Legal Aid Organizations' Comments
In Response To The U.S. Department of Education's
Proposed Borrower Defense to Loan Repayment Universal Forms
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National Consumer Law Center (on behalf of our low-income clients)
Housing and Economic Rights Advocates
Legal Aid Foundation of Los Angeles
The Legal Aid Society of Cleveland
Pine Tree Legal Assistance
Community Legal Services of Philadelphia

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## I. Introduction

As organizations that represent low-income student loan borrowers, we thank you for the opportunity to comment on the Department of Education's proposed borrower defense to loan repayment application form. Our organizations assist low-income student loan borrowers, many of whom were harmed by unscrupulous schools that engaged in predatory conduct to make a profit off of our clients' federal student aid dollars. Our comments reflect our experience working directly with low-income borrowers applying for borrower defense and other federal student loan discharges and are intended to help ensure that the proposed borrower defense application form is clear, accessible, and fair to all potentially eligible borrowers. We would welcome the opportunity to meet with the Department to discuss ways to make this form more accessible and less burdensome to the borrowers we serve.

As an initial matter, we are encouraged to see that the administration is committed to providing government services efficiently and equitably and minimizing the burdens experienced by the public when accessing government services or public benefits programs.[1] This commitment demands action to minimize the existing substantial burden borrowers face in

[1] Memorandum for Heads of Executive Departments and Agencies, From Shalanda D. Young, Director of OMB and Dominic Mancini, Deputy Administrator, OIRA, Re: Improving Access to Public Benefits Programs Through the Paperwork Reduction Act (April 13, 2022), *available at* https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf; Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, Exec. Order No. 14058, 86 Fed. Reg. 71357 (Dec. 13, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/13/executive-order-on-transforming-federal-customer-experience-and-service-delivery-to-rebuild-trust-in-government/.

accessing borrower defense relief. People eligible for borrower defense are likely to be concentrated in underserved communities and in populations that have vulnerabilities that may increase the burden of completing a complex application form. In our experience, many borrowers that are eligible for a borrower defense discharge may also have limited English Proficiency (LEP) or have a high-school or middle-school literacy level. Further, many borrowers attempt to complete the borrower defense form on their phones because they have limited access to a computer or to the internet. If the Department revises this form guided by the OMB's mandate to reduce the disproportionate barriers the most vulnerable borrowers face, the burden of completing this form would be meaningfully reduced for all of our low-income clients, and their access to much-needed debt relief would be correspondingly improved.

In addition, the accessibility of this form has significant racial equity implications. For-profit colleges—colleges that are subject to the overwhelming majority of borrower defense claims—target low-income Black and Brown communities and first-generation college students, and as a result these students are overrepresented at for-profit schools.[2] Given that people of color are disproportionately preyed upon by for-profit colleges and thus rely disproportionately on borrower defense discharges for redress, whether or not borrowers can successfully complete this form has a direct bearing on how the Department of Education is fulfilling President Biden's Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.[3]

While we are encouraged that the proposed forms are an improvement from existing forms, there is significant room for additional improvement, particularly on the individual application form. Under the Plain Writing Act of 2010, the Department of Education is required to write "clear Government communication that the public can understand and use."[4] This requirement applies to any communication that is necessary for obtaining any federal government benefit or service; provides information about any federal government benefit or

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[2] Student Borrower Protection Center, *Mapping Exploitation: Examining For Profit Colleges as Financial Predators in Communities of Color* (July 2021), *available at* https://protectborrowers.org/wp-content/uploads/2021/07/SBPC-Mapping-Exploitation-Report.pdf; J Geiman & Alpha Taylor, *Disproportionately Impacted: Closing the Racial Wealth Gap through Student Loan Cancellation, Payment Reforms, and Investment in College Affordability* at 19 (June 2022), *available at* https://www.nclc.org/wp-content/uploads/2022/10/2022_Disproportionately-Impacted.pdf.

[3] *See* Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government, Exec. Order No. 14091, 88 Fed. Reg. 10825 at § 3 (Feb. 16, 2023), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

[4] Pub. L. No. 111-274 (2010), *available at* https://www.govinfo.gov/content/pkg/PLAW-111publ274/pdf/PLAW-111publ274.pdf.

service; or explains to the public how to comply with a requirement that the federal government administers or enforces. Unfortunately, the new individual application and reconsideration forms fall short of being clear and easy-to-use by the public. We recommend that the Department work with plain language experts to redesign these forms and engage in user-testing before finalizing them to ensure that the public will be able to easily understand and use them.

