THE STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

XAVIER BECERRA
ATTORNEY GENERAL

MAURA HEALEY
ATTORNEY GENERAL

August 30, 2018

Submitted via Federal eRulemaking Portal

The Honorable Elisabeth DeVos
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Jean-Didier Gaina
United States Department of Education
400 Maryland Ave. SW, Mail Stop 294-20
Washington, DC 20202

Re: Docket ID ED-2018-OPE-0027

Dear Secretary DeVos and Mr. Gaina:

We, the undersigned Attorneys General of California, Massachusetts, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington write to comment on the U.S. Department of Education's ("Department's") proposed rulemaking on borrower defense and financial responsibility. The Department's proposals provide no realistic prospect for borrowers to discharge their loans when they have been defrauded and abused by unscrupulous schools. Among other issues, the Department's proposed process imposes an insurmountable evidentiary burden on borrowers, excludes broad categories of well-known school misconduct, and provides no means for group relief. The proposed regulations also fail to hold problematic schools accountable for their misconduct. The Department ignores numerous negative events that unquestionably should trigger mandatory sanctions against a predatory school, including the initiation of a state attorney general enforcement action. The proposed regulations accordingly would be disastrous for students and taxpayers, and a windfall for the exclusive benefit of law-breaking schools. We urge the Department to rescind this misguided proposed rulemaking.

The Department's proposed rulemaking represents an extraordinary and unjustified change of its prior position. Less than two years ago, the Department completed a thorough rulemaking on borrower defense and financial responsibility, in which the views of numerous schools, stakeholders, and public commenters were considered and incorporated into a comprehensive set of regulations. The regulations, promulgated by the Department in November 2016 ("2016 Rule"), went a great distance to achieving the Department's then-stated goal of giving defrauded borrowers access to a consistent, clear, fair, and transparent process to seek debt relief. At the same time, the 2016 Rule protected taxpayers by holding schools that engage in misconduct accountable and ensuring that financially troubled schools provide the government with protection against the risks they create. Squandering the progress made during the 2016 rulemaking process, the Department now proposes to rescind and replace its 2016 Rule, abandoning the thoroughly considered rationales underlying the final regulations. The Department now seeks to start this regulatory process from scratch, recklessly ignoring virtually all institutional knowledge developed in the two decades since the first borrower defense rule.

We are uniquely well-situated to understand the devastating effects that the Department's proposed regulations will have on the lives of borrowers and their families. State attorneys general serve an important role in the regulation of private postsecondary institutions. In this capacity, we have made addressing for-profit schools' mistreatment of student borrowers a priority. Numerous investigations and enforcement actions undertaken by our offices have revealed widespread misconduct on the part of predatory, for-profit schools. Such schools routinely deceive and defraud students, employing a multitude of unlawful tactics to line their coffers with federal student-loan funds at borrowers' expense. In just the last few years, for example, state attorneys general played a critical role in uncovering widespread misconduct at Corinthian Colleges and American Career Institute. Through these investigations, we spoke with numerous students who, while seeking new opportunities for themselves and their families, were lured into programs with the promise of employment opportunities and higher earnings, only to be left with little to show for their efforts aside from unaffordable debt.

The Department's proposals are grounded on multiple inaccurate and unsupported assumptions. First, the Department castigates borrower defense applicants as irresponsible and suggests that they should instead take "personal accountability for the decisions they make."[1] The Department also repeatedly suggests that such borrowers' "workplace performance" and "decision to change careers" are the real sources of their financial difficulties.[2] The Department's characterization of borrowers lacks any empirical support and is simply inaccurate. In reality, dramatic information imbalances, varying borrower sophistication levels, and targeted high-pressure sales tactics used by for-profit schools prevent prospective students from making informed decisions. These schools invest considerable resources to enroll large numbers of students into programs of questionable value, in order to access Title IV funds—the predominant revenue of for-profit schools. Ignoring this reality, the Department has relieved schools of

[1] 83 Fed. Reg. 37,243.
[2] *Id*. at 37,246.

accountability and has instead chosen to blame students for being victims.

Second, the Department expresses repeated concerns about "frivolous" borrower defense claims.[3] However, the Department provides no evidence whatsoever that students have ever submitted "frivolous" borrower defense claims in any significant number. In particular, the Department uses this baseless concern to justify excluding an affirmative borrower defense process from its proposed regulations, even though it has been accepting affirmative claims for more than 20 years without any apparent incident. The Department's reliance on this manufactured premise fundamentally undermines its proposed rule.

Third, the Department entirely ignores the fact that for-profit schools engage in the overwhelming majority of misconduct that the borrower defense rule seeks to redress. Of the more than 100,000 borrower defense claims received to date by the Department, more than 98% are from borrowers who attended for-profit schools. The Department's abject refusal to take account of an institution's proprietary status when evaluating a borrower defense claim is contrary to all available evidence.

Finally, the Department's repeated assertion that existing processes have proven inefficient and burdensome is disingenuous.[4] In 2016, the Department codified sensible, streamlined procedures to grant borrower defense relief efficiently to students harmed by school misconduct. Every stage of the Department's current proposal does the exact opposite; it implements insurmountable hurdles and intractable burdens that will effectively prevent borrowers with well-founded complaints from successfully asserting a borrower defense claim. Indeed, the Department's goal appears to have been just that: to protect schools at the expense of borrowers and taxpayers.

It is an understatement to say that the Department's proposals on borrower defense and financial responsibility completely miss the mark. They will provide an entirely unfair and unworkable process for defrauded students to obtain loan relief, and they will do nothing to deter and hold accountable schools that cheat their students. The following comment is a non-exhaustive list of the most glaring deficiencies of the Department's proposed rule.

I. THE DEPARTMENT'S PROPOSED FEDERAL STANDARD WILL TRAP BORROWERS IN UNLAWFUL LOANS

The federal standard proposed by the Department dramatically limits the institutional misconduct that can serve as the basis of successful borrower defense claims and creates insurmountable burdens for borrowers to establish these claims. This proposed standard appears to have been tailored for the specific purpose of limiting defrauded students' access to critical loan relief, while allowing predatory institutions to escape the consequences of their misconduct and retain taxpayer funds.

[3] *Id*. at 37,243, 37,244, 37,251, 37,252, 37,254.
[4] *See, e.g.*, *id*. at 37,251.

A. The Department's exclusion of state law and exclusive focus on "misrepresentation" as the sole basis for a borrower defense ignores numerous abusive practices of the for-profit school industry

The Department's reliance on "misrepresentation" as the only basis for borrower defense claims is unduly restrictive and ignores the range of abusive practices that predatory schools employ.

