repay a FFEL Program loan ~~may~~ *shall* be discharged without an application *or any statement* from the borrower if the- . . . (B) ~~Secretary or the guaranty agency, with the Secretary’s permission, determines that the~~ borrower qualifies for a discharge *under sections (d)(3)(i), (ii) and (iii)* based on information in the Secretary or agency’s possession. The Secretary or guaranty agency discharges the loan without an application or any statement from the borrower if the borrower did not complete [a] teach-out

Revising the proposed language to reflect our suggestions is particularly important to provide clarity for guaranty agencies. While the current closed school discharge regulations give ED and guaranty agencies (with ED permission) discretion to grant automatic closed school discharges without borrower applications, the Department and guaranty agencies have rarely used this authority.⁹⁴ Although the Department recently used this automatic discharge authority for some ITT Tech students, there are thousands of other schools that closed between 1986 whose former students continue to suffer from the burden of federal debt they do not owe. We therefore request that the Department adopt our recommended language so that the automatic discharges are mandatory both for Direct Loan borrowers and for commercially-held FFEL borrowers.

⁹⁴ 34 C.F.R. §§ 682.402(d)(8)(i) (FFEL Loans), 685.214(c)(2)(i) (Direct Loans).

C. We support lengthening pre-closure eligibility and encourage the Department to make extending the lookback period mandatory where extenuating circumstances are present.

We support the Department's proposal to lengthen the presumptive eligibility period for students who withdraw prior to school closure, but urge the Department to lengthen it to 1 year rather than the 180 days proposed, and to make extending it further mandatory where extenuating circumstances are present.

A one-year lookback period is more protective of students and is less burdensome to administer. A longer presumptive period would be more responsive to the reality that school closures do not occur when things have been going swimmingly, but instead after a sustained period of systemic failures in the administration of the institution. These failures both reflect and contribute to deteriorating quality of education for students—a cycle legal aid organizations have long witnessed. Our clients frequently withdraw more than six months before a closure because their school cut essential instructional services, stopped investing in necessary instructional equipment and facilities, ceased paying instructor wages or refused to replace instructors who quit, or discontinued programs before enrolled students could complete them. School closure is often preceded by misconduct designed to keep them in business and reduce liability for closed school discharges to the Department.⁹⁵ Schools have concealed their financial precarity by refusing to pay living “stipends” from Title IV funds to students, while reporting that those funds have been paid⁹⁶ and failing to report students who are on leaves of absence when the school closes. As the GAO has plainly stated: “research has indicated that a school’s financial struggles can have negative effects on its operations.”⁹⁷ These schools are perversely incentivized to keep students that they are unable to educate in order to maintain solvency.

In addition to lengthening the presumptive eligibility period to one year, we encourage the Department to make two additional changes to strengthen the regulations. First, where schools publicly announce they are closing more than a year in advance of when that closure will occur, the lookback period should extend back to when the first public announcement was made. Otherwise, schools can avoid liability by announcing that they will close long before they plan to

⁹⁵ The HEA requires the Department to “pursue any claim available to any [borrower who has been granted a closed school discharge] against the institution and its affiliates and principals. 20 U.S.C. § 1087(c).

⁹⁶ For example, before it closed, Argosy University kept over \$13 million in Title IV living stipends intended for students, and spent it on payroll and other overhead expenses while altering financial records so that it would appear that the stipends had been paid to students. Michael Vasquez & Dan Bauman, *How America’s College Closure Crisis Leaves Families Devastated*, CHRON. OF HIGHER EDUC. (April 4, 2019) <https://www.chronicle.com/article/how-americas-college-closure-crisis-leaves-families-devastated/>

⁹⁷ U.S. Gov’t Accountability Off., GAO-17-555, *Higher Education: Education Should Address Oversight and Communication Gaps in its Monitoring of the Financial Conditions at Schools* at 28 (2017) (“For example, two studies that we reviewed found that financial shortfalls can cause schools to reduce course offerings and increase class sizes. Two other studies have also found that declines in schools’ resources per student can result in reduced student supports and lower rates of graduation.”) (citations omitted).

do so, knowing that many students will withdraw and lose closed school discharge eligibility once they learn of the school's closure. While earlier announcements may benefit students generally, students who withdraw based on a closure announcement should be eligible for loan relief.