We have provided general comments regarding the forms below. Our comments primarily focus on the individual application form, as this is the form that will be used by the highest number of people.

Our comments first address the estimates the Department has set forth in the supportive statement of the amount of time that will be needed to fill out the individual application form and steps the Department should take to make the form less time-consuming to fill out. Our comments then focus in some detail on ways to improve the individual application form. We conclude by providing comments regarding the individual borrower reconsideration form and the third party group application forms.

We have also attached annotated versions of the individual forms themselves to reflect our more granular suggestions to improve the forms. Our annotations eliminate typos, identify questions that are irrelevant under the borrower defense regulations at 34 CFR 685.400 *et seq*, suggest word choice revisions that would make the form easier for borrowers to understand, and identify places where borrowers will need more clarity.

## II. Responses To The Department's Supportive Statement

### A. The Department Underestimates the Amount of Time It Will Take A Borrower to Complete the Individual Application Form

In item 12 of the supportive statement, the Department stated that it would take borrowers 30 minutes to complete the individual application form, with the cumulative burden being 150,534 hours for approximately 300,000 individual applicants.[5] We strongly disagree with this estimate.

The Department's estimate fails to reflect the "beginning to end experience of completing the information collection activity."[6] The proposed form is 19 pages, is written in single spaced,

[5] It is unclear whether the Department's estimates encompass the individual reconsideration forms. We similarly estimate that the reconsideration form will take at least two hours of preparation to engage in factual investigation and/or legal research, and we anticipate that it will take most borrowers at least an hour to draft and submit the reconsideration form itself.

[6] Memorandum for Heads of Executive Departments and Agencies, From Shalanda D. Young, Director, OMB and Dominic Mancini, Deputy Administrator, OIRA, Re: Improving Access to

10 point font, and has 77 open response questions. For most borrowers, it would take 30 minutes just to read and understand the form. But as explained below, completing the borrower defense application takes many more steps. Given what we have learned from borrowers completing the current form—a form that is substantially similar to the proposed form—a more accurate but conservative estimate of the time it will take an individual borrower to complete this form is 4-5 hours, regardless of whether they are completing the form on their own or they are working with a legal aid staff member to complete the form. That means that a more accurate estimate of the total burden of this form is 1.2 million to 1.5 million hours.

Preparing to complete the form often takes 2-3 hours or more. Most borrowers will prepare to complete this form by:

- Reading and attempting to understand the 19-page form,
- Attempting to seek out and understand information regarding what a borrower defense is and what claims the Department has granted in the past,
- Searching for evidence that might support their claim, including:
    - Searching for old school records or emails that might contain useful evidence as well as dates of enrollment and formal names for programs (note: many of our clients do not have housing stability and have often lost access to the email used to communicate with their school),
    - Searching the internet for old advertisements or school website information the borrower might have viewed when enrolling, and/or
    - Calling old classmates, instructors, or family members to help the borrower recall which school employees they spoke with or what that employee said.

In addition, if an attorney or other service provider is assisting the borrower with drafting their form, it will generally take an hour or more to interview the borrower about their school experience and to educate the borrower about what a borrower defense is and how to complete the application.

Further, completing the form itself is a multi-hour endeavor for most borrowers. Given that the proposed form substantially mirrors the existing form, the experiences of borrowers attempting to complete the existing form are instructive. Borrowers report that it takes them two hours or longer to respond to the current PDF form, and borrowers often tell us that it takes them multiple-hour long sessions to complete the online form.

Both borrowers who complete the online form and the PDF form observe that the way the form is designed requires that they repeat the same information over and over again. In many cases, multiple types of school misconduct occur in the same interaction with a borrower, or in

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Public Benefits Programs Through the Paperwork Reduction Act at 4 (April 13, 2022), *available at* https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf.

fluid interactions with the school. But the current form requires that the borrower repeat essentially the same information if they check a new category of school misconduct, even if they provided a comprehensive narrative when describing a different category of school misconduct earlier in the form. This repetition is made worse on the online form, where the borrower is required to complete text boxes before the application allows the borrower to progress to the next screen. As a result, borrowers experience significant psychological burden when completing these forms and often express frustration, confusion, defeat, anger, and exhaustion during the application process—even if they ultimately have a meritorious claim. The needless length and repetition of the current form causes many borrowers to be too discouraged to complete and submit it.