Under the Department's proposed standard, violations of state consumer protection laws and judgments obtained against schools under these laws will no longer constitute a basis for a borrower defense claim. The Department's misrepresentation-only standard ignores more than 40 years of well-established consumer protection law and the critical role that state law plays in defining and identifying predatory consumer conduct. Violations of state law have constituted permissible bases for successful borrower defense claims since the first borrower defense rule's promulgation in 1995, which itself was based on the Federal Trade Commission's "Holder in Due Course Rule," promulgated in 1975.[5] Consistent with more than four decades of well-established consumer protection law, borrowers should be able to obtain borrower defense relief whenever schools violate state consumer protection law, and schools should be liable for the cost of such relief. Not only is this approach fairer to borrowers, it is also in accordance with schools' existing obligation to comply with the laws of each state in which they decide to operate. This approach is also consistent with the established structure of student aid, which has long embraced the role of the states and state law. Both Title IV and veterans' educational programs, for example, rely in part on state agencies to authorize schools as eligible to receive benefits, pursuant to state law.

The Department's narrow misrepresentation-only standard does not begin to capture the universe of potential predatory-school misconduct. Unfair and abusive acts and practices that do not constitute fraud cause serious harm to borrowers, leaving them with substantial debt and an education of little to no value. For example, an abusive school seeking to maximize profits could employ high-pressure sales tactics, hire unqualified teachers, or unreasonably limit course enrollments to save costs. Although all of these practices harm students and undermine the entire value of their "education," the Department's proposal would provide no avenue for borrowers to escape unjustly incurred debts so long as no "misrepresentation" occurred. Recognizing state consumer protection laws would fill this gap precisely because it is "impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery."[6]

The Department's proposal excludes serious, well-known forms of school misconduct

[5] Under the "Holder in Due Course Rule," or "Holder Rule," its is an unfair or deceptive practice to bar consumers from asserting against third-party holders of a consumer credit contract all claims or defenses, including those under state law, that the consumer had against the original seller. 16 C.F.R. § 433.2. The Holder Rule has always applied and continues to apply to for-profit schools. 40 Fed. Reg. 53,524 ("The rule expressly applies to credit contracts arising from sales of services, such as trade or vocational school agreements as well as sales of consumer tangibles.").

[6] *People v. Nat'l Research Co.*, 201 Cal. App. 2d 765, 772 (1962).

that should entitle a student to borrower defense relief. For example, the proposed regulations would fail to recognize a school's material breach of an enrollment agreement as an actionable borrower defense. Such misconduct on the part of a school is one of the clearest and most straightforward grounds for providing relief to a cheated student. This unexplained reversal of Department policy is unreasonable and serves only to protect predatory schools. Additionally, the Department now proposes to exclude sexual or racial harassment as grounds for borrower defense because, according to the Department, harassment does not "directly relate[] to the loan or to the school's provision of educational services for which the loan was provided." This proposal is unconscionable. As the Department has previously explained, harassment can interfere with a student's right to receive an education free from discrimination.[7] Such institutional misconduct is thus intertwined with the provision educational services.

The Department's glaring exclusion of these and other bases for borrower defense favors the interests of predatory schools over students and would deny relief to borrowers who have been indisputably harmed by their schools. A borrower defense standard that focuses exclusively on deceptive conduct while ignoring serious harms caused by other types of abusive and unfair institutional wrongdoing leaves borrowers without the protections they deserve and require.

B. Borrowers should not be expected to provide proof of a school's "knowledge of falsity" or "reckless disregard of truth"

The Department's proposal to limit borrower defense relief to only those institutional misrepresentations that are "intentional" or "made with a reckless disregard for the truth" places an insurmountable evidentiary burden on claimants with meritorious claims.

The Department's proposed standard breaks with well-established consumer protection principles—embedded in both federal and state law—that impose liability on actors for their deceptive conduct, even when that conduct is unintentional.[8] When an institution makes misrepresentations to prospective students, regardless of the institution's intent, the costs of these misrepresentations should be borne by the institution, not by the injured borrowers. A rule that effectively shifts the costs of institutional misconduct from the school to borrowers by means of a virtually impossible evidentiary burden is not only patently unfair to borrowers and taxpayers, but also breaks with "the Department's longstanding position that a misrepresentation does not require knowledge or intent on the part of the institution."[9]

Notably, the Department concedes that "it is unlikely that a borrower would have evidence to demonstrate that an institution had acted with intent to deceive."[10] However, the Department does not explain how a borrower would be any more likely to possess evidence of a

[7] http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

[8] *See, e.g.*, *Porter & Dietsch, Inc. v. Fed. Trade Comm'n*, 605 F.2d 294, 309 (7th Cir. 1979) (FTC Act "imposes a strict liability standard on disseminators of false advertising."); *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996) ("It is not necessary to show the defendant intended to injure anyone since a violation of [California's Unfair Competition Law] is a strict liability offense.").

[9] 81 Fed. Reg. 75,937.

[10] 83 Fed. Reg. 37,257.

school's recklessness. In practice, expecting borrowers to possess evidence of either intent *or* recklessness is simply unrealistic. Information imbalances favor predatory schools over deceived borrowers, compounded by the fact that former students often face significant challenges obtaining *any* records from their schools. Making the requisite showing of intentionality or recklessness without the assistance of a lawyer or access to discovery would be impossible. In our experience as law enforcers, proving systematic and egregious fraud concerning placement rates and other issues can require a lengthy investigation, access to records via subpoena, and thorough analysis. In light of the obstacles facing defrauded borrowers, it is the Department's responsibility to avoid imposing undue evidentiary requirements on borrowers entitled to relief.

We are greatly concerned that the Department knows borrowers will be unable to meet its proposed standard. The Department's attempt to justify this standard on the basis of its "responsibility to the Federal taxpayer" rings hollow.[11] The Department's responsibility to both borrowers *and* taxpayers is best served by ensuring that abusive schools bear the costs of their misconduct. Instead of proposing a borrower defense rule that would achieve that goal, the Department has proposed regulations that eliminate important disincentives for institutional misconduct and needlessly limit the Department's ability to hold schools accountable for their actions. By shifting the costs of a school's misconduct to borrowers, the Department's proposed borrower defense standard sends a strong message to schools that they will not be held liable for predatory behavior.

C. Borrowers should not be required to prove financial harm beyond the inherent burden of federal student loan debt

The Department's proposed requirement that a borrower prove financial harm beyond the inherent harm of being saddled by an invalid Title IV loan is unfair to borrowers. It is also inconsistent with well-established consumer protection principles. This proposal ignores the negative consequences facing borrowers who are deceived into taking out federal loans, and it inappropriately discounts the significant opportunity costs those defrauded borrowers incur. A rule that disregards these realities is sorely inadequate and displays an astounding callousness to the plight of such borrowers.