Second, while we strongly support the proposed addition of specific exceptional circumstances to § 685.214(h), the Department should revise the regulations to provide that the withdrawal eligibility period is automatically and presumptively extended to the first occurrence of any of the proposed, specified exceptional circumstances. Unfortunately, while the Department has had the authority to extend the withdrawal period based on exceptional circumstances for many years, it has rarely used this discretion. Even when it has, the Department often waited many years after a school closure to exercise its discretion.⁹⁸ Each of the new exceptional circumstances proposed by the Department clearly implicates a degradation in educational value long preceding the closure date. For this reason, an automatic presumption for an extended withdrawal eligibility period is both reasonable and justified. The regulation should mandate an extension of the lookback period whenever any of the proposed specified exceptional circumstances have occurred, unless the Department publishes a written finding, based on clear and convincing evidence, that the school's educational services did not deteriorate in quality after the occurrence of the exceptional circumstance.

D. The Department should require schools to provide key closure notifications.

Although the 2016 Rules imposed a notice requirement on closing schools to inform students of their discharge rights,⁹⁹ the 2019 Rules struck that obligation.¹⁰⁰ That decision was an error and heightens borrowers' confusion when navigating their options after being confronted with the news that their school is on the verge of closing. We strongly encourage the Department to require closing institutions to inform the Department when it publicly announces it will close, to promptly provide borrowers with information about their closed school rights, and to inform borrowers when the school will close.

When schools decide that they are closing, they currently have no obligation to contemporaneously inform the Department that they will close. Instead, current regulations only require that a school report a closure 10 days *after* the closure has occurred.¹⁰¹ As a result, the Department often learns of school closures weeks, if not months, after the closure has already occurred. In fact, a recent GAO report revealed that for half of the schools that closed between 2010 and 2020 (546 schools), the Department was delayed by a month or more in identifying the

⁹⁸ Press Release, *Extended Closed School Discharge Will Provide 115K Borrowers from ITT Technical Institute More Than \$1.1B in Loan Forgiveness* (Aug. 26, 2021) <https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness>

⁹⁹ 34 CFR § 668.14(32)

¹⁰⁰ 83 Fed. Reg. 37242, 37251 (July 31, 2018); 84 Fed. Reg. 49788, 49847 (Sept. 23, 2019).

¹⁰¹ 34 CFR § 600.21(a)(8).

school as closed.¹⁰² The Department was 2 months delayed for 20% of the schools that closed during that period (220 schools), 6-11 months delayed for 6% of schools that closed (64 schools), and 1 year or more for 7% of schools (71 schools).¹⁰³ Education officials noted that the delay was due to schools' failure to comply with their obligation to inform the Department within 10 days that they closed and that the Department struggled to identify college closures that were not identified by the school.¹⁰⁴ In addition, the GAO identified that the Department frequently delayed recording the closure date of schools for an extended period of time because they were consumed with other administrative tasks related to the school's closure.¹⁰⁵ These compounding delays mean that tens of thousands of borrowers will be incorrectly told they are ineligible for relief if they apply close in time to when their school closed.¹⁰⁶ We propose that the Department remedy this gap in information by requiring that schools inform the Department when they publicly announce that they plan to close.

In addition, the Department should require that institutions provide borrowers with accurate information about their loan discharge rights. Without a mandatory notice process, some students may feel compelled to rush into major financial decisions that may not be in their best interests. For example, when a teach-out is offered, students often believe they are obligated to participate and complete the program, even though they have a right to opt for a closed school discharge instead. They may believe a teach-out is approved, when in fact it is not. Or, although instruction is seriously deteriorating, students may feel compelled to complete the program at the closing school, unaware that they have a right to withdraw within 180 days of the closure and receive a closed school discharge.

As we have previously noted, in the past,¹⁰⁷ closing schools often provide borrowers with inaccurate information about their discharge rights. For example,

- Westwood College provided a letter to students impacted by its closure.¹⁰⁸ This 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, even then, students could

¹⁰² U.S. Gov't Accountability Off., *GAO-22-104403, Education Should Improve Outreach to Borrowers about Loan Discharges at 11-15 (July 2022)* <https://www.gao.gov/products/gao-21-105373#:~:text=Key%20Takeaways,road%20for%20a%20student%27s%20education>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 15.

¹⁰⁶ The GAO identified that 22 percent of borrowers who attended a school that closed between 2010 and 2020—55,000 borrowers—attended a school that the Department was delayed in identifying as closed for a month or more. *Id.*

¹⁰⁷ 2016 Legal Aid Comment at 55.