Borrowers using both the PDF and online form also experience logistical difficulties when submitting their forms—challenges that needlessly extend how much time must be expended to submit an application. Borrowers often report that the online form deletes information they attempted to input before they can move to the next screen. In addition, they cannot move to the next screen until they complete all of the mandatory boxes on the screen they are on. That means that if they do not have that information available, they must stop, find the information, and then return later. Borrowers who submit a paper application (at times completing the form by hand) often must spend additional time completing the form again because the Department has lost it.

### B. Recommendations to reduce the time burden imposed on individual applicants.

We appreciate that the Department is attempting to compile a form that prompts borrowers to respond to each element necessary to substantiate a borrower defense claim, but we believe that there is a less burdensome way to do so. We recommend that the Department consider utilizing the A/B testing suggested in the OMB guidance to reduce the burden this form imposes on borrowers.[7]

We also propose that the Department user-test a reformatted version of the form that collapses the 6 sections on school misrepresentations or omissions in the proposed form (Employment Prospects, Career Services, Transferring Credits, Accreditation, Educational Services, Program Cost and Nature of Loans, Aggressive and Deceptive Recruitment) into a single section that is comprised of a checklist of all forms of school misconduct and follows that checklist with an open-ended narrative response question prompting the borrower to provide the

[7] User testing is also recommended by the Federal Plain Language Guidelines at 100-112 (March 2011), *available at* https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf. The Borrower Defense Application form is subject to the Plain Language Act, Pub. L. No. 111-274 (2010).

supporting details of the misconduct. This approach will reduce the amount of duplicative information the borrower must insert into the form. Collapsing the school misconduct section into a unified narrative section may also present borrowers with a more natural and intuitive way to tell their story and include all of the relevant facts without getting caught up in confusion about which facts may pertain to which type of school misconduct.

In addition, we ask that the Department fix the logistical and technical problems borrowers are experiencing when they submit these forms. It is essential that the online version of the form does not delete information and that the Department does not lose copies of completed forms submitted by mail. Some of the problems with the current online form might have been avoidable had legal aid organizations been given the opportunity to review the form before it went live.[8] We request that, at a minimum, legal aid attorneys be given the opportunity to work with the Department to improve the online form and reduce the places where it causes borrowers significant frustration or extends the time they must expend completing the application.

### C. The Department Ignores the Time Burden to Legal Aid Organizations and Other Entities Providing Borrower Defense Assistance

The supporting statement also notes in item 5 that the information collection does not impact any small business or non-for-profit enterprise that is independently owned and operated and is not dominant in its field and does not provide any burden estimate for that constituency. We disagree; legal aid attorneys and the nonprofit legal aid organizations they work for will be burdened by this information collection. Many legal aid attorneys dedicate time to assisting borrowers with individual applications and will dedicate substantial time to submitting group applications. Time spent on these applications will be time that the organization must pay for.

Legal aid attorneys experience a substantial burden when assisting borrowers with individual borrower defense applications. It often takes more than 12 hours of work for a legal aid attorney to research and draft an individual client's borrower defense claim. The attorney must interview the client and help them obtain their My Aid Data File from studentaid.gov; review relevant Department of Education regulations, guidance, and findings; investigate the school that is the subject of the application; seek evidence in support of the borrower's claim for

[8] The current form also contains substantive differences from the current PDF form that should have warranted a public comment period. The US General Services Administration and OMB note that where "form conversion [] sparks other, more substantive changes in what information is collected and how questions are written [and] change[s] or increase[s] burden […] [there may be] the need for additional public comment under the PRA." U.S. Gen. Services Admin., *Converting forms from paper to digital* (last accessed Mar. 29, 2023), *available at* https://pra.digital.gov/do-i-need-clearance/form-updates-and-conversions/.

relief; draft the borrower's application; work with the borrower to submit the application via their portal on stuentaid.gov or via mail; and verify that the Department has received the application.