Consumer protection principles embodied in both state and federal law consistently hold that being induced to take out a loan through misrepresentation, by itself, is sufficient to establish harm.[12] This principle is intuitive—the very fact of incurring and being required to pay back illegitimate debt is itself a serious financial harm. As the Department has recognized, high levels of student debt can have devastating impacts on borrowers' lives: decreasing the long-term probability of marriage; increasing the probability of bankruptcy; reducing home ownership rates; and increasing credit constraints, especially for students who drop out.[13] The devastation caused by predatory for-profit schools cannot be understated. Not only are borrowers'

---

[11] *Id*.

[12] *See, e.g.*, *People v. Caruso*, 176 Cal. App. 2d 272, 280 (1959) ("well settled" that a victim is harmed "where a promissory note or obligation to pay is obtained by the use of false representation").

[13] *See* 81 Fed. Reg. 76,051.

educational and occupational dreams shattered when they do not realize job opportunities they were promised, their financial lives are ruined by tens of thousands of dollars of illegitimate student-loan debt. This financial harm is compounded by the fact that both public and private student loans are presumptively non-dischargeable in bankruptcy, leaving borrowers responsible for these debts for the rest of their lives.[14]

The Department's proposal to exclude opportunity costs from the calculus of harm because such harms are "too difficult to quantify" is unacceptable and unrealistic.[15] Every dollar paid toward illegitimate student loan debt is one less dollar that borrowers have to pay for something else, including rent, utilities, child care, and other basic necessities. Since predatory schools prey on the most vulnerable, who often already face dire financial circumstances, the marginal utility of each dollar is extremely high for these borrowers. Borrowers may also lose access to GI Bill benefits, Pell grants, and other state-sponsored grant programs, as well as the time and opportunity to attend a different school.

These are serious, concrete harms that the Department is ignoring. Adding insult to injury, the Department proposes requiring victimized borrowers to sign an attestation form that the financial harm they suffered is not a result of their own career choices. Borrowers should not be required to sign any such form.

We call on the Department to reconsider this flawed, insulting approach and eliminate the proposed requirement that borrowers prove financial harm beyond the harm caused by taking out federal student loans.

II. An Affirmative Process Is Critical to Effective, Fair, and Efficient Borrower Defense Relief

An effective, fair, and efficient borrower defense regime must include an affirmative process for victimized students to submit claims for relief. The Department's proposal actually encourages borrowers to default, posing unnecessary risk to borrowers and taxpayers. The Department's proposed requirement that borrowers first default on their loans before they can assert a borrower defense claim is grossly deficient and needlessly forces borrowers into further economic injury. In the absence of an affirmative process, borrowers entitled to borrower defense relief will face a cruel no-win situation of choosing between repaying illegitimate loans, or defaulting—and enduring the significant harms associated with default—in order to assert a claim for relief. This dilemma serves no purpose other than to suppress borrowers from asserting meritorious borrower defense claims, again protecting predatory schools at the expense of students and taxpayers.

Forcing victimized borrowers to default on their loans before they may seek relief will only compound the harm they suffer. The harms that flow from default are significant and well

[14] *See* 11 U.S.C. § 523(a)(8).
[15] 83 Fed. Reg. 37,259.

known. In 2016, the Department was specific about these harms:

> When borrowers default on their loans, everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge. Borrowers who default might also be denied a job due to poor credit, struggle to pay fees necessary to maintain professional licenses, or be unable open a new checking account.[16]

The ramifications for servicemembers who default on their student loans can be particularly stark, including the loss or suspension of security clearances, which can derail a military career, prevent advancement, result in reclassification or separation, and limit post-service civilian employment. There is no defensible justification for forcing borrowers to endure these harms in order to access relief.

Critically, the Department's proposal to eliminate any affirmative borrower defense process is based on the patently erroneous premise that the Department had never accepted affirmative borrower defense claims prior to 2015. [17] As highlighted by Legal Services Center of Harvard Law School, the Department's proposal grossly and repeatedly misstates the Department's long-standing interpretation of allowing borrowers to submit "affirmative" borrower defense claims.[18] The Department has consistently interpreted its governing borrower defense rule to allow borrowers to affirmatively seek loan relief based on school misconduct at any time, whether in repayment, forbearance, or default. This interpretation has been in place for decades and is entirely in accordance with the Federal Trade Commission's "Holder in Due Course Rule," on which the borrower defense rule is based. The Federal Trade Commission has repeatedly reinforced the importance of the Holder Rule's affirmative process.[19] The Department has clear statutory authority to expressly define by regulation the mechanics of an affirmative process, as it did in 2016. Rather than rescinding the affirmative process it promulgated in the 2016 Rule, the Department should implement the same efficient and well-reasoned process. The Department has pointed to nothing between then and now that warrants a change in policy or approach.

III. APPLICATION OF "CLEAR AND CONVINCING" EVIDENTIARY STANDARD IS UNFAIR AND INAPPROPRIATE

In its request for comments, the Department suggests that, were it to adopt an affirmative process, it might apply a "clear and convincing evidence" standard.[20] The Department further

[16] 81 Fed. Reg. 76,051.

[17] This fundamental inaccuracy undermines the Department's Regulatory Impact and Net Budgetary Impact Analyses of its proposed rule, preventing the public from meaningfully commenting on the cost-benefit decisions that the Department has made in proposing this rule.

[18] http://predatorystudentlending.org/wp-content/uploads/2018/08/LSC-Prelim-Cmt-FINAL.pdf

[19] http://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf

[20] 83 Fed. Reg. 37,255.

suggests that it might apply this heightened evidentiary standard to defensive claims as well.[21] Such a heightened evidentiary standard would impose an unreasonable burden on defrauded borrowers and is inconsistent with consumer protection law. The evidentiary standard applicable to lawsuits brought under the large majority of states' consumer protection statutes is the far more reasonable "preponderance of the evidence" standard.[22]

Moreover, Supreme Court precedent establishes that a preponderance-of-the-evidence standard is the only appropriate one here. In *Herman & MacLean v. Huddleston*, the Court refused to "depart from the preponderance-of-the-evidence standard generally applicable in civil actions" in certain securities fraud actions.[23] Only this standard, the Court explained, "allows both parties to 'share the risk of error in roughly equal fashion,'" while "[a]ny other standard expresses a preference for one side's interests."[24] Declining to put a thumb on the scale in favor of securities-fraud defendants, the Court recognized that "[d]efrauded investors are among the very individuals Congress sought to protect in the securities laws. If they prove that it is more likely than not that they were defrauded, they should recover."[25]

The same reasoning dictates the same result here. There are no special rights or interests at stake in the borrower defense context that would justify imposing a heavier evidentiary burden on students than is applicable in all relevant civil litigation. Since borrowers applying for relief typically do not have the benefit of an attorney's assistance or access to discovery, imposing such an onerous evidentiary standard would effectively bar borrowers with meritorious claims from obtaining relief. Even in the absence of the Department's new proposed roadblocks, far too many borrowers who are eligible for relief never seek it. The Department should be trying to make it easier, not harder, for victimized borrowers to obtain relief, consistent with Congress's intent in enacting the borrower defense statute to protect the interests of student-loan borrowers.

