ConsumersUnion®
THE ADVOCACY DIVISION OF CONSUMER REPORTS

August 30, 2018

Betsy DeVos, Secretary
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Dear Secretary DeVos,

Consumers Union, the advocacy division of Consumer Reports,[1] appreciates the opportunity to comment regarding the Department's new proposed rule on Borrower Defenses and Financial Responsibility.

We have significant overarching concerns that this rule, as drafted, will essentially block student borrowers from obtaining relief, while shielding schools from accountability even when they engage in systematic misconduct.

The proposed Federal standard for borrower defense would, as drafted, be near-impossible for borrowers to meet even when they have credible claims. We urge the Department to set forth a fairer standard and process as follows:

- If a new Federal standard is created based on misrepresentation, base the standard on the school's conduct and its likelihood to mislead, regardless of intent;
- Allow borrowers to file a claim, regardless of repayment status, at any time;
- Allow borrowers to submit claims based on their personal testimony;
- Apply a preponderance of the evidence standard;
- Preserve a borrower's right to appeal and submit new evidence before making a final determination; and
- Permit group discharges where borrower defense claims demonstrate a pattern of misconduct at a particular school or program.

We are also opposed to the Department's proposal to restrict closed school discharges. We urge the Department to explicitly provide for automatic closed school discharges, and to permit students to apply for relief if the student declines to complete their education through a "teach-out" program offered by a failing school.

---

[1] Consumers Union is the advocacy division of Consumer Reports, an expert, independent, non-profit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. Consumers Union works for pro-consumer policies in the areas of financial services, as well as telecommunications, health care, food and product safety, energy, telecommunications, privacy and data security, and competition and consumer choice, among other issues, in Washington, DC, in the states, and in the marketplace. Consumer Reports is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

Furthermore, we urge the Department to ban the use of forced arbitration in school enrollment contracts, as set forth in the 2016 borrower defense rule, because it would protect students, further the objectives of preventing abuse of taxpayer funds, and the Department has clear legal authority to do so.

Finally, the financial responsibility provisions will fail to result in meaningful interventions that prevent schools from precipitously closing and leaving students stranded. The Department must include more mandatory "triggering events" that catch signs of mismanagement early enough to prevent harm to students.

Borrower Defense Standard

Under the Higher Education Act (HEA), borrowers of federal education loans have a right to assert a "defense to repayment of a loan made" under HEA, and the Secretary is directed to write regulations specifying which acts or omissions give rise to a borrower defense.[2] The borrower defense regulations promulgated in 1994 and placed into effect in 1995 stated that a borrower may assert a defense to repayment based on acts or omissions of a school that constitute a violation of applicable State law, but they did not specify a standard with burden of proof or formal process for asserting such defenses.

As several negotiators and members of the public stated throughout committee proceedings,[3] borrowers who were induced to enroll in poor programs and take on debts have experienced *prima facie* financial harm. They have lost time, money and the chance to get a better education elsewhere due to the actions of their schools. To properly implement borrowers' rights under HEA, the Department's borrower defense rule must set forth clear and reasonable procedures that give borrowers a fair shot at making a claim for relief, especially given the substantial power and information imbalance between financially distressed students and educational institutions. This rule is meant to protect students from unfair debt burdens - not shield schools that accept federal funds from accountability.

The new proposed Federal standard, for loans issued on or after July 1, 2019, sets an unusually high standard and burden of proof that will effectively bar legitimate claims for relief and leave students to suffer. If the Department creates a Federal standard, then at a minimum that standard should serve as a floor and still allow borrowers to assert claims based on violations of the applicable state law.

The final rule should not limit claims solely to borrowers in default. Under current law, borrowers have a right to assert a defense to repayment of their loans, period. It is unnecessary for the Department to create a distinction between "affirmative" and "defensive" claims. The Department characterizes the 1995 rule as providing a "defense to repayment in response to a

[2] HEA Section 455(h), 20 U.S.C. § 1087(h) (2018).
[3] *See, e.g.*, U.S. Dep't of Educ., Borrower Defenses and Financial Responsibility, https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html (Session 1, transcript of proceedings on Nov. 14, 2017) (testimony of Alexis Goldstein, Americans for Financial Reform, at 349-58).

collection proceeding"[4] on a Direct Loan, but the regulation is not so narrow in scope, nor has the Department been applying such an interpretation in practice. The 1995 regulation says "in any proceeding to collect on a loan," a borrower may assert a defense to repayment - and such "proceedings include, but are *not limited to*" certain garnishment, offset and credit bureau reporting proceedings.[5] The scope of proceedings is not explicitly limited to post-default collections proceedings, and the regulation contemplates that the borrower may be entitled to receive relief including, "but not limited to," both outstanding balances as well as amounts already paid toward the loan "voluntarily or through enforced collection."[6] Nothing in the plain language of this section indicates that the prior regulation is restricted only to claims made after collections proceedings have begun.