Technical issues also make it more difficult for legal aid attorneys to help borrowers submit borrower defense applications. Currently, there is no way for a legal aid attorney to submit a client's individual borrower defense application over the internet. As noted above, paper forms are often lost by the Department, so submitting these applications digitally is preferred. However, to do so, the legal aid attorney must bring their client into the office so that the client can log in to the client's studentaid.gov account and submit the application together with the attorney. This imposes a substantial burden on both the attorney and the client. The Department used to have an email address applicants could send the completed application to, but that has been discontinued.

Group applications are even more laborious. Attorneys spend hours speaking with borrowers and past employees at the school, searching for old copies of school documents, and issuing state public records requests for evidence material to their clients' claims. In addition, legal aid attorneys will spend hours combing through the Department's past borrower defense decisions to discern whether their clients' situation is analogous to instances of school misconduct that previously warranted relief. At a minimum, the Department should consider how legal aid attorneys will be affected by this information collection as well.

### D. Recommendations to Reduce the Amount of Time Legal Aid Attorneys Must Expend On The Application Forms

We ask that the Department establish a process by which attorneys can submit individual borrower defense applications on their clients' behalf. In the short term, we ask that the Department allow attorneys to submit their clients' applications to the Borrower Defense Group by email, and that the Borrower Defense Group email the attorney and client the application's tracking number and provide information regarding where that application is in the adjudication process.[9] In the longer term, we ask that the Department consider creating an administrative application submission process as part of its work to create an information sharing portal as required by the STOP Act.[10] Creating the portal will also reduce the preparation burden for legal aid attorneys, as it will allow them to more easily obtain their client's federal student loan history from the Department instead of relying on the borrower to navigate their own studentaid.gov account to provide the MyAidData TXT file.

[9] In the group discharge application forms, the Department requests that the applicant submit the application directly to the borrower defense group over email.
[10] Pub. L. No. 116-251 (2020).

In addition, the Department can reduce the "beginning to end experience of completing the information collection activity"[11] by giving the public more information that the Department holds about schools receiving federal aid and more information about how the Department is interpreting the new borrower defense standards. For example, the Department could reduce the preparation burden legal aid borrowers face by publishing information such as:

- which schools work with which third-party contractors,
- schools' Program Participation Agreements,
- records of when the Department has taken adverse action again schools in response to misconduct,
- a common repository of information about other federal agencies' enforcement actions against schools (that have been publicly disclosed),
- the volume of borrower defense applications that have been submitted pertaining to a particular school,
- more information about current borrower defense findings,
- information about how the Department will adjudicate claims that are not indicative of systemic misconduct on the part of the school,
- guidance interpreting the Department's new "detriment warranting relief" criteria for borrower defense eligibility.

Further, legal aid attorneys' burden would be reduced if the Department provided briefings or trainings regarding its new group application process.

## III. Comments Regarding the Individual Application Form

### A. The Department Should Revise The Application Form So That It Is Written in Plain Language And Should User-Test Both Its Design And Content For Accessibility.

The first rule of the Federal Plain Language Guidelines is "Think about your audience."[12] In the past, the Department has assumed that the audience for the borrower defense form is college-educated individuals who have some familiarity with legal terms. However, this is not the case. The population that may submit a borrower defense form is extremely varied. It includes Parent PLUS borrowers who may not have attended college at all, individuals without a

[11] Memorandum for Heads of Executive Departments and Agencies, From Shalanda D. Young, Director of OMB and Dominic Mancini, Deputy Administrator, OIRA, Re: Improving Access to Public Benefits Programs Through the Paperwork Reduction Act at 4 (April 13, 2022), *available at* https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf.

[12] Federal Plain Language Guidelines at 1 (May 2011), *available at* https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf.

GED or high school diploma who borrowed federal aid,[13] individuals who began but did not complete a postsecondary education program, and people who attended a certificate trade program. Importantly, many borrowers' program of study did not involve understanding and analyzing complex text. Furthermore, as noted above, we have clients who have meritorious borrower defense claims but have limited English proficiency or do not have a college literacy level.

Scrutinizing the form with the federal government's plain language guidelines[14] would assist all applicants. We have recommended plain language edits in our redlines throughout the proposed application form that will aid applicants' understanding of what, exactly, the Department is asking for.

