

Comments from the Legal Aid Community
to the Department of Education re:
Intent to Establish Negotiated Rulemaking Committee:
Title IV of the Higher Education Act of 1965, as amended (HEA)
Docket ID: ED-2021-OPE-0077
July 1, 2021

On behalf of our low-income clients and organizations across the country that provide free legal assistance to low-income student loan borrowers, the undersigned **38 legal services organization** submit these comments to address the U.S. Department of Education’s notice of intent to establish negotiated rulemaking committees to prepare proposed regulations for programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA). Our comments are informed by our work as legal aid practitioners. We strive to meet the legal needs of individuals and families with limited economic means, who otherwise would be without professional legal assistance.

Our clients come to us with crushing and unaffordable federal student loan debt that is often in default or in serial forbearances. Many of our clients attended schools that misled them about the quality and value of the education they were receiving. They also unknowingly signed enrollment agreements containing sweeping arbitration clauses purporting to waive their right to seek relief in court. They are rarely aware of their eligibility for various loan cancellation programs and, those who are, struggle to navigate the application process. In addition, they are often unaware that they might be able to manage repayment better by enrolling in a more affordable income-driven repayment plan. Yet these plans are not a panacea; many of our clients who are already enrolled in income-driven repayment plans still struggle to afford monthly payments and to keep up with the paperwork requirements. Consequently, many default on their loans and are left to face dire consequences, including wage garnishments, harassing collection practices, offsets of social safety net payments, and adverse credit reports. Because of decades of structural inequities and discrimination, these harsh realities are more likely to be felt by families of color. Student loans have burdened Black and Latino borrowers more than other groups, and, as a result, Black and Latino borrowers default at twice the rate of their white peers.¹

¹ Judith Scott-Clayton, The looming student loan default crisis is worse than we thought, Economic Studies at Brookings (Jan. 2018), available at <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/>; Ben Miller, The Continued Student Loan Crisis for Black Borrowers, Center for American Progress (Dec. 2 2019), available at <https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers>.

As you are considering the topics for regulation, we urge you to prioritize the needs of our low-income clients. Specifically, the Department should use the upcoming negotiated rulemaking to address the following specific issues:

- Options for Defaulted Borrowers
- Affordable Income Driven Repayment Plans
- Viable Cancellation Programs
 - Total and Permanent Disability Discharges
 - School-Related Loan Cancellation Programs

Options for Defaulted Borrowers

Many topics raised in the Department's Notice of Intent are critical to improving the outcomes of low-income borrowers. Yet, we were disappointed that the Department failed to include any topics intended to provide relief to defaulted borrowers. More often than not, the borrowers that reach out to us for assistance are in default on their loans. The extraordinarily punitive collection tactics used by the Department to recoup student loan debt, such as wage garnishment and offset of social security benefits, the Earned Income Tax Credit and the Child Tax Credit, threaten the financial security of our clients and their families.

The Department has the authority under the Higher Education Act to eliminate some of the most harmful collection practices and provide more options, such as income-driven repayment, for defaulted borrowers. We urge the Department to take this opportunity to do so.

Affordable Income-Driven Repayment Plans

Although current income-driven repayment (IDR) plans are more affordable than the standard ten-year repayment plan, many of our clients still struggle to afford these payments, especially for Federal Family Education Loan (FFEL) borrowers who do not have access to PAYE or REPAYE. For many of our clients, IDR feel like an eternity of bureaucracy, paperwork, and overwhelming debt that often grows over time and risks crashing down on them when they miss paperwork. Our clients desperately need an affordable IDR plan that is easier to navigate and requires less time before cancellation.

The Department should adjust how payments are calculated under IDR to ease the burden of student loan repayment for low-income borrowers. Specifically, it should increase the amount of protected income used to calculate a borrower's monthly payments; 150% of the current federal poverty guideline is too low to meet our clients' basic needs. The Department should also shorten the repayment period, eliminate negative interest amortization and capitalization, and make it easier for borrowers to get into and stay in an IDR plan.