The Department rightly notes that the borrower defense regulation was rarely used prior to 2015, but borrowers didn't begin to seek relief because they were now learning for the first time that "affirmative" claims were allowed. Virtually no borrowers knew of their rights to assert a borrower defense at all, until the widespread abuses, scandals and Department actions against several large for-profit colleges were made sufficiently visible to the public. In late 2014, on the heels of several state and federal investigations into widespread misconduct, the massive for-profit chain Corinthian Colleges collapsed and left thousands of current students stranded.[7] Former students who had been struggling to repay their debts from Corinthian programs suffered the further injury of learning that their credentials would be forever tarnished in light of the collapse. Soon after, in 2016, for-profit ITT Tech also succumbed after similar investigations after leaving thousands more in debt for a worthless education.[8] As these schools began to close, the Department conducted outreach to affected students, as did state attorneys general and various nonprofit organizations, to help them understand their rights.

Furthermore, the Department incorrectly asserts that from 1994-2015, it interpreted its own regulations so as only to permit defensive claims in collections proceedings.[9] As Harvard's Legal Services Center demonstrated in its preliminary comments filed on August 2, 2018, numerous "affirmative" borrower defense cases were adjudicated and approved by the Department prior to 2015.[10] This mischaracterization of the Department's prior interpretation of its own policies raises significant concerns as to whether this proposal has been vetted appropriately pursuant to administrative law and procedure.

The Department's "Option A" proposal to limit claims made on or after July 1, 2019 only to borrowers in default and facing collections is troubling and lacking a rational basis. The

---

[4] 83 Fed. Reg. 37242, 37251 (proposed July 31, 2018).
[5] 34 C.F.R. § 685.206(c)(1) (emphasis added).
[6] 34 C.F.R. § 685.206(c)(2).
[7] *See* Anya Kamenetz, *The Collapse of Corinthian Colleges*, NAT'L PUBLIC RADIO, Aug, 8, 2014, *available at* https://www.npr.org/sections/ed/2014/07/08/329550897/the-collapse-of-corinthian-colleges (reporting on agreement with Dep't of Educ. to sell or close all campuses).
[8] *See* Patricia Cohen, *Downfall of ITT Technical Institutes Was a Long Time in the Making*, N.Y. TIMES, Sept. 7, 2016, *available at* https://www.nytimes.com/2016/09/08/business/downfall-of-itt-technical-institutes-was-a-long-time-in-the-making.html.
[9] 83 Fed. Reg. at 37253.
[10] Letter from Eileen Connor, Legal Servs. Ctr., Harvard Law Sch., to U.S. Dep't of Educ. (Aug. 2, 2018), *available at* https://predatorystudentlending.org/wp-content/uploads/2018/08/LSC-Prelim-Cmt-FINAL.pdf (includes documents obtained pursuant to FOIA request).

Department makes a distinction between “affirmative” and “defensive” claims that was only briefly raised during negotiations,[11] and none of the drafts submitted to the committee proposed limiting claims only to borrowers in default.[12] The Department has failed to demonstrate a rationale for putting borrowers in a position to wait until they default on their loans or be otherwise barred from relief, given the severe consequences of default. A borrower in default can incur hefty fees and be subject to administrative wage garnishment, tax refund and Social Security offsets, and damaging impacts to their credit histories. As Student Veterans of America and others have pointed out,[13] military-connected borrowers risk losing their security clearances if they default on their loans - an unduly burdensome Hobson’s choice that could bar relief to a population that has been disproportionately affected by abuses in the for-profit sector of higher education.[14] Furthermore, the Department admits that it does not have sufficient evidence to suggest that allowing affirmative claims will incentivize borrowers to file claims even when they haven’t experienced harm.[15]