In addition, plain language involves design. As the Department revises the form, it should solicit review and user testing from plain language experts to make sure it is accessible for all borrowers.[15] We note that the application design should be visually improved. The introduction at the beginning of the form is a block of text and the disclosures at the end of the form are blocks of text. This style of presenting information is overwhelming and will be difficult for most borrowers to digest. We recommend that the title font be increased and that the margins of the text be increased to 1 inch on the left and right side. In addition, we recommend that the Department user-test representing some of the information in the introduction in information graphic format instead of blocks of text to see if it makes it easier for borrowers to digest the information presented.

### B. The Form's Instructions Should List All Of the Examples of School Misconduct Provided in 34 CFR 668 Subparts F and R And Provide Borrowers With More Clarity Regarding The Adjudication Process And Timeline To A Decision.

We believe that the Department could make substantial improvements to the application's introduction. The introduction is critical to ensure that borrowers understand the eligibility criteria for a borrower defense[16] and to set borrowers' expectations regarding how

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[13] 20 U.S.C. § 1091(d) (Jan. 1, 1986 until July 1, 2012); 34 C.F.R. §§ 682.402(e), 682.402(e)(13)(iv) (FFEL), 685.215(a)(1)(i) (Direct Loan) (citing student eligibility regulations at 34 C.F.R. § 668.32(e)(1) and ATB test requirements at 34 C.F.R. §§ 668.141–668.156)

[14] Federal Plain Language Guidelines (May 2011), *available at* https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf

[15] The Department should, at a minimum, submit the form to its own Plain Language Department. *See U.S. Department of Education Plain Writing Initiative*, U.S. Dept. of Ed. (last visited Mar. 29, 2023), *available at* https://www.ed.gov/plain-language.

[16] Learning about program eligibility is included in the burden calculation under the PRA. Memorandum for Heads of Executive Departments and Agencies, From Shalanda D. Young,

much time they need to dedicate to complete the application, what they must do to prepare, and what they can expect will occur once they submit the application. The Department could significantly improve upon the introduction by taking the following steps, which we expand on below:

1. ensuring its definition of what claims qualify for a borrower defense mirrors the information solicited in the application and mirrors the requirements laid out by 34 CFR 685.401 and 34 CFR 668 Subparts F and R;
2. providing clarity regarding how Parent PLUS borrowers and students whose parents took out Parent PLUS loans should assert borrower defense claims; and
3. informing borrowers about how long it will take for the Department to provide a decision and what will happen if the borrower's claim is included in a group application.

First, we propose that the description of what a borrower defense is should adhere more closely to the definitions provided in 34 CFR 685.401 and 34 CFR 668 Subparts F and R.[17] In the proposed form, neither the narrative provided in the instructions nor the categories of misconduct provided in section 3 accurately summarize the elements of a borrower defense claim articulated by 34 CFR 685.401 or the expanded list of school misconduct in the revised version of 34 CFR 668 subparts F and R. In fact, the categories of school misconduct in Section 3—Employment Prospects, Career Services, Transferring Credits, Accreditation, Educational Services, Program Cost and Nature of loans, Aggressive and Deceptive recruitment, Judgment, Breach of Contract—raise additional bases of school misconduct that are not discussed in the introduction at all.

Further, the form's questions emphasize that the borrower needs to demonstrate harm and reliance, but the introduction omits any discussion of those topics. The introduction's explanations also use legal terminology—like "breached contract" and "judgment"—that many borrowers would not understand (and certainly would not know how to explain in the application itself). These flaws with the form will cause borrowers unnecessary confusion and make it more likely that borrowers with meritorious claims will not be able to complete the form in a manner sufficient to support their claims.

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Director of OMB and Dominic Mancini, Deputy Administrator, OIRA, Re: Improving Access to Public Benefits Programs Through the Paperwork Reduction Act at 9 (April 13, 2022), *available at* https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf.

[17] 34 CFR 668 Subparts F and R are cross listed within the definition of what constitutes a borrower defense, 34 CFR § 685.401(b). If the Department has determined that items listed within the enumerated lists of school misconduct no longer qualify a borrower for relief due to the new eligibility element of "detriment warranting relief" included in the final rule, we strongly ask that the Department publish clear guidance to explain the final regulations.