IV. THE DEPARTMENT SHOULD INCLUDE STATE ATTORNEYS GENERAL IN THE BORROWER DEFENSE PROCESS

The Department's proposal excludes any role for state attorneys general. This exclusion reverses the Department's longstanding practice of partnering with state attorneys general, undercuts states' role in protecting students, and ignores the states' recognized responsibilities in the "triad" of higher-education oversight. Acknowledging states' unique role and responsibilities, the Department's 2016 Rule specifically included judgments obtained by state regulators as an *automatic* basis for borrower defense. Those same rules also recognized investigations and enforcement actions by state attorneys general as early warning signs that a school might be financially irresponsible and at risk of shutting down. Under the 2016 Rule, actions taken by

[21] *Id*. at 37,245.

[22] The Department has claimed that "most States" employ the clear-and-convincing evidence standard for adjudicating common-law fraud. This statement is unsupported by the Department's stated authority, and, in any event, the common-law fraud standard is not an appropriate point of reference in the context of the borrower defense rule. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983).

[23] *Id*. at 387-91.

[24] *Id*. at 390 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

[25] *Id*.

state attorneys general served as critical deterrents to school misconduct by jeopardizing predatory schools' continued access to federal funds.

States have been and will continue to be on the front lines of bringing school abuses to light and protecting students, but the Department's aberrational exclusion of state attorneys general and state law from the borrower defense framework impedes our efforts to the detriment of borrowers across the country. The Department's proposal to exclude state attorneys general from this process is illogical and inefficient. Such an ill-advised course of action will harm students and taxpayers alike.

V. THE DEPARTMENT'S PROPOSED TIME BARS ARE UNREASONABLE AND UNNECESSARY

The Department's proposed regulations impose unreasonable time bars on students asserting a borrower defense claim. If implemented, these restrictions will benefit only predatory schools by further suppressing borrowers' assertion of meritorious claims.

In its primary proposal (which omits an affirmative borrower defense process), the Department proposes requiring borrowers to raise a defense to repayment within the timeframe specified for requesting a hearing in their notice of collection activity: "[t]he timeframes vary from 30 days for consumer reporting and wage garnishment to 65 days for Federal salary offset and tax refund offset."[26] Under this proposal, victimized borrowers would have only a few weeks to assert their claim or risk losing it. The Department grossly understates the devastating impact of its proposal by merely noting that it "could require more effort on the part of individual borrowers to submit a borrower defense application."[27] In practice, this narrow application window would likely shut out most borrowers—the overwhelming majority of whom are unaware of their rights to relief, without legal representation, and lacking the evidence needed to establish wrongdoing.

The Department's alternate proposal (which includes an as-yet undefined affirmative process) is similarly problematic. Imposition of any time limitation on borrower defense claims—let alone the Department's proposed three-year time bar—is patently unfair.[28] Because there is no corresponding time limit for the Department to collect on student loans, fundamental fairness dictates that no time bar should apply to a borrower's ability to assert a borrower defense. Otherwise, borrowers could find themselves in the draconian predicament of being legally obligated to repay a loan that was conclusively procured illegally.

The Department's failure to propose a tolling provision if the school's misconduct was not reasonably discoverable renders its proposed three-year time bar particularly troubling. Under the Department's proposal, deceived borrowers who do not learn until years later that they were defrauded will be cut off from relief while continuing to suffer under the weight of

[26] 83 Fed. Reg. 37,299.
[27] *Id*.
[28] *See id*. at 37,326.

illegitimate debt. Imposing strict time limitations for borrowers to assert a borrower defense claim is unnecessary and unreasonable in light of realities harmed borrowers experience.

VI. The Department's Elimination of a Group Discharge Process Is Inefficient and Harms Borrowers and Taxpayers

The Department's elimination of the group discharge process established by the 2016 Rule is inefficient and places unnecessary burdens on defrauded borrowers. Numerous investigations and enforcement actions have revealed that predatory schools often engage in systemic misconduct, subjecting large numbers of prospective and enrolled students to the same egregious abuse and deception. It is unfair to require defrauded students to submit individual applications, proving each instance of fraud, when a school's rampant misconduct is already well established (proven, for example, through the investigations of state attorneys general).

In the absence of a group discharge process, many eligible borrowers will be deprived of relief to which they are entitled. Our offices' significant experience conducting outreach to borrowers with meritorious borrower defense claims has demonstrated that most borrowers who have been defrauded by their schools are unaware of the borrower defense process or their entitlement to relief. In 2017, for example, the Department's sustained efforts to reach out to defrauded Corinthian borrowers failed to reach even a substantial fraction of students eligible for relief. As a result, the Department asked a bipartisan group of forty-seven States to engage in massive outreach efforts to contact these students and inform them of their eligibility. Moreover, even when borrowers are aware of borrower defense relief, they often find the application process overwhelming and confusing. Absent a group discharge process, those schools that have committed the most egregious and systemic misconduct will benefit from their wrongdoing at the expense of borrowers with meritorious claims who are unaware of or unable to access relief.

The Department's stated rationale for reversing its position on a group discharge process is illogical. First, the claim that evidence of reasonable reliance on a misrepresentation must be considered on an individualized basis was squarely and rightfully rejected by the Department during its prior rulemaking. As the Department previously explained, "if a representation that is reasonably likely to induce a recipient to act is made to a broad audience, it is logical to presume that those audience members did in fact rely on that representation."[29] The Department correctly concluded that "there is a rational nexus between the wide dissemination of the misrepresentation and the likelihood of reliance by the audience, which justifie[s] the rebuttable presumption of reasonable reliance upon the misrepresentation."[30] As the Department acknowledged, such a presumption is entirely consistent with Federal consumer law.

Second, the contention that a group discharge process would place an "extraordinary burden" on the Department is unrealistic.[31] The Department's proposed alternative to group discharge is a process whereby the Department is required to review and individually adjudicate

---

[29] 81 Fed. Reg. 75,971.
[30] *Id*.
[31] 83 Fed. Reg. 37,244.

hundreds of thousands of individual borrower defense claims. Unless the Department is counting on eligible borrowers failing to apply for relief, applying a group discharge to the entire affected cohort of borrowers would undoubtedly be more cost-effective and efficient than the proposed individualized alternative. Undertaking a tedious individualized process is unnecessary where a school's widespread misconduct has already been established.

Finally, the Department's repeated assertion that borrowers may be harmed by inclusion in a group discharge because the school may then properly deny releasing their transcripts (or other credentials) reflects a profound misunderstanding of the challenges facing defrauded borrowers.[32] First, withholding credentials to induce payment of a debt is precisely the sort of predatory and unfair conduct that state consumer protection laws outlaw.[33] Moreover, borrowers are unlikely to benefit in any way from the receipt of an official transcript from a school that has engaged in the type of egregious, systemic misconduct that would justify a group discharge. Finally, the Department improperly assumes that a school may refuse to provide an official transcript to a borrower whose loan has been forgiven. To the contrary, the Department may and should, through its present rulemaking, forbid a school from withholding such credentials. The Department's own regulatory choices to empower predatory schools do not constitute compelling reasons for further depriving victimized borrowers of critical relief.