The Department raises the question of whether limiting the borrower defense rule to defensive claims would incentivize borrowers to engage in “strategic default”[16] - but apparently fails to consider the even greater likelihood that it will incentivize debt relief companies to aggressively market their services to borrowers, telling them to default in order to apply for relief. Such practices were common in the previous decade, when debt relief companies marketed their services to people struggling with credit card debt. Although the industry briefly declined after federal regulators took notice,[17] these same kinds of companies have proliferated in recent years as more people have struggled to repay student loans. So-called “student debt relief” companies have marketed services such as loan consolidation or enrollment in income-driven repayment plans to borrowers struggling at varying stages of repayment. They have come under investigation by federal agencies - including the Department, in the past - for deceiving

[11] 83 Fed. Reg. 37242, 37253 (referencing that one negotiator “noted” the 1995 regulation implied only defensive claims were submitted, while others believed affirmative claims were allowed).
[12] *See* U.S. Dep’t of Educ., Borrower Defenses and Financial Responsibility, https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html (Session 2, “Issue Paper #1 - Federal Standard”; Session 3, “Issue Paper #1 - Federal Standard”).
[13] *See* Michael Stratford, *Veterans Groups Concerned with DeVos “Borrower Defense” Plan*, POLITICO MORNING EDUC., Aug. 8, 2018, https://www.politico.com/newsletters/morning-education/2018/08/09/veterans-groups-concerned-with-devos-borrower-defense-plan-311194 (quoting Will Hubbard, negotiator representing interests of servicemembers and veterans for this rulemaking).
[14] *See, e.g.*, S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, S. REP. NO. 112-37, pt. 1 at 78-82 (2012) (two-year Senate study using undercover GAO investigators) (detailing military-focused recruiting tactics, from deceptive lead generator websites implying official military affiliation to in-person recruiting at wounded warrior barracks and veterans hospitals).
[15] 83 Fed. Reg. at 37243.
[16] *Id.*
[17] Telemarketing Sales Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010) (codified at 16 C.F.R. § 310); *see also* Press Release, Fed. Trade Comm’n, FTC Issues Final Rule to Protect Consumers in Credit Card Debt (Oct. 27, 2010), *available at* https://www.ftc.gov/news-events/press-releases/2010/07/ftc-issues-final-rule-protect-consumers-credit-card-debt (announcing final amendments, compliance guide).

borrowers and charging fees for actions that borrowers can take on their own for free.[18] Myriad problems in the education loan servicing industry have already contributed to the growth of these debt relief companies; creating a rule that requires borrowers to default before seeking relief will only further embolden debt relief companies to target borrowers with promises that they can help them file successful borrower defense claims, for a fee.

If a new Federal standard is implemented, the Department should permit both affirmative and defensive claims ("Option B") and make additional changes to the standard as discussed below.

The final rule should permit borrowers with legitimate claims to obtain full relief from federal loans incurred to attend a program. The proposed rule would define "provision of educational services" solely in terms of resources required to be provided by a state licensing agency or accreditor, while ignoring the very real costs that students incur in a variety of ways to pay for their attendance at a particular program. HEA authorizes grants and loans to students to help cover their actual cost of attendance - both direct costs such as tuition and books, and indirect costs such as housing and transportation. The Department has failed to explain why such a narrow definition is necessary to ensure it is balancing the interests of students, taxpayers and schools.

Even full relief from federal loans is an insufficient to remedy the many harms students have experience when lured by false promises into attending predatory schools. These students may also have private loans and other out of pocket costs; lose critical Pell grant dollars that they can't get back to use for a second chance at a better education; suffer financial hardship due to their loans and worthless degrees that can lead to evictions and ruined credit; and suffer stress and embarrassment at having been duped and unable to get a job in their intended field. They can also never get back the time they wasted at a school they would not have attended if the school had been honest with them—time they could have spent attending a better school.

Given that full relief from the relevant federal loans is insufficient to get harmed borrowers back to where they would have been *absent the school's misconduct*, the Department should not look for ways to reduce relief still further.