¹⁰⁸ See Attachment B to 2016 Legal Aid Comment.

transfer credits to a different program at a different school and still be eligible for a closed school discharge.¹⁰⁹

- ICDC College in California closed and arranged for a teach-out with a distance education provider, including for brick-and-mortar students.¹¹⁰ 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. These students—who later became legal aid clients—did not want to complete their program online, but did not know they could instead seek a closed school discharge.

To prevent these types of misleading disclosures, the Department should require that any closing institution—including those that do not offer teach-outs—provide specified language to students describing their closed school discharge rights. This language should fully inform borrowers of their discharge rights, clarify when the institution will close, and inform the student of his or her right to withdraw. Without this type of notice, schools may pressure students to enroll in teach-out plans at other predatory institutions, as we have seen in the past. Proscribing exactly what and how an institution must provide notice to borrowers avoids institutions' efforts to obfuscate borrowers' discharge options by, for example, hiding the disclosure in a long, wordy form, or in small text.

In addition, the Department should require that these notices be sent within 3 days of the institution publicly announcing that it will close. Expedient notice is important because borrowers deserve to be fully informed of their options and may begin to make teach-out or withdrawal decisions shortly after learning the school is closing.

E. The Department should not reinstate borrowers' loans for failure to cooperate in subsequent actions against the school.

The Department proposes minor, technical changes to section 685.214(e), which currently requires that a borrower cooperate with the Secretary in any judicial or administrative proceeding against the borrower's school. The current regulation also states that “upon the Secretary's tendering to the borrower the fees and costs that are customarily provided in litigation to reimburse witnesses” the borrower must provide testimony, provide documents that are reasonably available to the borrower, or provide sworn statements. If the borrower “fails to provide the testimony, documents, or a sworn statement,” the Secretary is required to revoke a discharge or deny a borrower's application for relief.

¹⁰⁹ See 34 C.F.R. § 685.214(c)(1)(i)(C); see also 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.”).

¹¹⁰ See Attachment C to 2016 Legal Aid Comment.

We urge the Department to repeal these punitive revocation and denial provisions in its final rule. First, the language here is more demanding than the analogous language in the proposed borrower defense rule,¹¹¹ which requires that a borrower reasonably cooperate with Department requests. Second, there are many justifiable reasons why a borrower would fail to respond to the Department’s request for information. As we discussed above, the majority of closed school discharge borrowers attend for-profit schools and are low-income. To the extent they have suffered from a school closure and defaulted federal loans, it is likely they have suffered economic instability and other hardships – including evictions or frequent moves, mental and physical health issues, and changes in employment. They also often work low paying jobs that provide little or no leave time they need to comply with Department requests. Such borrowers, who were harmed by school closures through no fault of their own, should not be punished for failing to respond to mail or email communication that may follow weeks, months or even years after they receive a discharge.

F. The Department should revise the rules to correct cross-references.

Although the Department proposes to relocate the closed school discharge criteria from § 685.214(c) to § 685.214(d), it did not propose to correct the cross-reference to old subsection (c) in § 685.214(a)(1). For this reason, we suggest the following amendment to § 685.214(a)(1):

The Secretary discharges the borrower’s (and any endorser’s) obligation to repay a Direct Loan in accordance with the provisions of this section if the borrower (or the student on whose behalf a parent borrowed) did not complete the program of study for which the loan was made because the school at which the borrower (or student) was enrolled closed, as described in paragraph ~~(e)~~(d) of this section.

5. Total and Permanent Disability

We strongly support all of the Department’s proposed reforms to the TPD program. The TPD program is vital for the economic security of borrowers with disabilities, who are twice as likely to live in poverty as people without disabilities.¹¹² The proposed reforms will finally allow the TPD program to live out its statutory purpose of providing relief to borrowers who cannot afford to pay back their student loans due to their disability.

¹¹¹ Compare with proposed section 685.410.

¹¹² Nat’l Council on Disability, National Disability Policy: A Progress Report (Oct. 26, 2017), https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf, (“[P]eople with disabilities live in poverty at more than twice the rate of people without disabilities (29 percent compared to 12 percent.”).

