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August 30, 2018

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave., S.W.
Mail Stop 294-20,
Washington, DC 20202

Dear Mr. Gaina,

On behalf of the associations listed below, representing college leaders, educators, and professionals, we write offering comment on the Department's proposed final rule on borrower defenses to repayment (Docket ID ED–2018–OPE–0027). While the proposed rule includes changes to the methodology the Department uses to assess the financial stability of institutions, we will submit comments on that subject in a separate letter. This letter will address only the proposed changes to the process for granting borrowers relief due to the sudden closure of, or fraud or misrepresentation by, their institution.

As the representatives of colleges and universities, we have a clear interest in ensuring that any process impacting institutions is fair to all parties and balanced in its approach. From our perspective, the proposed rule fails to meet that standard.

Our particular concerns will be addressed in detail below, but it is important to state at the beginning that as problematic as individual provisions may be, when taken together these provisions would make asserting a successful claim functionally impossible. This will not just adversely impact those individuals, but also will eliminate accountability for the worst actors and incentivize practices we know to be harmful to students.

The specific provisions of concern in the rule are as follows:

Affirmative Claims

The Department proposes to limit the ability to assert a defense to repayment only to defensive claims (those made in response to collection actions following default by the borrower). The Department stated that its proposal to only allow borrowers in default to assert borrower defense is how it interpreted the rule from 1994 to 2015, and that the 2016 rule expanded that interpretation to "affirmative defenses" by all borrowers.

Comments filed by the Legal Service Center of Harvard Law School on August 3, 2018, however, include documents from the Department's Office of General Counsel that clearly show this characterization to be inaccurate. These comments demonstrate that in 2015, the Department simply affirmed, rather than changed, its longstanding interpretation that all borrowers, regardless of repayment status, may assert borrower defense. This mischaracterization undermines the Department's rationale for denying borrowers affirmative claims

Because this has been the Department's consistent policy, we find no compelling reason to change it. On the contrary, we believe that limiting the ability to assert defensive claims only would introduce several practical problems while also undermining the purpose of the rule.

Our first concern is based on the principle that victims of fraud should not be denied the ability to seek redress based on their repayment status. What the Department proposes would unduly harm those who have sought to meet their obligations, while simultaneously providing a tangible incentive to default on their payments. Considering the significant negative impact of entering default, the limited likelihood of relief under the proposed rule, and the broad consensus around the importance of implementing policies to avoid default, this proposal is contrary to meeting those goals. For these reasons, we strongly believe that the Department should allow for both affirmative and defensive claims to be asserted.

The Department also seeks comment on whether, if affirmative claims are allowed, they should be judged under the existing "preponderance of evidence" standard or under the higher "clear and convincing" standard. We see no reason why claims of either type should be judged under different standards or why borrowers should have to meet a higher standard than the preponderance of evidence standard used in civil law.

In summary, we believe the rule should allow for both affirmative and defensive claims, and that both types of claims should be determined under a preponderance of evidence standard. Further, a successful defensive claim should necessitate action by the Department to notify credit bureaus of the decision so that records of the default are expunged from the borrower's credit record.

Partial Relief and Determination of Financial Harm

The Department moves to change the relief offered for a successful borrower defense claim from full relief to a more limited form of partial relief that depends upon a determination by the Department of the amount of financial harm suffered by the borrower. Perhaps acknowledging the enormous difficulty of this task, the Department has provided no concrete suggestions about how it would determine the severity of financial harm experienced by the borrower. The proposed rule only requests comment on how the Department should calculate the relief provided. As a benefit to borrowers, it is incumbent upon the Department to clearly delineate the conditions borrowers would need to meet in order to receive either partial or full relief. Given this and the severity of the burden the Department imposes upon borrowers to assert a successful claim, we believe that providing full relief for the borrower and recovering those funds from the institution remains the appropriate action for the Department to pursue.

Beyond the appropriateness of providing full relief to borrowers under the proposed rule, there are a number of reasons to doubt the Department's ability to make fair and accurate determinations of the degree of financial harm suffered by each individual borrower. Any such determination would need to account for a wide range of factors that could include the borrower's education and employment history, the regional unemployment rates both overall and in the borrower's career field and numerous other circumstances that directly impact an individual's earnings potential. Even if these factors could be reliably measured and some income gain is determined to exist, that gain would then need to be measured against the expenditures the borrower put towards their program. As evidence of the inherent complexity of this method, the proposed rule references the serious difficulties the Department faced in attempting to create a formula to address this, and resultantly, does not include a proposed formula.