The final rule should not include overly burdensome requirements for demonstrating "financial harm." The Department rejects the assertion that enrolling in a program based on a misrepresentation and incurring debt is enough to demonstrate financial harm - and cites the borrower's obligation to pay under the Master Promissory Note whether or not the borrower

---

[18] *See* U.S. Dep't of Educ., Third-Party debt relief companies' use of institutional names, logos and other trademarks, https://ifap.ed.gov/eannouncements/033016ThirdPartydebtreliefcompaniesuseofinstitutionalnameslogosandothertrademar.html (bulletin announcing two cease-and-desist letters sent to debt relief companies on Jan. 28, 2016); *see also* Proposed Stipulated Final Judgment and Order, Consumer Fin. Protection Bureau v. Student Loan Processing.US, Case. No. 14-1967 (filed C.D. Cal. Mar. 15, 2016); Press Release, CFPB Takes Action to Shut Down Illegal Student Debt Relief Scheme (Mar. 15, 2016), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-shut-down-illegal-student-debt-relief-scheme/; Stipulated Final Judgment and Order, Consumer Fin. Protection Bureau v. College Educ. Servs. LLC, Case No. 14-3078 (filed M.D. Fla. Jan. 15, 2015); Press Release, CFPB Takes Action to End Student "Debt Relief" Scams (Dec. 11, 2014), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-end-student-debt-relief-scams/.

completes the program of study or is satisfied with the education received.[19] Yet the same Master Promissory Note also states that the borrower has the right to assert a defense to repayment; these two provisions are not mutually exclusive.[20] Furthermore, it is difficult to make sense of the Department's position that incurring these debts cannot constitute financial harm in and of itself, when the heart of the Department's proposal may require student borrowers to *default on their loans and face collections* before they can file a claim.

The final rule should not include a statute of limitations or other deadline for seeking relief. Under the Department's proposed Option A, where only defensive claims can be made, the limitations period is not based on when the student left a program but there is still a deadline to apply for relief. A borrower would have only 30-65 days after the start of a collection proceeding (depending on the type of collection action)[21] to file a claim - an incredibly short time frame within which to learn about the borrower defense claim process, gather supporting evidence, and file a claim.

We also have concerns that even under proposed Option B, which would permit affirmative claims, a borrower would have to file a claim within three years after leaving school - regardless of whether they learn of a misrepresentation, or the borrower defense claim process, within that time. Borrowers may take years to assert a defense simply because they were not previously aware of their rights or how to pursue them, or because the facts of their school's misconduct had been hidden until news broke of a public investigation or lawsuit.

A borrower may have a harder time proving their eligibility for a borrower defense many years after the misconduct occurred - but if they have a credible claim, the Department should adjudicate it. Given that federal education loans have no statute of limitations on collection,[22] borrowers should be able to file claims at any time to seek relief.

The final rule should employ a preponderance of the evidence standard for all claims. If the evidence available to the Department, including information submitted by the borrower as well as information already in the Department's possession, shows that it is more likely than not that a borrower was victim of an institution's misconduct that provides a borrower defense, the borrower should get relief. A preponderance of the evidence standard is the typical standard for civil actions, including consumer protection claims.[23] It is also the standard that the Department uses in other proceedings regarding federal education loans.[24]

By contrast, there is no reason to limit relief only to borrowers able to satisfy a higher burden of proof, such as "clear and convincing" evidence standard. These higher burdens of proof are the

---

[19] 83 Fed. Reg. at 37259.
[20] *See* U.S. Dep't of Educ., Master Promissory Note, Direct Subsidized and Direct Unsubsidized Loans, William D. Ford Direct Loan Program, https://studentloans.gov/myDirectLoan/subUnsubHTMLPreview.action (Section 23, "Additional loan discharge information") ("In some cases, you may assert, under applicable law and regulations, a defense against repayment of your loan on the basis that the school did something wrong or failed to do something that it should have done").
[21] *See* 83 Fed. Reg. at 37260.
[22] 20 U.S.C. § 1091(a) (2018).
[23] *See, e.g.*, CAL. EVID. CODE § 115 ("Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence").
[24] *See* 34 C.F.R. § 34.14(b), (c) (administrative wage garnishment); 34 C.F.R. § 31.7(e) (federal salary offset).

exception to the rule in civil cases, and are typically reserved for claims where fundamental rights are at stake, such as habeas corpus rights in capital cases.[25]