A. The expansion of the categories of disability determination will make the TPD program less burdensome

We welcome the Department's expansion of SSA's disability categories to include (1) SSA beneficiaries who have an onset of disability date at least five years ago; (2) SSA beneficiaries on the compassionate allowance list; (3) eligible SSA beneficiaries currently receiving retirement benefits and met the requirement for TPD discharge prior to retirement; (4) borrowers in SSA Medical Improvement Possible (MIP) category that had their disability renewed at least once; time; and (5) borrowers who had their disability onset date at least five years prior to applying for a TPD discharge or has been receiving SSDI or SSI benefits for at least five years prior to applying for TPD.

This proposed regulation would improve access to relief through the TPD program for the more than 600,000 SSA disability beneficiaries with SSA documented disabilities who under current regulations are not eligible for a TPD discharge based on their SSA information.¹¹³ It will significantly streamline their access to relief by eliminating the obstacles these borrowers would have otherwise faced in navigating the process of applying based on a physician's certification of their disability. And importantly, as discussed below, it would expand access to automatic disability discharges that entirely remove the administrative barriers that too often stand between people with disabilities and student loan relief.

B. We support the Department's proposal to eliminate the burdensome and unnecessary post-discharge monitoring period

The three-year post-discharge monitoring period is an unnecessary bureaucratic hurdle that has prevented many disabled borrowers from retaining the TPD discharge they are entitled to by law.¹¹⁴ The elimination of the three-year post-discharge monitoring period will ensure that borrowers whose loans are discharged under the TPD program are not pulled back into student debt because of paperwork problems.

The NPRM cites compelling data evidence that the post-discharge monitoring requirements have caused many borrowers eligible for discharge to have their student loans reinstated solely as a result of missing paperwork, despite continuing to meet earnings requirements. That evidence is consistent with our experience working with student loan borrowers. Paperwork requirements in the student loan system routinely trip up borrowers from all backgrounds, with, for example, huge portions of borrowers missing IDR recertification

¹¹³ 34 C.F.R. § 685.213(b)(2)(ii).

¹¹⁴ Clare Lombardo & Cory Turner, Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised, NPR (Dec. 4, 2019), <https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve>.

deadlines.¹¹⁵ Paperwork requirements fall particularly heavily on low-income, elderly, and disabled borrowers, whose limited resources, health complications, changes in contact information, and often urgent competing life demands exacerbate the burdens all borrowers face in navigating the student aid bureaucracy.

We therefore applaud the Department's proposal to eliminate the burdensome and unnecessary three-year post-discharge monitoring period.

C. Allowing other health professionals to certify a borrower's disability will simplify and accelerate the TPD application process

Borrowers with disabilities who do not qualify for TPD based on their SSA documentation face many obstacles in getting a physician to certify their disability. The challenge is especially difficult for those residing in low-income areas. This is partly because in some low-income communities, getting to a physician is not readily accessible and requires more planning and coordination. Furthermore, borrowers in low-income communities where access to healthcare is limited often interact more with other health professionals like nurse practitioners and PA than they do with physicians. Likewise, some borrowers with mental health disabilities interact more with their psychologist, and their psychologist will often have more information about the nature of their disability. Additionally, all patients, but especially patients with the least resources, have little control over who within the healthcare system meets with them or signs their paperwork.

People should not be denied access to discharges due to these constraints that are outside of their control. We strongly support the Department's proposal to allow other professionals to certify a borrower's disability and believe that the proposed regulation will make the TPD application process less burdensome for borrowers seeking TPD discharge through the physician certification route.

D. We support the automation of TPD discharge for borrowers when the Department has access to information about their presumptive qualification for a TPD discharge

The proposal to provide automatic discharge to borrowers who presumptively qualify for TPD based on information available to the Department will provide automatic loan cancellation for millions of SSA borrowers – some of whom are still currently required to submit an application to qualify TPD. We believe that the proposal to automate the TPD discharge process for certain borrowers will allow the Department to more quickly and equitably fulfill the

¹¹⁵ Restoring the Promise of Income-Driven Repayment: An IDR Waiver Program Proposal, (National Consumer Law Center, Center for Responsible Lending, & Student Borrower Protection Center, Jan. 2022), https://www.nclc.org/images/pdf/student_loans/Final-SBPC-NCLC-CRL-IDR-Waiver-Proposal.pdf ; *see also* Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt, (National Consumer Law Center and Student Borrower Protection Center, Mar. 2021), https://www.nclc.org/images/pdf/student_loans/IB_IDR.pdf

Congressional intent of the TPD program and provide much-needed relief to statutorily qualified disabled borrowers. We admire the Department’s use of automation to fast-track loan forgiveness for TPD borrowers and we urge the Department to embrace application-free automation in other aspects of the federal student loan program to the maximum extent possible.