In our experience, borrowers struggle to identify eligible school misconduct if they are given generalized summaries of what might count and will fail to describe relevant information within their applications. Instead, they do best when given specific lists that illustrate what misconduct might be actionable. Specific examples help to organize their thoughts and jog their memory about instances of school misconduct. As a result, we have provided proposed language that rephrases the relevant regulations in a plain language list in the introduction.[18] That way, borrowers will be more likely to provide all relevant information when submitting their initial application and they will only need to review the introduction when determining what preparation they need to do before sitting down to complete the form.

Second, the proposed form states that Parent PLUS borrowers may complete an application but leaves ambiguous what will happen if the student submits a claim or what kinds of allegations the parent may make. The Department should clarify whether the student must submit an application and whether separate applications filed by the student and the parent will be considered together, as a joint pair. Given that the form is focused on the student's experience, the form should explain how a Parent PLUS borrower should complete the form if the student has not or will not complete their own application.

Third, the proposed form's introduction does not provide clarity regarding how long it will take the Department to provide a decision on the borrower's application and provides no information regarding what will happen to an individual claim if it is subsumed by a group claim. Borrowers experience heightened amounts of anxiety, angst, and depression the longer they wait for a decision on their borrower defense claim, particularly when their expectations regarding the timeline do not match the Department's actual timeline. It is also more difficult for borrowers to make financial plans or decisions while awaiting the outcome of a debt relief application. To reduce this psychological burden, the Department should provide clear instructions regarding the adjudication process and timeline both on its website and in the introduction to the application.

### C. Section 3 of the Form Should Be Revised So That It Is Clearer Regarding The School Conduct That May Qualify The Borrower For Relief, The Number Of Questions Soliciting Repetitive Information Are Reduced, and All Questions Regarding Harm That Resulted From School Misconduct Are Asked In Section 5 Instead of At The End Of Each Type of School Misconduct.

As noted above, the current format forces the borrower to restate the same information over and over as they attempt to provide information about each type of school misconduct. We strongly recommend that the Department consider re-formatting this aspect of the form and

[18] *See* Federal Plain Language Guidelines (May 2011), *available at* https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf.

subject it to user testing to strike the right balance between borrower burden and high-quality information. The current approach of dividing questions about school misrepresentations into six different categories makes the form more duplicative, makes it take longer, and increases the risk that borrowers will not provide the right facts in the right sections. Multiple kinds of misrepresentations may occur within the same interaction with a school employee or representative, and the form requires that the borrower submit the same information over and over again. Instead, we suggest that the Department user-test dividing the school misconduct portion of the form into the following subsections: misrepresentations,[19] omissions, aggressive and deceptive recruitment, and breach of contract.

However, even if the Department sticks with the current format, there are improvements that could increase the quality of information the Department receives from borrowers and reduce the burden borrowers face when completing this form. We recommend that the Department expand the discrete kinds of school misconduct listed so that it mirrors the misconduct in 34 CFR 668 Subparts F and R. We also recommend that it consolidate and revise the open-ended questions so that borrowers know that they should provide a narrative that describes each of the forms of misconduct they check off.

In addition, questions regarding harm appear in each school misconduct subsection in Section 3 while there is a discrete section 5 for the borrower to assert the harm they've experienced. The Department should delete the questions in Section 3 regarding "How the information provided caused [the borrower] harm (for example, have you suffered financial harm, lost opportunities, or experienced other harm as a result)?". Instead, we recommend that borrowers asked about harm suffered in only Section 5 and that the Department add a checklist of common types of harm the Department recognizes.

These recommendations are detailed in the next two subsections.

### 1. The Department Should Ensure That Borrowers Can Disclose All Necessary Information in a Minimally Burdensome Way

The checklists of school misconduct within Section 3 are very helpful to borrowers trying to figure out what conduct would be eligible for a borrower defense discharge. However, the proposed lists leave out important examples of misconduct listed in 34 CFR 668 Subparts F and R that may qualify them for a discharge. We have annotated the proposed form to include those items and to improve the accessibility of the existing items by proposing plain language edits.

[19] Ideally, the Department would convert the list we have proposed in the introduction to the form into a checklist and then provide unified open-ended questions that follow that list.