The Department considered arguments for higher standards of proof, including the clear and convincing standard, during the 2016 rulemaking and found that the "preponderance of the evidence" standard "is appropriate" for borrower defense claims and "strikes a balance between ensuring borrowers who have been harmed are not subject to an overly burdensome evidentiary standard and protecting the Federal Government, taxpayers, and institutions from unsubstantiated claims."[26]

If the final rule permits both defensive and affirmative claims, as we believe it should, then a preponderance of the evidence standard should always apply, regardless of the type of claim. A higher evidentiary burden would result in denials of relief to many borrowers with credible evidence that they were scammed into taking out loans simply due to the difficulty of gathering overwhelming evidence. A heightened standard of proof is particularly inappropriate for an administrative proceeding that does not include evidence discovery rights for the plaintiff that would be available in court, and in which the vast majority of borrowers will not have access to a lawyer.

The final rule should not require a showing of intent, knowledge or "reckless disregard for the truth," but instead set forth a standard that focuses on whether the school's acts or omissions would have a tendency to mislead a reasonable person under the circumstances. The Department's proposed definition of "misrepresentation" deviates sharply from how it is typically defined in other contexts for civil claims[27] by including an intent standard, instead of focusing on whether the act has a tendency to mislead.

In its 2016 final rule, the Department stated that it "is more reasonable and fair" for an institution to be held responsible for harm it causes borrowers by misrepresentations or other misconduct than to leave borrowers to bear such costs, regardless of the institution's intent.[28] A borrower harmed by a school recruiter's false statement should be eligible for relief even if the recruiter did not know the statement was false. Providing otherwise would unfairly leave injured borrowers to bear the cost of harms caused by their schools, rather than placing the cost of that harm on the institution that caused it - and was in the best position to prevent it. For this

---

[25] *See, e.g.*, Calderon v. Thompson, 523 U.S. 538 (1998).
[26] 81 Fed. Reg. 75926, 75936 (Nov. 1, 2016).
[27] A misrepresentation is typically considered illegal under state laws prohibiting unfair or deceptive acts or practices ("UDAP" laws), as well as the Federal Trade Commission (FTC) Act. An act or practice is "deceptive" under the FTC Act if (1) it is a representation, omission or practice misleads or is likely to mislead a consumer; (2) the consumer's interpretation is reasonable under the circumstances; and (3) the misleading representation, omission or practice is material. *See* FTC Policy Statement on Deception (Oct. 14, 1983) (appended to Cliffdale & Assocs., Inc., 103 F.T.C. 110, 174 (1984)). The FTC used this very authority to pursue action against DeVry University after uncovering evidence that DeVry had made unsubstantiated claims to students in its marketing materials for many years about job placement rates and expected income levels associated with its job training programs. The agency alleged that DeVry's advertisements were deceptive, and that as a result the school had been unjustly enriched through their unlawful conduct. *See* Complaint at ¶59, FTC v. DeVry Educ. Grp., Inc., Case No. 16-cv-579 (filed Jan. 27, 2016). The action was resolved through a $100 million settlement, the proceeds of which will provide refunds to students. Stipulated Final Order at 10, FTC v. DeVry Educ. Grp., Inc., Case No. 16-cv-579 (filed Dec. 15, 2016).
[28] 81 Fed. Reg. at 75947.

reason, as well as the important practical point that "[g]athering evidence of intent would likely be nearly impossible for borrowers,"[29] a Federal borrower defense standard should not require borrowers to prove the school's intent to be eligible for relief. It should not be incumbent on the borrower to know, or to prove, that a recruiter knew that a statement was false.

This is not to suggest that borrowers should be entitled to discharge their loans based on trivial, harmless mistakes. But rather than focusing on whether a school acted with intent or made a mistake, the better approach is to focus on whether such conduct was reasonably likely to harm the student under the circumstances. For example, a school that publishes a job placement rate of 90% when the true rate is 89% has likely made a trivial error; by contrast, a school that publishes a job placement rate of 90% when the true rate is actually 9% has likely harmed students who chose to enroll based on the published rate.

Borrower Defense Process

The final rule should permit claims where the claimant's attestation to their experience, combined with documents already in the Department's possession, establishes a reasonable basis for proceeding. Borrowers do not have subpoena power in this process; they will typically not be able to obtain evidence from schools to evince recklessness or intent. A borrower's affidavit should constitute sufficient evidence to move forward.