6. False Certification

The proposed regulations, which are the product of committee consensus, will improve the odds that borrowers will be able to obtain relief after their school falsely certifies their eligibility for Title IV aid, or after being a victim of identity theft or forgery. Below, we explain the benefits of key aspects of the proposals.

First, we are pleased that the proposed regulations would clearly allow both state attorneys general and legal aid attorneys to submit group discharges on behalf of students. The Department has existing authority to provide group discharges, including without application, for false certification and has used a group-based approach at times in the past.¹¹⁶ For example, in the 1990s, it identified schools that engaged in widespread ability-to-benefit (“ATB”) fraud and granted false certification discharges for all borrowers from those schools who submitted discharge applications, without pursuing the typical individual adjudication.¹¹⁷ But to date, the Department has been very slow to pursue false certification group discharges, only doing so when pushed to do so by litigation.¹¹⁸ As a result, students who attended schools like FastTrain, whose owners were indicted for widespread false certification violations,¹¹⁹ struggle with their student debt even though they are likely eligible for relief. Under the proposed regulations, legal aid attorneys and state attorneys general could apply for group relief for these borrowers.

Allowing for group discharges will ease the burdens associated with applying for and adjudicating applications for relief. Legal aids are on the ground and often engage in extensive research to identify whether a client has been subject to false certification violations. Under the proposed regulations, legal aid attorneys will only need to compile one set of evidence when applying for relief instead of submitting hundreds of pages of materials for numerous individual applications. In addition, legal aid attorneys will be able to submit a group application that encompasses other low-income borrowers who are unaware of their right to submit a discharge.

¹¹⁶ 34 C.F.R. § 685.215(c)(8).

¹¹⁷ For a list of schools for which ED has granted group discharges, see Nat’l Consumer Law Center, Student Loan Law, Section 10.4.2.7 (6th ed. 2019).

¹¹⁸ In 2017, the Department agreed to group discharges for as many as 36,000 students who attended the Philadelphia campus of the Wilfred Academy of Hair and Beauty Culture and the New York campus of Robert Fiance to settle a lawsuit filed by New York Legal Assistance Group. Patricia Cohen & Emily Rueb, U.S. To Help Remove Debt Burden for Students Defrauded by For-Profit Chain, NY Times (Aug. 9, 2017) available at <https://www.nytimes.com/2017/08/09/business/wilfred-student-debt.html>.

¹¹⁹ See Second Superseding Indictment, *U.S. v. Amor*, U.S. Dist. Ct., S. Dist. of Fla., Case No. 14-20750- CR-LENARD (Sept. 29, 2015).

Including this provision within the regulations instead of leaving it as an informal sub-regulatory process provides legal aid attorneys with assurance that their extensive applications will be adjudicated and allows them to seek review of decisions on behalf of the class.

Second, we strongly support the proposal to rescind the 2019 amendments to the False Certification regulations. In 2019, the Department amended the regulations in ways that made it harder for borrowers to obtain relief, including by making borrowers ineligible for discharge if they signed an attestation that they had a high school diploma.¹²⁰ As we previously commented, these barriers unfairly prevented borrowers harmed by a schools' falsification of their federal aid eligibility from obtaining relief.¹²¹ There is rampant documentation falsification at institutions that commit false certification violations—indeed, that is the core of false certification.¹²² Students at predatory schools do not typically prepare their own financial aid applications or documents. Instead, recruiters and financial aid representatives often fill out the documents for students and instruct them to sign.¹²³ Students, trusting these school officials, sign as told, without understanding or having a chance to review the documents. These schools may disqualify students from relief—and avoid oversight—by inserting attestations into the mound of paperwork (or, commonly, electronic paperwork) that borrowers are instructed to sign, or that are improperly signed for them by school employees. Thus, the 2019 amendments do not exclude “undeserving” students from obtaining relief; instead, they provide the instructions for fraudulent institutions to continue to game the federal student loan system. This has already proven to be a problem, as legal aid clients have recently been denied false certification discharges on the basis that their FAFSA applications (almost always completed by the predatory school) stated that they had completed high school. The Department should remove such barriers to relief created by the 2019 amendments, and we are glad to see the proposed rules do so.