In addition, we recommend that the Department limit the open-ended questions beneath each category of school misconduct in Section 3. In the online form, borrowers will be required to enter something for each open-ended response, and some of the questions are duplicative. For example, most borrowers will explain what the school said and how it was false or misleading at the same time when narrating the school misconduct they were harmed by. Thus, borrowers will provide the same explanation twice if the form first asks, "what was said" and then asks, "how was it false or misleading?" Similarly, both the "When and where" and the "how" question both ask for how the communication was made, requiring repetition from the borrower—questions that also should be consolidated. We have edited the proposed form with suggestions regarding how to reduce the number of questions asked without sacrificing the information received from the applicant.

Lastly, borrowers may feel that it is enough to check a checkbox and not realize that they need to fully explain each item they checked above. As a result, they may fail to include information that is pertinent to their application. We recommend adding language to each open-ended question to remind the borrower that they must provide information in their own words regarding each of the checklist items they selected.

**2. The Department Should Revise The Proposed Form So That Borrowers Are Asked To Describe The Cumulative Detriment Warranting Relief For All Of The School's Misconduct Only Once, In Section 5, And Are Given A Checklist Of Recognized Forms Of Harm.**

At the end of each category of school misconduct, the proposed form asks, "How has the information provided caused you harm (for example, have you suffered financial harm, lost opportunities, or experienced other harm as a result)?" Then, the form asks 3 open-ended questions regarding harm again in section 5. As currently phrased, these questions are confusing. In addition, they will cause the borrower to provide the same information over and over again. We strongly recommend that the form be revised to ask the borrower to explain the ways they've been harmed only in one place, such as Section 5, and that the Department revise its open-ended questions to ask about the harm the school's misconduct, cumulatively, has caused the borrower.

The new borrower defense standard allows a borrower to assert that the cumulative detriment they have experienced from multiple acts of school misconduct warrants relief. Although 34 CFR 685.401 states that "a borrower defense means an act or omission of the school […] that caused the borrower detriment warranting relief," it does not require that where multiple acts or omissions have occurred, the borrower must show harm as to each one. Instead, where there are multiple acts or omissions of a school, the Department should consider their cumulative effect when determining whether to provide the borrower with relief. To interpret the regulations otherwise would risk the possibility of unjustly denying relief to borrowers who

experienced a myriad of harms that taken together would render their education worthless or would otherwise entitle them to relief.

This reading also comports with borrowers' experiences. In our experience, borrowers are not able to isolate the specific amount of harm attributed to each act of school misconduct. Instead, they identify that their school engaged in multiple forms of misconduct and describe how their school's cumulative misconduct harmed them. Many will explain that they would not have attended their program had they known the truth or had they not been subject to the school misconduct. Most will articulate that they were harmed because they took on debt, needlessly expended Pell grant dollars, wasted their time, and passed on other opportunities, like jobs or other higher-quality programs. As a result, it makes more sense to ask borrowers in one section how all of the misconduct their school committed harmed them.[20]

We recommend revising Section 5 so it mirrors the format used in Section 3: a checklist and then open-ended questions that allow borrowers to communicate the cumulative harm they experienced from all of the school's misconduct. Borrowers will not intuitively share a comprehensive list of the types of harm the Department recognizes, in part because they feel shame or embarrassment and are reluctant to share unless they know it is important to their application. By providing a checklist, borrowers will have an understanding of what types of harm are significant. The open-ended questions will give borrowers the opportunity to provide more detail in their own words.

### D. The Department Should Provide Plain Language Guidance For Individual Borrowers Who Will Apply For Relief.

We are grateful that the Department has published a guide[21] for borrowers regarding how they can successfully complete a borrower defense form. However, it is not written for the audience of borrowers we work with and is missing important information, like directing borrowers to the Department's prior borrower defense findings. Like the individual application form, this guidance is also subject to the Plain Writing Act of 2010 and falls short of being easy to read and use by the public.

We ask that, like the forms themselves, the Department ask plain language experts to review this guidance. We also ask that the Department consider redesigning this guide so that it incorporates more plain language design principles and then user-test the redesigned page so that

[20] In light of the need to ask the borrower about harm incurred cumulatively as a result of school misconduct, we also proposed alternative language that would require that borrowers narrate in their own words how their school's misconduct harmed them.
[21] Federal Student Aid, "Borrower Defense Loan Discharge" (accessed April 3, 2023), *available at* https://studentaid.gov/manage-loans/forgiveness-cancellation/borrower-defense.

it is more accessible to the borrowers we serve. We also ask that the Department consider educating borrowers about the borrower defense discharges via other mediums, like videos, graphic images, or one-page explainer materials.