The final rule should provide claimants with the opportunity to see all evidence used by the Department to make a decision, as well as the right to appeal a denial. The Department's proposal would allow schools to see the evidence that the borrower submits and then submit rebuttal evidence, but the borrower will not be able to respond to the school's evidence prior to the final decision on the claim. The Department also proposes not to rely on its own records or information obtained by the Secretary - the reasons for which are not explained - but states that if it does, the *school* will be able to review and respond to such evidence.[30] Borrowers, by contrast, are not afforded such an opportunity.[31] Then, at the end of the process, the decision is final and the borrower cannot appeal.

It is difficult to fathom how placing high evidentiary burdens on the borrower, with a short window to file; allowing the school to rebut claims with its own evidence and see other evidence used by the Department; not allowing the borrower to see all the evidence used by the Department; and foreclosing the possibility of an appeal will resemble anything close to a balanced process that produces "fair and accurate" decisions.[32] The borrower should have a right to know about all evidence upon which the Department is basing its decision, and have a reasonable opportunity to respond if denied relief.

The final rule should permit group claims, to streamline the adjudication process where there is widespread evidence of a school's pattern or practice of misconduct. The

---

[29] 81 Fed. Reg. at 75937.
[30] 83 Fed. Reg. 37242, 37261.
[31] The borrower will see the school's response to their claim, but not the entire body of evidence upon which the Department bases its decision. The school, however, is informed of any information the Department uses from its own records. *See* 83 Fed. Reg at 37327 (proposed sections 685.206(d)(7), (8)(i)).
[32] *Id.*

Department acknowledges that groups of borrowers may have claims of misrepresentations made by "the same school and the same facts and circumstances,"[33] but states that it must "examine the facts and circumstances of each borrower's individual situation"[34] before it can adjudicate a claim. But to do so would add significant time and cost to the Department's claims processing, and would be unnecessary if the Department is receiving evidence that the same facts and circumstances apply to many borrowers who attended the same program or institution.

Group relief should be available without necessitating each individual borrower to file an individual defense, and without requiring the Department to make individualized determinations. Many harmed borrowers may not otherwise be aware of their right to relief or may face challenges to filing individual claims. Furthermore, in light of the reported delays that the Department is already experiencing in processing individual claims,[35] it would be more efficient and appropriate for the Department to process group claims where it has evidence that a school has engaged in widespread misconduct.

The final rule should also permit third parties, such as state attorneys general or legal aid organizations, to file group claims when they possess evidence of widespread school misconduct. Legal advocates are already on the front lines seeking to help distressed borrowers, and are often in a better position to file claims than the borrowers themselves.

Forced Arbitration

The final rule can and should prohibit schools' use of forced arbitration clauses and class action waivers in its enrollment contracts with students. The Department is reversing its prior, well-reasoned position from 2016 that as the steward of Title IV, HEA funds, the Department has the authority to condition access to federal funds upon the requirement that schools refrain from using forced arbitration. However, the Department cites case law and recent congressional activity that do not provide a reasonable basis for this change in position.

The question of the Department's authority to restrict arbitration was discussed several times during negotiations. Several negotiators asked, repeatedly, the Department why it changed its position. During session 2 of negotiations, by way of response, the Department submitted for the record an amicus brief[36] from the Department of Justice (DOJ) in a recent Supreme Court case regarding arbitration in the employment context.[37] In that brief, the DOJ argues that where employers and employees agree to resolve disputes via arbitration, the Federal Arbitration Act

---

[33] 83 Fed. Reg. at 37262.
[34] 83 Fed. Reg. at 37263.
[35] The Department states that as of January 2018, it had received 138,989 claims - of which only 23 percent have been processed. 83 Fed. Reg. at 37243. According to a recent report by The Century Foundation, borrower defense claims have increased by 29 percent since August 2017. *See* The Century Fdn., College Fraud Claims Up 29 Percent Since August 2017 (2018), *available at* https://tcf.org/content/commentary/college-fraud-claims-29-percent-since-august-2017/?agreed=1 (using data obtained from FOIA requests to the Department).
[36] *See* U.S. Dep't of Educ., Borrower Defenses and Financial Responsibility, https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrowerdefense.html (Session 2, "Department of Justice Brief on Arbitration").
[37] *See* Epic Sys. Corp. v. Lewis, 584 U.S. ___, 138 S. Ct. 1612 (2018).