Third and finally, we applaud the proposal to address the unduly burdensome evidentiary requirements that must be satisfied to support a claim for identity theft under the existing regulations. The HEA states that a loan that was “falsely certified as a result of a crime of identity theft” shall be discharged by the Secretary.¹²⁴ But nothing in the statute itself requires that there be a court judgment to justify discharge based on identity theft, and the burden of

¹²⁰ 34 C.F.R. § 685.215(e)(1)(ii).

¹²¹ 2018 Legal Aid Comment at 87-102.

¹²² Comments from the Legal Aid Community, Comments on Proposed Regulations on Borrower Defenses and Used of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations (Aug. 30, 2018), available at https://www.nclc.org/images/pdf/student_loans/comms-proposed-rule-arb-closed-sch-false-cert.pdf.

¹²³ These institutions often utilize high pressure sales tactics where students are pressured to enroll immediately and presented with large stacks of documents to sign with limited time to review. In addition, some recruiters may provide loan contracts to students in English when they do not speak English. All of these practices can lead to students unknowingly signing documents that contain false or inaccurate information. Furthermore, since most of the financial aid forms are completed electronically, a borrower need not even be present to review or sign the financial aid documents before they are submitted.

¹²⁴ 20 U.S.C. § 1087(c)(1).

obtaining such a court judgment is often insurmountable. A borrower cannot force a prosecutor to pursue an identity theft case and they may not have the capacity or resources to bring a civil suit themselves. Some states have laws that victims of identity theft can utilize to bring a lawsuit to obtain declaratory and injunctive relief. However, filing a lawsuit and litigating it to judgment is not affordable or feasible for most borrowers, and especially low-income borrowers. Further, a borrower often must be able to identify the alleged identity thief to pursue this route. In many cases, the borrower does not know who stole their identity, or has a strong reason why initiating contact with the alleged identity thief is inappropriate. For example, in at least one legal aid case, the alleged identity thief was an ex-partner who was abusive. Reinitiating contact with a former abuser solely in order to obtain relief from the Department could potentially put the borrower at risk of physical, mental, and emotional harm. The proposed rule eases this burden significantly by allowing the borrower to use alternative, more attainable forms of evidence to support their identity theft claim, making relief more accessible for harmed borrowers.

7. PSLF

When Congress created the Public Service Loan Forgiveness program (PSLF), it promised borrowers that if they dedicated at least 10 years to a qualified public service employer and made 120 payments, their remaining student debt would be forgiven.¹²⁵ However, the PSLF program has been a fix-as-you-go loan forgiveness program that has drifted the promise of loan forgiveness beyond the ten years, or 120 payments, intended by Congress.¹²⁶ When the first group of PSLF borrowers submitted their application for forgiveness in 2017, it became shockingly evident that major fixes were needed to make the program work.¹²⁷ Regulatory hurdles, lack of communication to borrowers, miscounting of payments, and misleading guidance from loan servicers resulted in the denial of over 98 percent of borrowers' applications for loan forgiveness under PSLF.¹²⁸ In response, Congress attempted to fix the program by temporarily expanding the program to include more borrowers.¹²⁹ Even with the temporary PSLF expansion, 99% of borrowers who submitted applications were denied.¹³⁰ More recently, the Department attempted to fix some of the program's longstanding problems through the PSLF Waiver, which provides more opportunities for borrowers to have payments counted towards

¹²⁵ 20 U.S.C.A. § 1087e

¹²⁶ Cory Turner, Why Public Service Loan Forgiveness Is So Unforgiving, (Oct. 17, 2018), <https://www.npr.org/2018/10/17/653853227/the-student-loan-whistleblower>

¹²⁷ GAO Report, Public Service Loan Forgiveness, Education Needs to Provide Better Information for the Loan Servicer and Borrowers, (Sept. 5, 2019), <https://www.gao.gov/assets/gao-18-547.pdf>

¹²⁸ Federal Student Aid, Public Service Loan Forgiveness Data, (2018) <https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data>

¹²⁹ GAO Report, Public Service Loan Forgiveness, Improving the Temporary Expanded Process Could Help Reduce Borrower Confusion, (Sept. 5, 2018), <https://www.gao.gov/assets/gao-19-595.pdf>

¹³⁰ *Id.*

PSLF that would not have otherwise been counted.¹³¹ However, the PSLF waiver is temporary and set to expire this October.