The Department should also ensure that FFEL and Parent PLUS loan borrowers are able to access affordable IDR plans. Parents who seek our help with debts incurred for their children's education – especially Parent PLUS loans – are often in particularly dire circumstances. Data indicate that the burdens of intergenerational PLUS loan debt fall hardest on low-income Black

families.² As a 2018 report by New America documented, low-income Black families are more likely to take on PLUS loan debt than low-income white families.³ The PLUS loans they have obtained have higher interest rates than other types of student loans, lack Department-imposed limits on amount borrowed, are not eligible for the income-driven repayment plans, and can rarely be discharged in bankruptcy. As a result, low-income Parent PLUS borrowers come to us with much larger debts, and fewer options for averting or resolving defaults.

Viability Cancellation Programs

The statutory cancellation programs provide a vital safety net for our low-income clients, especially those who have a disability or have been cheated by predatory institutions. But data released by the Department demonstrates that these programs have systematically failed to reach the borrowers they are intended to benefit.⁴ The primary reasons is that the Department has created overly restrictive eligibility and proof requirements and placed a series of unnecessary bureaucratic hurdles between borrowers and relief. The Department must fix existing cancellation programs--including borrower defense, closed school, false certification, public service loan forgiveness, and disability discharge programs--so that they actually reach the borrowers they are intended to help. Relief should be expanded and automated as much as possible. While fixing the cancellation rules is critical, the Department should not and does not need to wait for a rulemaking to automatically provide relief to the 517,000 borrowers⁵ who have been identified as eligible for a disability discharge, borrowers who are eligible for a closed school discharge according to the Department's own records who never reenrolled in any higher education program, and the hundreds of thousands of borrowers with pending or wrongly denied borrower defense applications.⁶

Total and Permanent Disability Discharges

We join with the Consortium for Citizens with Disabilities (CCD) in calling for the Department to revisit the Temporary and Permanent Disability (TPD) regulations promulgated in 2012 and to make several changes: 1) modifying the criteria for the program to reflect Congressional intent, 2) automating and simplifying the program, and 3) eliminating the monitoring period. The TPD program was intended to eliminate the burden of student loans for individuals whose disabilities

² Zoe Kemmerling and Claire Torchiana, Higher Education at Any Cost: Parents' Challenges with the Federal PLUS Loan program, Housing & Economic Rights Advocates (June 2021), *available at* <http://www.heraca.org/include/brochures/ParentPlus-Loans-Report.pdf>; Rachel Fishman, The Wealth Gap PLUS Debt: How Federal Loans Exacerbate Inequality for Black Families, New America (May 2018), *available at* <https://www.newamerica.org/education-policy/reports/wealth-gap-plus-debt>.

³ *Id.*

⁴ U.S. Dep't of Educ., Federal Student Aid, Loan Forgiveness Reports, *available at* <https://studentaid.gov/data-center/student/loan-forgiveness>.

⁵ Student Defense, Press Release, New Data: ED Department Withholding Debt Discharges for More Than Half a Million Student Borrowers With Disabilities Entitled to Relief (June 11, 2021), *available at* <https://www.defendstudents.org/news/body/Coalition-Letter-iTPD-6.11.21.pdf>.

⁶ Order Denying Class Settlement, To Resume Discovery, and to Show Cause, *Sweet v. Cardona*, No. 146, 19-cv-03674-WHA (N.D. Cal.).

prevent them from substantial employment, but too many of our clients never see such relief because of the substantial bureaucratic burdens within the program. Importantly, the 3-year monitoring period has prevented tens of thousands of borrowers from obtaining a total and permanent discharge of their student loans due to paperwork issues – a result that is contrary to the TPD program's statutory purpose, as well as common sense.

School Related Discharge Programs

For every client we see who is eligible for a school-related loan discharge, there are dozens more who remain unaware of their legal right to relief and who lack access to legal assistance. It is therefore critical that all the school-related loan discharge programs be designed to deliver relief to intended borrowers through group and automated relief processes that leverage the Department's knowledge and data regarding eligibility. Because group processes will not capture all eligible borrowers, discharge rules should also carefully provide avenues for individual borrowers to seek discharge that will be manageable and accessible by those with the greatest need without legal assistance.