VII. A SUCCESSFUL BORROWER DEFENSE CLAIM SHOULD AT LEAST PRESUMPTIVELY RESULT IN FULL DISCHARGE AND REFUND

The Department should abandon its stated proposal of providing only partial relief to borrowers who have successfully established their schools' misconduct. Providing only partial relief for successful borrower defense claims would shift the cost of institutional misconduct from abusive schools to defrauded borrowers and taxpayers. A school that has harmed a borrower through its misrepresentations and other abusive conduct should not be afforded the presumption that its education had some value to the borrower. To the contrary, rather than giving these institutions the benefit of the doubt, borrowers should—at the very least—be afforded a presumption that they are entitled to full discharge of their student loans and refunds of all amounts already paid.

The Department's suggestion that borrowers with successful claims should have their relief limited ignores the fact that even full debt relief typically fails to make a borrower whole. Defrauded borrowers lose much more than the value of the Title IV loans they are induced to take out. For example, if they have reached their lifetime maximum Pell grant eligibility, they lose out on such grants forever, costing them thousands of dollars or the chance to pursue future educational opportunities. Borrowers who are defrauded by their schools also suffer serious economic opportunity costs by virtue of the time they spend enrolled in predatory schools. Such costs include the wages they would otherwise be earning and additional expenses like childcare. Moreover, borrowers often suffer serious consequences due to negative credit history,

---

[32] *Id.*

[33] *See, e.g.,* Cal. Civ. Code § 1788.16 (incorporating 15 U.S.C. § 1962b-1692j of the Fair Debt Collection Practices Act, which, among other things, outlaws harassing, oppressing, or abusive debt-collection conduct).

jeopardizing their housing and job opportunities, as well as access to additional loans or credit sources. The Department's proposal to provide less than full relief to borrowers who have suffered abuse by predatory schools fails to acknowledge these harms.

Critically, any process that requires borrowers to substantiate the amount of relief to which they are entitled would impose an unfair burden on those borrowers. Without providing any explanation of what a potential partial relief process would entail, the Department suggests that it will determine a borrower's partial relief "based on the degree of harm suffered" by the borrower.[34] However, calculating a borrower's "degree" of harm would be inherently speculative and counterfactual since the vast majority of students would never have enrolled in an institution if that institution had made truthful representations. Limiting borrowers' relief would, in essence, create a secondary review process for borrower defense claimants whose claims have already succeeded on the merits. This second level of review stands only to benefit abusive institutions, who—despite having committed serious misconduct—will no longer be required to bear the full cost of their wrongdoing. Since the Department may only require abusive institutions to pay back amounts *actually* forgiven by the Department, the adoption of a partial relief policy will water down a critical financial deterrent to institutional misconduct. This policy change would therefore harm both borrowers and taxpayers.

Any partial-relief policy will needlessly complicate the borrower relief process and introduce significant inefficiencies for both borrowers and the Department. Indeed, the proposed rule acknowledges the "complexity" associated with calculating partial relief.[35] A methodology that purports to calculate the "degree" of an individual borrowers' harm will also open the door to arbitrary and impermissible inconsistencies in the amount of relief afforded to borrowers with successful borrower defenses.

For these reasons, it is critical that any partial relief policy be subject to notice-and-comment rulemaking and exposed to public consideration. We are dismayed that the Department appears poised to adopt a partial-relief policy without providing *any* details in advance about what such a policy would entail. The Department's failure to provide any details for its proposal would deprive the public of a meaningful opportunity to comment on the process that the Department will ultimately adopt. This attempt to evade the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 500 et seq., is patently improper. The Department had ample opportunity to articulate a proposal for calculating partial relief and to address this topic in its negotiated-rulemaking sessions. In fact, the Department's representative repeatedly stated during those sessions that the Department was "pretty committed to going in with partial relief."[36] After engaging in detailed deliberations about the merits of a partial-relief process—and repeatedly expressing an intention to limit relief in some manner—the Department cannot now point to the "complexity of such determinations" as an excuse for its failure to provide commenters with an opportunity to respond to a concrete proposal. To the contrary, an issue's

[34] 83 Fed. Reg. 37,263.
[35] *Id*.
[36] http://www2.ed.gov/policy/highered/reg/hearulemaking/2017/bdsession5day2.pdf

complexity only heightens the importance of providing an opportunity for the public to respond to coherent, articulated policy proposals.

VIII. THE DEPARTMENT'S PROPOSED PROCESS FOR ADJUDICATING CLAIMS IS BURDENSOME AND UNFAIR TO STUDENTS, AND GIVES ABUSIVE SCHOOLS EXCESSIVE CHANCES TO AVOID LIABILITY

The Department proposes adjudicating borrower defense claims in a profoundly unfair adversarial process that pits students—who will almost always be unrepresented—against well-resourced institutions.[37] Under the nominal goal of enabling the Department "to obtain as much evidence as possible from all sources" and therefore promote "fair and accurate decisions," the Department ignores the dramatic disparities in resources and sophistication between borrowers and schools.[38] The Department seems determined to institute a process that will actively prevent victimized borrowers from successfully asserting their rights to relief.

In 2016, the Department sensibly set out to design a process to adjudicate borrower defense claims that would not require the assistance of an attorney or other third-party.[39] A critical feature of that rule was that the Department would conduct a "a non-adversarial process"—meaning that students would not have to directly confront schools in the course of the Department's adjudication of their borrower defense claims.[40] This process appropriately helped "even[] the playing field for students" and "reduce inequities in resources" between borrowers and schools.[41] The Department's proposed process now seems aimed at achieving the opposite goal.

Compounding the inequities, the Department's proposal requires the Department to initiate a separate process to obtain recovery from a school for each successful borrower defense claim. Requiring a separate process for recovery from the school is entirely gratuitous when the initial adjudication is already adversarial. There is no reason to provide a culpable institution a second chance to escape liability. Making matters worse for borrowers, the Department requires them to "cooperate" in any proceeding initiated by the Department against the school, under the threat of having their relief "revoked."[42] This proposed system appears designed to provide schools with multiple opportunities to escape accountability while placing unreasonable roadblocks in the path of injured borrowers.