This rulemaking process presents the Department with the opportunity to make lasting and permanent corrections to a systematically broken program, restore borrowers' confidence, and fast-track loan forgiveness to eligible borrowers, including low-income borrowers and borrowers of color. For many of these borrowers, including our low-income clients and legal services employees – forgiveness delayed is forgiveness denied. They simply can't afford to wait for another rulemaking or another PSLF overhaul to get the loan forgiveness they have earned through years of dedicated public service. The Department should use this rulemaking to make lasting and permanent corrections to the PSLF program.

We applaud the reforms being proposed by the Department, which we believe will address some of the systemic problems with the PSLF program. As the Department considers employer eligibility and redefines important regulatory provisions, we urge the Department to take a more expansive and inclusive approach so that more borrowers doing public service work can benefit from loan forgiveness.

Regarding the proposed improvements to the PSLF application process, we welcome the proposed regulations counting as qualifying payments (1) pre-consolidation direct loan payments, including payments on Direct Parent PLUS loans; (2) certain deferments and forbearances periods, including economic hardship deferments, administrative forbearance, and mandatory administrative forbearance; (3) partial payments made in multiple installments; and (4) lump sum payments equal to or greater than the scheduled payments.

A. Counting pre-consolidation Direct loan payments, including on Parent PLUS loans, will help ensure borrowers do not lose time they have earned toward forgiveness

The proposal to count pre-consolidation payments made on Direct Loans will help many low to moderate income public service employees reach loan forgiveness sooner. The current policy of restarting the clock toward forgiveness when borrowers consolidate their loans unfairly and unnecessarily trips borrowers up, forcing public service workers to spend extra years in repayment simply because they consolidated. We applaud the Department's proposal to do away with this policy.

Notably, this change would ensure that Parent PLUS borrowers who must consolidate their loans in order to access IDR do not lose credit for any pre-consolidation time they spent repaying under the standard plan. This is particularly important for Black families, who typically have lower wealth than the typical white family and they therefore rely substantially on Parent

¹³¹ Press Release, U.S. Department of Education Announces Transformational Changes to the Public Service Loan Forgiveness Program, Will Put Over 550,000 Public Service Workers Closer to Loan Forgiveness, (Oct. 6, 2021), <https://www.ed.gov/news/press-releases/us-department-education-announces-transformational-changes-public-service-loan-forgiveness-program-will-put-over-550000-public-service-workers-closer-loan-forgiveness>

PLUS loan to pay for their children's education.¹³² One in five black students at our nation's Historically Black Colleges and Universities (HBCUs) rely on Parent PLUS loans to pay for 30 percent of their college tuition.¹³³ Though fixing PSLF will not resolve the disproportionate impact of student debt on Black Parent PLUS borrowers, the proposed regulation is a small but commendable step in the right direction. We celebrate these changes and urge the Department to adopt them in its final rule.

B. The proposed hold harmless period will allow low-income borrowers to receive PSLF credits for time in forbearances and deferments

We welcome the Department's proposal to allow eligible borrowers who spent time in certain forbearances or deferments to get credit for PSLF under a hold harmless period. The proposed hold harmless period will ensure that borrowers whose path to loan forgiveness under PSLF was delayed because of wrongful forbearance steering or other servicer misconduct get back the time lost. The Department correctly recognizes the difficult and unattainable burden these borrowers would have faced if they were required to prove they were victims of servicer steering or other misconduct to be credited for this time.

If implemented, the proposed hold harmless provision will allow our low-income clients who qualify for \$0 IDR payments to get PSLF credit they missed out on without having to make additional payments. However, we want to caution that many of our low-income clients with IDR payments slightly above \$0 may not be able to make a lump sum payment to buy credit for past time spent in forbearance or deferment. Many low-income Americans, and particularly low-income people of color, have very limited savings to draw from to make a lump sum payment. We therefore encourage the Department to consider creating a process through which borrowers who cannot afford to make the additional payment to claim the lost time may seek a waiver or reduction of the lump sum payment requirement. Notwithstanding the foregoing, we believe the proposed hold harmless period will benefit many low-income borrowers, and we encourage the Department to adopt it in its final rule.