### E. The Department Should Translate The Form And All Guidance Into Spanish And Other Languages.

These forms and any accompanying guidance should also be available in Spanish and other languages commonly used by borrowers. Many predatory colleges have specifically targeted their deceptive practices towards Spanish speakers who are not fully proficient in English (Limited English Proficiency or LEP individuals). In addition, the Department should translate forms into other languages, as needed, based on assessment of the most common languages of LEP individuals at for-profit or predatory schools, or specific schools subject to relevant enforcement action or investigation.

Translated discharge forms are critical to ensuring that LEP borrowers harmed by colleges are able to understand and exercise their federal right to apply for discharges. If the Borrower Defense application is not translated into Spanish and other languages, LEP borrowers will be denied the loan discharges to which they are entitled by law, which will likely result in large numbers of them defaulting on their loans, suffering from the Department's harsh involuntary debt collection tactics, and being barred from access to quality higher education. This result is contrary to the purpose of the Higher Education Act, as well as the requirements of Title VI of the Civil Rights Act, and President Biden's own commitment to racial justice equity.[22]

## IV. Comments Regarding the Individual Reconsideration Form

We have provided a number of suggestions for plain language revisions to the individual borrower reconsideration form by annotating the form itself and are submitting an annotated version with these comments. In addition, we want to highlight a significant inaccuracy the form contains and that should be corrected.

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[22] Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government, Exec. Order No. 14091, 88 Fed. Reg. 10825 at § 3 (Feb. 16, 2023), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.; Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

The proposed form contains a checkbox with the following text: "Consideration under the applicable state law standard (**only** for group members with Direct Loans disbursed prior to July 1, 2017)." This is inaccurate. Borrowers with any type of loan that was disbursed before July 1, 2017 and that can be consolidated into a Direct Loan may request that their claim be reconsidered under the applicable state law standard. In its final rule, the Department explained that it interpreted the Higher Education Act to require that FFEL loans be treated in parity with Direct Loans. As a result, the Department ensured that borrowers with FFEL loans could access the borrower defense process, stating, "§ 685.401(b) makes clear that a BD claim is available to a 'borrower with a balance due on a covered loan[,]' which includes 'a Direct Loan **or other Federal student loan that is or could be consolidated into a Federal Direct Consolidation Loan**.' § 685.401(a)." (emphasis added)[23]

Further, 34 CFR 685.401(c) states that the state law standard is available "for loans first disbursed prior to July 1, 2017"; it does not limit the state law standard's applicability to Direct Loans. Likewise, 34 CFR 685.407 does not exclude non-Direct Loans issued before July 1, 2017 from consideration under the state law standard. Additionally, the 2022 amendments to 34 CFR § 685.212 do not make the applicability of 34 CFR 685 subpart D contingent on the date of the Direct Consolidation loan that paid off other loans.[24] As a result, the Department should make clear that borrowers with outstanding debt on any loan issued prior to July 1, 2017 may request reconsideration under the state law standard.

Finally, much of the burden and confusion associated with the reconsideration form turns on whether borrowers can tell what evidence the Department reviewed when denying their application. In the past, denial letters have contained opaque information regarding the basis of the Department's denial. To ensure that this does not occur in the future, we request that the Department provide borrowers with copies of the evidence that was cited in the Department's denial letter so that borrowers can determine whether the denial was an administrative error or whether they have additional evidence to provide.

## V. Comments Regarding the Third-Party Group Application Forms

Generally, the third-party group application forms are sufficiently straightforward for a legal audience. However, the amount of burden imposed on applicants turns on how much guidance the Department provides regarding how it is interpreting the new borrower defense rules. Specifically, we ask that the Department provide guidance regarding how third-party requestors should provide evidence pertaining to "detriment warranting relief" beyond sworn borrower statements.

[23] 87 Fed. Reg. 65904, 65916 (Nov. 1, 2022).
[24] 87 Fed. Reg. at 66058 (Nov. 1, 2022).

## VI. Conclusion and Contact Information

Thank you for this opportunity to comment on these application forms. Please contact Kyra Taylor at KTaylor@nclc.org with questions or if you would like to discuss further.