Furthermore, the Department repeatedly notes the administrative burden imposed by reviewing the tens of thousands of borrower defense claims that have been asserted in recent years. Setting aside the significant challenges inherent in attempting to make these determinations at all, doing so on the scale considered would greatly increase the time and difficulty involved in processing each claim, adding enormously to the burden on the Department and further delaying the expeditious review of claims.

For these reasons, it would be far fairer to borrowers, and simpler to administer for the Department, to retain full relief for successful claims.

Single Federal Standard

The rule proposes to eliminate state law causes of action as the basis for asserting a defense to repayment. The Department explains that this is intended to address cases in which different state laws may impact similarly situated borrowers differently. However, the Department has interpreted statute as allowing for state law causes of action to serve as the basis for asserting a borrower defense for over two decades, so the proposed rule is in direct conflict with the Department's own long-standing practice.

If the Department is concerned that a borrower's ability to assert a defense is limited by the state in which they reside, it is certainly reasonable (and in line with statute) for the Department to allow a borrower to assert a claim under a separate federal standard. In this case, the federal standard would supplement rather than supplant the state and federal law provisions cited in statute.

It has been the clear goal of this Administration and this Department to reduce the size and scope of the federal role in education and return power to states and local entities. It is inconsistent for the Department to propose a method that would subvert the state role and undercut judgements made at the state level. This approach would result in a significant usurpation of state authority by the Department and is at odds with the Department's broad policy objectives.

Group Claims

The proposed rule would allow borrowers to assert claims only as individuals and not as part of a group. This proposal is particularly surprising as the Department at several points explains decisions made while drafting the rule as driven by the need to reduce its administrative burden. Allowing borrowers from the same institution where clear patterns of abuse have been determined to assert claims as a group would be the most efficient way to address large numbers of claims expeditiously. Similarly, allowing group claims would strengthen the usefulness of this rule as an accountability measure, as institutions would know that efforts to defraud students could result in large groups of students being given relief, with the associated financial impact on the institution.

We share the Department's concerns regarding outside actors attempting to monetize the process of group claims. We raised similar concerns in our comments on the 2016 rule. However, there are options the Department could consider to limit this possibility as an alternative to disallowing group claims entirely.

Borrowers' Obligation to Prove Intent or Reckless Disregard

In defining the uniform federal standard borrowers would need to meet to assert a claim, the proposed rule includes an obligation on the borrower to provide evidence sufficient to demonstrate "that a school has made a misrepresentation with either knowledge of its falsity or with a reckless disregard of the truth." This is despite the fact that the rule notes "that it is unlikely that a borrower would have evidence to demonstrate that an institution had acted with intent to deceive." It is difficult to reconcile these two positions, and it would be reasonable to instead simply allow borrowers to submit sufficient evidence to prove that fraud or substantial, material misrepresentation was responsible for their taking out loans, regardless of whether it was due to the specific intent or reckless disregard of the institution.

The interest of both the Department and the public in this process is in rectifying harm to borrowers who have been subject to fraud or misrepresentation. It should not be necessary for the borrower to meet the high bar of proving intent or reckless disregard to accomplish these goals. Doing so undermines the interests of borrowers who have been victimized but also weakens the value of this rule in promoting the accountability of institutions. This also is relevant to protecting taxpayers' interest, as the surest protection would be for institutions to avoid behaviors that would give rise to borrower defense claims in the first place.

Timeframe for Asserting Claims and the Use of New Evidence

In our comments on the 2016 rule, we supported applying a three-year statute of limitations on a borrower's ability to assert a defense to repayment in light of the Department's long-standing policy requiring institutions to retain records for three years.

In the case of affirmative claims, we believe the three-year statute of limitations should still apply, though with important caveats. Our support for this limitation was predicated upon the design of the 2016 rule that allowed borrowers to produce new evidence to assert a claim or reopen a decision. The proposed rule does not give borrowers the right to introduce new evidence either to assert claims past the statute of limitations or to reopen claims previously decided. It does not serve the public interest to deny claims that may otherwise be granted because relevant information is not available, and then bar individuals from later making use of compelling evidence when it becomes available. Instead, the Department should set reasonable limits on what constitutes new evidence but not bar its use.

We support the process for the handling of defensive claims, which allows for the assertion of a borrower defense to repayment upon the initiation of collection activities, regardless of what stage of repayment a borrower is in.

We would propose, especially given the Department's interest in resolving claims expeditiously, that once collection actions have begun, the filing of defensive borrower defense claims should be accompanied by a corresponding delay in enforcement actions until the claim is resolved. We appreciate that this may give rise to frivolous claims being asserted to simply delay collections, but given the very short period of time for collection actions to be resolved (as little as 30 days), it is in the best interest of both the borrower and the Department to resolve a borrower defense claim before additional actions are undertaken.