IX. A PROCESS ALLOWING THE RECONSIDERATION OF BORROWER DEFENSE CLAIMS IS FAIR AND EFFICIENT

The Department's proposal to abolish a borrower's right to seek agency reconsideration

[37] *See, e.g.*, 83 Fed. Reg. 37,261 (under proposed § 685.06(d)(7), after a borrower submits an individual claim, his school "will be notified of the pending application and allowed to submit a response and evidence.").
[38] *Id*.
[39] *See* 81 Fed. Reg. 78,962.
[40] *Id*.
[41] *Id*.
[42] *See* 83 Fed. Reg. 37,264.

of an adjudicated borrower defense claim is unfair and inefficient. Under the Department's proposed adversarial framework, not only are borrowers now pitted directly against the schools (who will undoubtedly have counsel), but they now have only one chance to garner all possible evidence to support their claim—without the benefit of counsel or discovery and often within only a matter of weeks. This scheme is plainly inequitable.

Under the 2016 Rule, borrowers could file requests for reconsideration of an adjudicated claim. These requests would be heard by the same official who made the original decision. To guard against the risk of a prolonged process, borrowers seeking reconsideration were required to make a "clear demonstration" of new evidence that "cannot just be cumulative of other evidence in the record at the time" of the original decision "but must also be relevant and probative evidence that might change the outcome of the decision being reconsidered."[43] Fundamentally, the Department recognized that "borrowers may not have the same access to information that the Department or the school may have."[44]

The Department now justifies rescinding the reconsideration process based on the patently unrealistic premise that "the Department expects to receive and consider all relevant evidence" during the original determination process.[45] This specious prediction is especially problematic given the gross imbalance of resources and access to records built into the Department's proposed adversarial process. As with other proposed changes, the Department's proposed elimination of a reconsideration process puts another thumb on the scale against borrowers in favor of predatory schools by stripping away fair and efficient borrower protections.

X. THE DEPARTMENT'S PROPOSAL DETERS BORROWERS FROM CONSOLIDATING THEIR LOANS

The Department's proposal to treat consolidated loans as new loans for borrower defense purposes prejudices borrowers by deterring them from seeking the benefits of loan consolidation. As the Department recognizes, loan consolidation has numerous benefits, including simplifying the repayment process, lowering monthly payments, and obtaining a fixed interest rate.[46]

The Department now seeks to deprive students of these tangible benefits by effectively punishing them for consolidating their loans. Under the Department's proposed regulations, regardless of when a loan was first issued, loans consolidated after July 1, 2019, will be subject to the Department's new proposed rule—a rule that stacks the deck against the borrower in favor of predatory schools at every stage. Loans distributed before July 1, 2019, which a borrower seeks to consolidate, will be stripped of the benefits of prior borrower defense rules to which they would most logically be subject. Borrowers will be faced with an unnecessary no-win situation of either foregoing the benefits of loan consolidation or giving up their rights to a fair

[43] 81 Fed. Reg. 75,963.
[44] *Id*.
[45] 83 Fed. Reg. 37,262.
[46] http://studentaid.ed.gov/sa/repay-loans/consolidation

borrower defense process. This approach raises significant fairness and retroactivity concerns, which call into question the legality of the Department's proposal.[47]

The Department's approach in 2016 was considerably more reasonable. In 2016, the Department acknowledged that some borrowers might find application of prior borrower defense rules preferable to the new standard. By deciding that loan consolidation would not affect the applicable standard, the Department allowed borrowers who took out loans before July 1, 2017, to continue to access any potential advantages from the prior standard, as well as any potential benefits from loan consolidation.[48] The Department should return to the 2016 framework for loan consolidation, which, rather than punish borrowers, encouraged them to extract themselves from default and to make use of the benefits of loan consolidation.

XI. THE DEPARTMENT'S PROPOSED CHANGES TO THE CLOSED-SCHOOL DISCHARGE PROCESS WILL HARM STUDENTS AND UNDERMINE THEIR AUTONOMY IN SCHOOL CHOICE

The Department's proposed changes to the closed-school discharge process practically eliminate its availability and wholly undermine student choice and autonomy. The Department proposes eliminating discharges for students whose schools close but provide a teach-out plan or an orderly closure approved by the school's accreditor and, if applicable, the school's state authorizing agency.[49] In yet another avoidable, unfair dilemma created by the Department's proposal, students enrolled at a school that announces its impending closure would have to choose between two potentially unpalatable alternatives. First, students could reject the teach-out and withdraw to avoid suffering the declining quality of education that is likely to accompany a school closure. In doing so, however, students will give up recourse for the loans they have already incurred and will likely face an uphill battle to transfer any of the credits they earned at the closing school. Alternatively, borrowers could continue to incur debt in order to finish a teach-out or orderly closure program that may differ in any number of significant ways from the program they selected when they enrolled. Students should not be required to attend a school or continue in a program that they did not choose. We are deeply concerned that the Department's proposed changes will eliminate the availability of closed-school discharge.

The Department's 2016 Rule provided a much more equitable process that empowered students. The 2016 Rule allowed students who were enrolled at a school at the time of the schools' closure, or within a window of time immediately preceding the closure, to obtain a discharge of federal loans used to attend that institution if they did not complete the same program of study at another school or transfer credits earned at the closed school to another school.[50] This approach is consistent with how closed school discharge has worked since 1994. The Department considered comments arguing that automatic discharges "create incentives to

[47] *See generally Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *id.* at 291 (Scalia, J., concurring in the judgment).
[48] *See* 81 Fed. Reg. 75,939.
[49] *See, e.g.*, 83 Fed. Reg. 37,254.
[50] *See* 81 Fed. Reg. 76,034.

withdraw that are contrary to public policy favoring program completion," but found that forcing students to complete teach-out programs offered by a closing school would be even worse public policy:

> [I]t is not always in the borrower's best interest to continue a program through graduation. In a closed school situation, the value of the degree the borrower obtains may be degraded, depending on the reasons for the school closure. Borrowers at closing schools may incur unmanageable amounts of debt in exchange for relatively low-value degrees. We do not believe that it is good public policy to require these borrowers to repay that debt if they cannot or choose not to complete the program . . . .[51]

Just two years later, the Department now rejects this compelling rationale and sound public policy in favor of a process that prejudices students and deprives them of autonomy and school choice. In our experience, for-profit school closures are often associated with wrongdoing, and along with the closures, the market value of the degrees they confer plummets—in which case, completing a teach-out to obtain a devalued degree does not come close to remedying the injury to students. The Department should reverse its course and return to its 2016 approach.

While we applaud the Department's proposed increase in the automatic eligibility period for closed school discharge from 120 to 180 days, we oppose the elimination of two examples of "exceptional circumstances" that would allow the Secretary to expand the period even further. The Secretary currently has the discretion to expand the eligibility period for closed-school discharge in "exceptional circumstances," which include "the school's discontinuation of the majority of its academic programs . . . or a finding by a State or Federal government agency that the school violated State or Federal law."[52] The Department's proposal—without explanation—eliminates these two important examples of "exceptional circumstances." Although the Secretary retains discretionary authority to consider these circumstances, we worry that in practice this deletion represents the Department's decision that those dire situations do not warrant expansion of closed-school discharge eligibility. Furthermore, the Department's proposal encourages a school to eliminate all but a few programs at a given campus in order to avoid closed-school discharge liability. We oppose these changes.