¹³² Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambaugh, Examining the Black-white wealth gap, (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> ;

¹³³ Peter Granville, Parent PLUS Borrowers: The Hidden Casualties of the Student Debt Crisis, (May 31, 2022), <https://tcf.org/content/report/parent-plus-borrowers-the-hidden-casualties-of-the-student-debt-crisis/?session=1&agreed=1&agreed=1>

C. The Department should expand the proposed hold harmless provision to allow previously defaulted borrowers to claim PSLF credits for periods of default

There are over 7 million borrowers in default, many of whom have been in default for more than 10 years.¹³⁴ These borrowers are disproportionately women and people of color.¹³⁵ Until the recent payment pause, they faced severe consequences of default under our federal student loan system.¹³⁶ They were subjected to forced collection actions, including wage garnishments, treasury offsets of tax refunds, and federal benefits payments.¹³⁷ Many of them were making forced collection payments that were substantially more than what they would have paid under a qualifying IDR plan.¹³⁸ Some of these borrowers are working for PSLF-eligible employers and are providing the public service contemplated in the PSLF statute. For these borrowers, their delayed path to PSLF loan forgiveness is not just the result of a broken program, rather it is the result of a student loan system that unnecessarily punishes borrowers who struggle to access affordable payment programs rather than streamlining their path into and through income-driven repayment.

Like the forbearances and deferments discussed in the hold harmless proposal, periods of default are often the result of a combination of financial hardship and servicing failure to connect the borrower to IDR, and do not ordinarily count towards PSLF forgiveness.¹³⁹ Though the PSLF statute is clear that the loan must not be in default at the time of forgiveness, it does not prohibit the Department from granting PSLF credits to *previously* defaulted borrowers for periods of default, so long as the borrower can satisfy the payment requirements for that period.¹⁴⁰ Therefore, to reduce the negative consequences of default for public service employees, we propose that the Department expand the hold harmless provisions to allow previously defaulted borrowers to get PSLF credits for periods of default if they had qualifying employment during the periods of default and if they are able to make payment equal to what they would have owed under IDR at the time. Furthermore, in calculating the required payment to get PSLF credits under the hold harmless period, the Department should adjust the amount due to reflect any amount the borrower paid during the relevant period through forced collection actions or voluntary payments.

¹³⁴ Sarah Sattelmeyer, Trapped by Default, Why borrowers default on their student loans and how the system jeopardizes their economic security, (July 27, 2022), <https://www.newamerica.org/education-policy/briefs/trapped-by-default/>

¹³⁵ *Id.*; Melanie Hanson, Student Loan Debt by Gender, (Dec. 16, 2021), <https://educationdata.org/student-loan-debt-by-gender#:~:text=%24929%20billion%20in%20student%20loan,to%20pay%20off%20student%20loans>.

¹³⁶ Sarah Sattelmeyer, Trapped by Default, Why borrowers default on their student loans and how the system jeopardizes their economic security, (July 27, 2022), <https://www.newamerica.org/education-policy/briefs/trapped-by-default/>

¹³⁷ *Id.*

¹³⁸ Restoring the Promise of Income-Driven Repayment: An IDR Waiver Program Proposal, (National Consumer Law Center, Center for Responsible Lending, & Student Borrower Protection Center, Jan. 2022), https://www.nclc.org/images/pdf/student_loans/Final-SBPC-NCLC-CRL-IDR-Waiver-Proposal.pdf

¹³⁹ 20 U.S.C.A. § 1087e

¹⁴⁰ *Id.*

We believe that including previously defaulted borrowers in the hold harmless provision is reasonable in light of the Department’s recognition of the negative impact of default and delinquency through the announcement of operation “fresh start.”¹⁴¹ We thank the Department for announcing operation fresh start, and we believe that expanding the hold harmless proposal to count past time in default for borrowers who have paid, or agree to pay, what they would have paid under IDR for that period will move public service workers beyond fresh start and into loan forgiveness.

Conclusion

Thank you for considering these comments. We welcome any opportunities to work with the Department in strengthening protections for low-income borrowers. If you have any questions about these comments, please contact Abby Shafroth (ashafroth@nclc.org), Kyra Taylor (ktaylor@nclc.org), or Alpha Taylor (ataylor@nclc.org).

¹⁴¹ Press Release, Biden-Harris Administration Extends Student Loan Pause Through August 31, (Apr. 6, 2022), <https://www.ed.gov/news/press-releases/biden-harris-administration-extends-student-loan-pause-through-august-31>