Pre-dispute Arbitration Clauses and Class Action Waivers

The Department states that allowing institutions to mandate students sign pre-dispute arbitration clauses and/or class action waivers helps provide a path for borrowers to seek remedies from institutions before filing a borrower defense claim. On the contrary, mandating the use of such agreements simply limits borrowers' options in seeking redress, limits their ability to gather the types of evidence needed to support borrower defense claims, and provides protection to institutions that are acting against the interests of their students. We fail to see how allowing these types of requirements is beneficial to the public.

False Certification Discharge

The proposed rule would make explicit that a borrower who provides an attestation of their high school graduation status for admissions purposes would not be eligible for a false certification discharge if that attestation was false. While this is a sensible policy overall, it is important to consider circumstances under which that false attestation was the result of a deliberate effort by an institution. Students who have been induced to misrepresent their eligibility as a result of institutional efforts or practices should be entitled to relief under false certification when those circumstances can be determined.

Closed-School Discharges and the Teach-Out Process

The proposed rule makes changes to how closed-school discharges are handled, including extending the window to qualify for a closed-school discharge from 120 to 180 days, eliminating the automatic trigger for the award of a closed-school discharge, and tying a borrowers' eligibility to receive a closed-school discharge to their participation in a teach-out process offered by the institution.

Of these changes, we strongly support the extension of the window to 180 days. As the proposed rule noted, students are often able to perceive declines in educational quality or opportunity at institutions that are beginning to fail, and providing those students with additional time to transfer, limit borrowing, or make other changes to further their educational goals will result in better outcomes and may reduce the necessity for borrowers to seek a closed-school discharge.

The use of automatic triggers for closed-school discharges is a simple method to address large numbers of impacted students. While the proposed rule correctly notes the Secretary's existing authority to award closed-school discharges to groups of students in the absence of a trigger, it has not been the practice of this or previous administrations to use this authority. As a result, retaining an automatic trigger is a valuable tool to ensure students are not unduly harmed by the absence of activity on the part of the Secretary, particularly in cases where large institutions have abruptly closed.

We would support maintaining the trigger created by the 2016 rule, which provides for an automatic discharge for borrowers who have not enrolled in a Title IV-eligible institution within three years of their previous institution's closure. Not only does this protect students who may not be aware of their ability to seek a discharge, but also helps mitigate the potential administrative burden on the Department from multiple individual applications for discharge.

Additionally, the Department's assertion that the use of the trigger may result in institutions withholding transcripts from former students who have been issued a closed-school discharge is unpersuasive. A more appropriate area of concern should be ensuring that students retain access to their records if their school suddenly closes rather than predicating a policy change on an institutional practice that appears to be solely punitive in nature.

We are similarly concerned with how the proposed rule ties a borrower's eligibility for a closed-school discharge to their participation in an institution's teach-out process. It is clearly in the best interest of all parties for a school that is closing to provide meaningful paths to completion within a student's program of study (either at the original institution or another institution). However, several recent examples have demonstrated that not all teach-out plans serve all students well. Students have been offered the choice of attending classes at institutions hundreds of miles from their original institution, or offered coursework exclusively through distance education when their original programs necessitated physical interaction. In such cases, even when accreditors and state authorizers have signed off on the plans, students should be allowed the option to decline to participate without losing their eligibility for a closed-school discharge.

Process Error in the Rule

Beyond the substantive issues raised above, we are concerned that the proposed regulation may not comply with the requirements of the Administrative Procedure Act.

As announced at the outset of the negotiations it held on the rule, the Department clearly asserts in the preamble that it is legally required to measure the proposed rule against the baseline of the regulation currently in effect and not the 2016 regulation that the Secretary chose to delay (pp. 3725-37251). Despite this identification of current law as the legal baseline, the NPRM provides no budget analysis against that baseline and instead uses the 2016 regulation—which never fully took effect—as the benchmark for its net budget impact analysis. There are legitimate questions as to whether this deficiency renders the NPRM noncompliant with the APA. The Department may need to amend and republish the NPRM.

As the representatives of institutions, we strongly support regulatory measures that are targeted, effective, and provide a necessary balance between protecting students and ensuring appropriate responsibility on the part of institutions. It is our belief that the proposed rule moves far too much in one direction, and if implemented as drafted, would further penalize borrowers for the actions of certain institutions operating in a manner contrary to the public interest.

We appreciate your attention to these comments.

Sincerely,

Terry W. Hartle
Senior Vice President

On behalf of:

ACPA-College Student Educators International
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
Association of American Colleges and Universities
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Council of Graduate Schools
Council of Independent Colleges
EDUCAUSE
NASPA - Student Affairs Administrators in Higher Education
National Association for College Admission Counseling
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
The Common Application