The Department also proposes to abolish automatic closed-school discharges, which is yet another major policy reversal that inflicts significant harm on borrowers. Under the 2016 Rule, students who attended a closed school and did not subsequently enroll in a Title IV-eligible institution within three years of their schools' closures, would automatically receive a discharge of their loans.[53] This commonsense approach is fair to borrowers and is highly efficient and easy to administer. The Department selected this approach after considering and rejecting an "opt-out

[51] *Id.*
[52] 34 C.F.R. § 685.214(c)(1)(i)(B).
[53] *See, e.g.*, 81 Fed. Reg. 76,036.

notice" for automatic discharges, rightly noting that it "is unlikely that a sufficient number of borrowers will choose not to have their loans discharged to justify the administrative burden involved in sending the borrower an opt-out notice."[54] At the time the Department was also appropriately "concerned that an opt-out notice could be confusing, and result in 'false positives''—borrowers inadvertently choosing to opt out of the discharge."[55]

In a thinly reasoned policy turnaround, the Department now speculates that an automatic discharge "could have unintended consequences for students because an institution, or the custodian of its student records, is permitted to and might withhold the official transcripts of borrowers who received a closed school discharge."[56] This is a baseless concern. As previously discussed, the Department does not explain the basis for a school's supposed ability to withhold transcripts on these grounds, and such predatory conduct would clearly violate state consumer protection laws. Moreover, there is no evidence that closed schools or, more typically, the custodians of records (e.g., bankruptcy trustees) who inherit their files, do in fact withhold transcripts because a student obtained a loan discharge. Our experience suggests the contrary and, indeed, a number of states have laws requiring that schools provide the state authorizing agency with student records as part of the closure process.[57] For example, the trustee overseeing the bankruptcy of ITT Educational Services, Inc. paid (out of estate assets) to digitize the records of tens of thousands of former students and to provide those records to the States for the express purpose of enabling affected students to access them. The Department's purported reason for revoking automatic closed-school discharges thus rings hollow.

XII. THE DEPARTMENT'S DECISION TO ALLOW SCHOOLS TO REQUIRE BORROWERS TO ENTER PRE-DISPUTE ARBITRATION AGREEMENTS AND CLASS-ACTION WAIVERS IS UNREASONED AND DAMAGING

The Department's proposed reversal on the use of mandatory pre-dispute arbitration agreements and class-action waivers by Title IV-recipient institutions is unreasoned and harms both borrowers and taxpayers. It is critical that the Department preserve students' right to bring suit against schools that have committed misconduct and to do so in collaboration with other similarly harmed students. Mandatory pre-dispute arbitration agreements preclude students from bringing meritorious claims and prevent information about the few disputes that are brought from ever coming to light. This suppression harms students and undermines law enforcement. Similarly, bans on class actions often make securing legal representation financially infeasible for students, effectively preventing students from bringing their claims against schools. Relegating dispute resolution to private, unaccountable forums often leaves students without the ability to effectively seek redress from their schools, forcing these students to seek relief from the government. As a result, mandatory arbitration agreements leave the government and taxpayers footing the bill for institutional misconduct while predatory schools get a free pass.

---

[54] *Id*. at 76,038.
[55] *Id*.
[56] 83 Fed. Reg. 37,286.
[57] *See, e.g.*, Cal. Educ. Code § 94927.5(a) ("Prior to closing, an institution shall provide to the [Bureau for Private Postsecondary Education] . . . [p]ertinent student records, including transcripts . . . .").

The Department explicitly recognized the importance of preserving students' right to file suit in court in its 2016 Rule. After conducting a review of voluminous evidence, the Department reached the following conclusion:

> [E]vidence showed that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program. It is undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.[58]

Despite stating that a "reweighing of the issue"[59] has led the Department to recommend rescinding the 2016 Rule's prohibition on mandatory pre-dispute arbitration agreements and class-action waivers, the Department failed to address—or even acknowledge—the overwhelming evidence that supported the 2016 Rule.

Rather than consider the significant harms identified by the Department less than two years ago, the Department's proposed rule points obliquely to "potential advantages"[60] of arbitration—"advantages" that have repeatedly been disproven.[61] Critically, even if they were substantiated, the purported advantages listed in the proposed rule fail to justify the Department's change of policy in support of *mandatory pre-dispute* arbitration agreements. Any hypothetical benefits that arbitration may confer upon borrowers could be achieved through *voluntary post-dispute* arbitration. In the event that borrowers believe they will benefit from agreeing to arbitrate their disputes, nothing in the 2016 Rule would stop borrowers from entering a post-dispute agreement to do so. It is illogical and unreasonable to suggest that theoretical benefits to borrowers justify eliminating their right to bring a legal claim in court and depriving them of the opportunity to make a reasoned decision about whether to arbitrate any particular dispute.

The Department is incorrect in concluding that requiring schools to disclose their use of mandatory pre-dispute arbitration agreements will adequately protect borrowers by allowing them to "elect to enroll at an institution that does not include arbitration provisions."[62] The idea that students will understand the disclosures and simply be able to identify and select a school that does not use predispute arbitration agreements is a fiction. The use of such agreements is pervasive among for-profit schools, and such schools often use high-pressure sales tactics and

---

[58] 81 Fed. Reg. 76,025.

[59] 83 Fed. Reg. 37,265.

[60] *Id*.

[61] *See, e.g.*, http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/; http://www.nclc.org/issues/state-fact-sheets-forced-arb-harms-consumers-servicemembers-vets.html; http://www.epi.org/publication/forced-arbitration-is-bad-for-consumers.

[62] 83 Fed. Reg. 37,265.

rely on prospective students' lack of understanding about arbitration and the consequences of mandatory arbitration agreements. Requiring disclosures about arbitration agreements will not solve these problems or mitigate the information imbalances that are so often exploited by predatory institutions.