(FAA) requires that such agreements be enforced, notwithstanding other rights that employees would have under another federal law - in this instance, the Fair Labor Standards Act (FLSA).[38]

The facts of that case are wholly distinguishable and do not provide a sound basis for rejecting the notion that the Department can place conditions on access to Title IV, HEA funds by restricting schools' use of forced arbitration. The FAA generally upholds the enforceability of contracts that have arbitration clauses, but it does not preclude the Department from preventing contracts between schools and students to include arbitration clauses to begin with. Furthermore, the Department is ignoring legal precedent affirming that when the federal government is conferring a benefit, it may place conditions on that benefit. School participation in the Title IV programs is a privilege, not a right; schools must enter into Program Participation Agreements (PPAs) with the Department and abide by the terms of those agreements.[39] Placing conditions upon beneficiaries of a federal program is "well within the kind of regulation upheld by courts that address the authority of the government to impose conditions that limit the exercise of constitutional rights by beneficiaries. That case law gives strong support for the position that the Department has authority to impose limits...on the use of class action waivers and predispute arbitration agreements.[40] The Department regulates several activities that relate to schools' participation in the Direct Loan program, from advertising and recruiting to procedures for refunding tuition back to the Department,[41] as well as many specific aspects of schools' contracts with students.[42]

Nor can the Department cite the recent congressional repeal of the Consumer Financial Protection Bureau's (CFPB) arbitration rule as a basis for its decision to reverse course on arbitration,[43] because it pertains to a different kind of contracting activity and is generally irrelevant to this rulemaking. When it promulgated its arbitration rule, the CFPB invoked its authority under Dodd-Frank to directly regulate certain consumer financial contracts *between private parties*.[44] The Department's 2016 borrower defense rule, by contrast, sought to regulate the activities of schools participating in the Direct Loan programs *through its own PPAs with those schools*. Furthermore, the CFPB arbitration rule and 2016 borrower defense rule may both have been "informed by" the CFPB's 2015 study on arbitration,[45] but that study remains available as an empirical reference even if the CFPB's final arbitration *rule* was repealed; this fact likewise does not, as the Department would contend, serve as a basis for the Department's changed position in this rulemaking.

---

[38] Dep't of Justice Brief, *supra* note 36, at 9.
[39] As the Department stated in its 2016 rule, "[T]he HEA gives the Department the authority to impose conditions on schools that wish to participate in a Federal benefit program...Section 452(b) of the HEA states, 'No institution has higher education shall have a right to participate in the [Direct Loan] programs authorized under this part [part D of title IV of the HEA].'...Section 454(a)(6) of the HEA authorizes the Department to include in [a] PPA 'provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of' the Direct Loan program." 81 Fed. Reg. 75926, 76022 (Nov. 1, 2016).
[40] 81 Fed. Reg. at 76023 (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2330-31 (2013) (quoting Rust v. Sullivan, 500 U.S. 173, 197 (1991)).
[41] *Id.* (citing 20 U.S.C. §§ 1094(a)(20), (22)).
[42] 81 Fed. Reg. at 76024 (citing examples related to student enrollment, academic progress, late fees).
[43] 83 Fed. Reg. 37242, 37265. The CFPB arbitration rule was repealed in October 2017. S.J. Res. 47, 115th Cong. (2017); H.R.J. Res. 111, 115th Cong. (2017).
[44] 12 U.S.C. § 5518 (2018).
[45] 83 Fed. Reg. at 37265.

The CFPB's authority to regulate arbitration in certain consumer contracts does not impact the Department's authority and responsibility under HEA, an entirely different statute with different policy objectives, to ensure proper administration of Title IV funds through its own contracts with schools.[46] Using HEA authority to stop forced arbitration in school contracts is consistent with the objective the Department has in "protecting the taxpayer investment in Direct Loans."[47] As the Department stated in 2016, "[t]hat objective includes preventing the institutions empowered to arrange Direct Loans for their students from insulating themselves from direct and effective accountability for their misconduct to the taxpayer. Predispute arbitration agreements, like class action waivers, do each of these, and thus jeopardize the taxpayer investment in Direct Loans."[48]