The borrower defense discharge rules are the most gravely in need of revision, but it is critical that the closed school and false certification discharge regulations be revised to effectuate discharges for those statutorily eligible. In revising the borrower defense rules, the Department should also restore the limits on forced arbitration that were eliminated under the last borrower defense rulemaking, as arbitration clauses prevent us from challenging illegal conduct by for-profit schools in court - resulting in greater losses for taxpayers.

With respect to the false certification and closed school discharge regulations, at a minimum, the Department should restore regulations in effect prior to July 1, 2020, except:

- the Department should broaden the disqualifying status basis for a false certification discharges.
- the Department should amend the 180-day eligibility period for students who withdraw prior to school closure to apply retroactively and extend it to FFEL Loans.
- the Department should restore the automatic discharge regulation for students who do not obtain financial aid within 3 years after the date of closure, but should amend it to (1) apply retroactively to all borrowers who obtained loans on or after January 1, 1986; and (2) remove the 3 year waiting requirement. It should enact a similar provision for FFEL Loans.

In addition, the regulatory presumption that students who enroll in a new program after a school closes are ineligible for a closed school discharge unless they can prove that they either did not transfer to the same or similar program or that they did not transfer any credits is unduly burdensome and contrary to the purpose of the HEA's closed discharge mandate. This regulation is not justified given the reality that 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 requirement should be repealed retroactively.

The Department's own data regarding the low rates of eligible borrowers who actually apply for closed school discharges demonstrate that there are likely thousands of borrowers, if not hundreds of thousands, who are eligible for a closed school discharge but who have suffered for decades under the burdens of defaulted federal loans. These are disproportionately people of color, women, immigrants and children of immigrants who never obtained the education they paid for. All overly burdensome barriers to closed school discharges for these borrowers should be removed to effectuate Congressional intent and provide much-needed relief.

Composition of the Negotiating Committee

For too long, the Department has crowded the table with lenders and schools and given few spots to student and borrower advocates. The Department must ensure that representatives of all impacted types of student loan borrowers are at the table. We also join with disability advocates in calling for a disability advocate seat at any negotiating committee discussing the disability discharge regulations.

Thank you for your consideration of these comments. We welcome any opportunities to work with the Department in strengthening protections for borrowers. If you have any questions about these comments, please contact Persis Yu (pyu@nclc.org).

Comments submitted on behalf of:

Atlanta Legal Aid Society
Bay Area Legal Aid
Brooklyn Bar Association Volunteer Lawyers Project
Charlotte Center for Legal Advocacy
Community Legal Aid
Community Legal Aid SoCal
Community Legal Aid Society, Inc. (Delaware)
Community Legal Services of Philadelphia
Community Service Society of New York
Consumer Bankruptcy Assistance Project
DNA - People's Legal Services
Empire Justice Center
Florida Legal Services, Inc.
Gulfcoast Legal Services Inc
Housing and Economic Rights Advocates
Indiana Legal Services, Inc.
Indianapolis Legal Aid Society, Inc.
Jacksonville Area Legal Aid, Inc.
Legal Aid Chicago

Legal Aid Foundation of Los Angeles (LAFLA)
Legal Aid Service of Broward County, Inc.
Legal Aid Society of Milwaukee
Legal Aid Society of Palm Beach County
Legal Aid Society of San Diego, Inc.
Legal Aid Society of Southwest Ohio, LLC
Mid-Minnesota Legal Aid
Mississippi Center for Legal Services Corporation
Mountain State Justice
National Center for Law and Economic Justice
National Consumer Law Center (on behalf of its low-income clients)
Nevada Disability Advocacy & Law Center
New York Legal Assistance Group (NYLAG)
Northwest Justice Project
Pisgah Legal Services
Project on Predatory Student Lending at Harvard Law Legal Services Center
Public Counsel
Public Law Center
Tzedek DC