In addition to harming victimized borrowers, mandatory arbitration agreements prevent the Department, state law-enforcement authorities, and accreditors from obtaining information about institutional misconduct that could result in significant consequences for schools and protect additional students from abuse. The Department's current proposal to reverse its requirement that schools provide the Department with information about arbitration proceedings is a self-defeating move that is contrary to the interests of law-enforcement agencies, borrowers, and taxpayers. Allowing institutions accused of misconduct to not only force students into secret tribunals but then to hide the proceedings and findings from regulators permits predatory institutions to evade law enforcement and to continue harming borrowers at taxpayers' expense. The Department's invocation of "the burden to the Department of reviewing" records of arbitrations to justify non-disclosure is a blatant abdication of the Department's responsibility to borrowers.[63]

While the proposed rule obliquely points to "subsequent legal developments"[64] as a primary reason for reversing its policy on mandatory arbitration, there have been no legal developments that erode the Department's clear legal authority to place restrictions on institutions' access to government funds. During the 2016 rulemaking, the Department undertook an exhaustive review of its legal authority to prohibit schools participating in the Direct Loan program from using mandatory arbitration agreements and class-action waivers in certain contexts. The Department correctly concluded that the Department may—consistent with both the Higher Education Act and the Federal Arbitration Act ("FAA")—"impose a condition on the participation by a school in [a] specific Federal program."[65] Critically, the 2016 Rule "do[es] not bar schools from using any kind of predispute arbitration agreements, or class action waivers, so long as they pertain only to grievances unrelated to the Direct Loan Program."[66] The Department has pointed to no new legal authority that in any way calls into question the continued accuracy of the Department's prior legal analysis. Instead, the Department cites extensively to a recent Supreme Court decision, *Epic Systems Corp. v. Lewis*, that is utterly irrelevant.[67] *Epic Systems* dealt with a question of statutory interpretation and found that the National Labor Relations Act does not reflect a congressional intention to displace the FAA and to ban class and collective action waivers. No such question of statutory interpretation is at issue here, and the Court did not so much as reference the question of whether an agency can restrict the use of arbitration agreements as a precondition for participation in a federal program.

In light of the unmistakable harm that forced arbitration causes to borrowers, we call on

[63] *Id*.
[64] *Id*.
[65] 81 Fed. Reg. 76,023.
[66] *Id*.
[67] 138 S. Ct. 1612 (2018).

the Department to reconsider is rescission of its 2016 Rule's mandatory arbitration and class-action waiver provisions. These provisions are critical for protecting borrowers, holding predatory schools accountable for their misconduct, and facilitating regulators' institutional oversight.

XIII. The Department's Proposed "Financial Responsibility" Metrics Will Not Hold Predatory Schools Accountable

The Department's proposal dramatically weakens the financial-responsibility standards that require at-risk schools to set aside funds to cover potential taxpayer losses. These standards not only deterred wrongdoing by raising the costs of institutional misconduct, they also served as important early warning signs that a school may be at risk of closing or borrower defense liability. The Department's financial-responsibility standards should protect taxpayers and students from the price of school failures by creating real disincentives to curb institutional misconduct. The Department's 2016 Rule went a tremendous distance to doing just that. The Department now proposes to rescind its 2016 standards and replace them with new standards that fail to hold predatory schools accountable. The Department's simultaneous loosening of school financial-responsibility standards and the dramatic restriction of the availability of borrower defense relief is extremely troubling.

The Department's proposal narrows—rather than enlarges—the class of events that constitute "mandatory" triggers—i.e., those that make a school automatically fail the Department's general standards for financial responsibility. Mandatory triggering events are critical student and taxpayer protections because when a school experiences such an event, it *must* make an alternative showing of financial responsibility, such as a letter of credit totaling at least 10% of the amount of Title IV funds received by the school over the previous year. The Department now proposes to limit mandatory triggering events to only those whose "consequences are known and quantified . . . and objectively assessed through the composite score methodology, or whose consequences pose a severe and imminent risk."[68] This standard excludes a multitude of events that put schools at risk of closing. For example, in 2016, the Department recognized an enforcement action brought by a state attorney general as a critical mandatory trigger because it was an event that provided immediate, realistic financial jeopardy.[69] The Department's erosion of mandatory triggers needlessly puts students and taxpayers at risk.

The Department's proposal also transforms various events that were mandatory triggers under its 2016 Rule into "discretionary" triggers, allowing the Department to decide on a case-by-case basis whether they constitute a failure of financial responsibility. In particular, if a school's two most recent cohort default rates are 30% or greater, or if it fails to meet the 90-10 rule,[70] the Department no longer considers these mandatory triggers. Both of these metrics, however, are directly related to a school's solvency—schools are ineligible for Title IV funds if

[68] 83 Fed. Reg. 37,273.
[69] 81 Fed. Reg. 75,988.
[70] The 90-10 rule is codified at 34 C.F.R. § 668.28. It caps the percentage of revenue that a for-profit school can receive from federal financial-aid sources at 90%; the other 10% of revenue must come from alternative sources.

they do not remediate these issues within specific periods of time. It is disingenuous for the Department to now dismiss these tests as “events whose consequences [are] speculative,” or events better suited for merely “increased oversight by the Department.”[71]

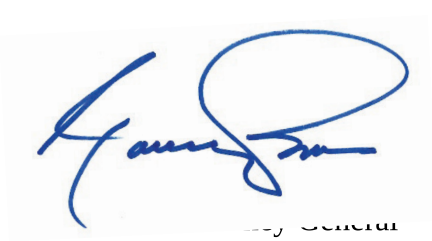
Additionally, the Department’s proposal altogether abolishes certain critical events from being considered triggers at all. Beyond excluding attorney general enforcement actions, the Department now illogically rejects as a trigger an accreditor’s requirement that a school submit a teach-out—an event the Department codified as a mandatory trigger in 2016. The 2016 Rule also recognized additional, important discretionary triggers that the Department has now abandoned—for example, (1) if a school had significant fluctuations in Pell Grant and Direct Loan funds; (2) if the school exhibited high drop-out rates, or (3) if the Secretary anticipated borrower defense claims against the school. The Department’s proposal now rejects all of these. The triggers that the Department proposes eliminating were rooted in common sense and experience. Removing them from the Department’s arsenal confirms that the Department has little interest in meaningfully regulating an industry that has wrought havoc upon students and taxpayers.

The Department should retain the sensible scheme that it issued in 2016, which identified early warning signs for the potential costs of closure or unlawful behavior, and required schools to put up meaningful financial protections before it was too late. The Department’s proposed changes put students and taxpayers on the hook for a school’s risky behavior, abandoning the Department’s obligation to protect students and to serve as a responsible steward of taxpayer dollars.

* * *

The Department has improperly delayed and discarded its carefully considered and duly promulgated 2016 Rule on borrower defense and financial responsibility. The Department’s current proposal does little to protect students and taxpayers, and seems designed to allow predatory schools to thrive, while cutting off relief to victimized students. We urge the Department to rescind its proposed rulemaking.

Sincerely,



y General

[71] 83 Fed. Reg. 37,273.

George Jepsen
Connecticut Attorney General

Delaware Attorney General

Karl A. Racine
Attorney General for the District of Columbia

Illinois Attorney General

Thomas J. Miller
Iowa Attorney General

Maine Attorney General

Brian E. Frosh
Maryland Attorney General

Lori Swanson
Minnesota Attorney General

Gurbir S. Grewal
New Jersey Attorney General

Barbara D. Underwood
New York Attorney General

North Carolina Attorney General

Oregon Attorney General

Josh Shapiro
Pennsylvania Attorney General

Rhode Island Attorney General

Washington State Attorney General