Abuses at schools like Corinthian were allowed to continue unabated for years, in part because students were blocked from holding them accountable in court due to forced arbitration clauses in their enrollment contracts. As the Department stated in 2016, "some institutions, notably Corinthian, aggressively used class action waivers to thwart actions by students for the very same abusive conduct that government agencies, including this Department, eventually pursued. Corinthian used these waivers to avoid the publicity that might have triggered more timely enforcement agency action, which came too late for Corinthian to provide relief to affected students."[49]

If the Department is serious today about protecting the taxpayer investment in Direct Loans, it must ensure that students have meaningful avenues to hold schools accountable for misconduct. Indeed, students may be less likely to seek relief directly from the Department through the borrower defense claim process if they can instead have their day in court. For these reasons, we once again urge the Department to reinstate its ban on the use of forced arbitration provisions in school enrollment contracts.

Closed School Discharge

We appreciate the Department's proposal to allow claims from borrowers who withdraw within 180 days prior to a school's closure instead of 120 days. However, the additional changes proposed would have the overall effect of restricting the closed school discharge option for many students.

The final rule should expressly permit automatic closed school discharges, to ensure all affected students receive relief. We are disappointed that the Department will not provide automatic closed school discharges in the regulations. Although the Department notes that the Secretary has discretion to approve a closed school discharge without an application,[50] it is unknown whether and to what extent such discretion would be used. To promote greater

---

[46] As the Department noted in 2016, Congress has not taken actions to imply that laws governing consumer lending operate on the same subject matter as loans created under HEA. *See* 81 Fed. Reg. 75926, 76024 (noting certain exemptions from the Truth in Lending Act for HEA loans).
[47] 81 Fed. Reg. 75926, 76022.
[48] *Id.*
[49] *Id.*
[50] 83 Fed. Reg. 37242, 37267.

certainty and transparency regarding the circumstances under which an automatic discharge will apply, we recommend making this option explicit.

The final rule should not cut off closed school discharges simply because the school offers a "teach-out" option. Student who do not wish to complete their program of study through a failing school's teach-out plan should not be barred from obtaining a closed school discharge simply because the school offered the plan. They may be understandably wary of such an option if it is being provided by a school that is about to close, uncertain of the likely value to be received compared to withdrawing from the program and starting fresh elsewhere.

Financial Responsibility

The Department's proposed "trigger warnings" related to financial responsibility are too narrow, and may come too late, for detecting mismanagement at a school that could lead to closure. Successful borrower defense claims against a school that materially impact its composite score would of course be relevant. However, the likelihood that significant numbers of borrowers will succeed on such claims will be slim, if the final rule implements a borrower defense standard like the one proposed here. It is therefore up to question whether such a triggering event would ever happen.

The other proposed mandatory triggering events - withdrawal of owner's equity, or SEC suspension of an publicly-trade institution's stock - will likely only capture situations where institutions are already on the brink of collapse. Schools experiencing these kinds of events are unlikely to wind down of their activities in an orderly fashion, nor be in a position to refund the Department for losses related to borrowers' claims for relief.

The final rule should include more mandatory trigger warnings, to provide the Department a reasonable opportunity to intervene before students are caught in the middle of a crisis. The Department proposes certain discretionary triggers that should instead be mandatory - such as accreditor agency actions, violations of the 90/10 rule, and high cohort default rates. In addition, the Department should include other significant indicators of trouble ahead - at a minimum, events such as state and federal enforcement actions resulting in settlements or judgments.

Conclusion

The borrower defense rule must provide students who have been harmed a reasonable opportunity to apply for relief from their loans. This proposal, if implemented, would essentially bar claims for relief even when borrower were misled into debt for programs that failed to provide an adequate education.

The Department has a responsibility to ensure that the borrower defense process implements borrowers' statutory rights under HEA and promotes integrity of our financial aid programs, so that we never see another Corinthian collapse in disgrace. We cannot forget the lessons of the past and expect a better outcome for students this time around. Students and taxpayers have subsidized more than enough fraud, waste and abuse already; we urge the Department to

implement a rule that corrects injustices and promotes the integrity of our financial aid programs.

Thank you for the opportunity to submit these comments.

Sincerely,

Suzanne Martindale[51]
Senior Attorney

[51] Served as negotiator representing the interests of consumer advocacy organizations for this rulemaking.