CLASP

Policy solutions that work for low-income people

August 30, 2018

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

Docket ID ED-2018-OPE-0027

Dear Jean-Didier Gaina:

Thank you for the opportunity to comment on the Department of Education's (ED) proposed student loan borrower defense to repayment rule.

As a non-profit, anti-poverty organization, the Center for Law and Social Policy (CLASP) promotes federal and state policies that give low-income people economic security. Postsecondary education can play a key role in helping improve low-income families' economic mobility. However, public policies and practices must prioritize equitable opportunity for low-income students, particularly students of color. The changes proposed in the above-mentioned Notice of Proposed Rulemaking falls short on that measure. While the NPRM suggests that the proposed changes to the borrower defense rule will result in $12.7 billion in "savings," it comes at a tremendous cost to students. We are deeply concerned that this rule will cause long-term harm to student borrowers and will allow for bad practices to again take root.

We are particularly concerned about the impact that this rule would have on students of color. As a result of federal policies that have exacerbated intergenerational wealth disparities between whites and historically underrepresented groups, students of color have less familial wealth and are therefore more likely to borrow federal student loans. Students of color also disproportionately **enroll at** for-profit colleges. For-profit colleges, as the notice cites, are most likely to engage in the bad behavior that leads to successful borrower defense to repayment claims (page 329).

The proposed rule sends a clear message that ED, the designated overseer of this debt, feels it has no obligation to protect the individuals who hold it. It abandons consumer protections designed to protect students and consistently sides with institutions that adopt the worst practices. The proposed rule does this in several specific ways:

Disallows Collective Claims

The proposed rule makes changes to the current rule in ways that harm consumer protection and significantly shifts the existing balance of power—already heavily tilted in institutions' favor—away from students. Specifically, it would no longer allow groups of borrowers who were defrauded by the same institution to have their loans discharged as a group. This change would be extremely damaging to low-income borrowers.

ED's belief that "[a]n individual process would offer all borrowers fair and equal access to defense to repayment relief" does not accord with the reality of low-income borrowers' lives. Forcing students to pursue relief on their own means each must find representation (or navigate the process alone), collect all the required documentation available that would justify their claim, and have the financial luxury to wait for relief while their claim sits in the queue until it is decided. By comparison, under the current rule, borrowers need only demonstrate they were part of the same widespread institutional mistreatment as their fellow classmates.

If a low-income borrower were to get legal assistance to make a borrower defense claim, they would likely turn to a legal services agency. These organizations are overburdened as it is; by some measures, there is less than **one lawyer per 10,000** low-income people to handle civil matters like student loan discharge. What ED's proposed provision really does is limit access to relief exclusively to students who have the time and financial resources—and who are able to meet the strict time deadlines set elsewhere in the proposed rule—to see the process to the end. Low-income and students of color have the most power and access to legal representation when they can take collective action. We therefore strongly urge ED to maintain current group discharge ability.

Endorses Arbitration Agreements

In the proposed rule, ED suggests rolling back rules to restrict forced arbitration, arguing that it is a more affordable and faster alterative to lengthy legal proceedings. The rule suggests that arbitration may be "more accessible to borrowers since it does not require legal counsel." In reality, students would be at a distinct legal disadvantage against potentially large for-profit institution chains that can afford high quality legal counsel. For example, at its peak, Corinthian Colleges was **valued at $1.7 billion**. A low-income (probably working, possibly parenting) borrower who has many other life matters to handle in addition to seeking the relief they deserve cannot hope to prevail against an institution of that size. Moreover, institutions are advantaged by the nature of these agreements, which allow them to choose the arbiter who will hear the dispute.

As further proof that arbitration agreements aren't in a borrower's best interest, research shows these agreements are typically used by organizations where there was already a significant power imbalance in favor of the employer or institution. **The Economic Policy Institute has found** that the use of mandatory arbitration among employers is much more common in low-wage workplaces and in industries that are disproportionately female and Black. While citing new Supreme Court precedent in *Epic Systems Corp. v. Lewis* may support ED's position, numerous **labor experts agree** that the practical impact of that decision specifically, and the existence of class action bans and arbitration in general, chill the ability for individuals to fight against bad behavior perpetrated by large businesses or entities. ED must keep in place, and enforce, the current ban on arbitration and class action waivers.

Narrows the Definition of Misrepresentation While Raising the Evidentiary Threshold

Similarly, the proposed rule gravely reduces a student's ability to hold accountable those institutions that are intentionally deceptive and take students' time, money, and hope for a better economic outcome. The proposed rule restricts borrower defenses to repayment by eliminating altogether breach of contract and state law judgment provisions, excluding quality of education, and raising the standard students must meet to show misrepresentation.

The rule proposes a standard for borrowers that would be practically impossible for anyone to meet. Declaring that borrowers must, by a preponderance of the evidence, demonstrate that the institution "acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth" is a bad faith standard. Under what circumstances could borrowers be reasonably expected to know what an institutions' intent was? How were they to know to collect evidence at the time of enrollment (or whenever the misrepresentation took place), which was likely years prior to their claim? ED further proposes the unreasonable standard that the borrower must have "reasonably rel[ied]" on that information to enroll, and that decision to enroll must result in "financial harm." (For affirmative claims, ED proposes an even higher evidentiary threshold, clear and convincing evidence, which aligns neither with consumer protection law nor with ED's other administrative proceedings.) Standards that no one could meet must be abandoned.

Even more concerning, ED suggests it might require borrowers to submit additional evidence—disguised benignly in the notice as "information"— about the borrower's personal employment history. Asking for a borrower's on-the-job performance, results of drug tests, criminal history, driving history, and/or health history is completely inappropriate and has no bearing on the alleged bad action(s) of the institution. Given our country's structural racism that over-criminalizes people of color and impacts their ability to find employment, borrowers of color would likely appear less deserving of forgiveness based on information that could be contained in that submission.

Because ED doesn't provide one, it's hard to determine a justification for these requirements, other than to pre-emptively discourage borrowers from filing a claim in order to avoid having to comply with such a potential "information" request. It is never appropriate for ED to hold a borrower's loan discharge hostage in exchange for this information. This is also true of the proposal to allow institutions to withhold a student's transcript if their loan has been discharged.

Potentially Eliminates Affirmative Claims – and Modifies them in Damaging Ways

In terms of the types of claims ED will accept, the choice to allow only defensive claims has costs: it means that borrowers in near-distress, but not yet in collections or other default-triggering proceedings, have no options for relief without first defaulting. Defaulting on student loans has long-lasting consequences for borrowers. For instance, it can limit their ability to continue their postsecondary education elsewhere, and negatively impact their credit score, which can, in turn, limit their ability to rent or purchase a home, buy a car, or find and maintain employment. Allowing both defensive and affirmative claims is the best option for borrowers and for taxpayers.

However, the affirmative claim system ED has proposed is unacceptable. For one, students would no longer have the opportunity for loan discharge if the school offers a teach-out; the student would be required to participate in the teach-out and afforded no debt relief option. There are countless legitimate reasons why a student would decline a teach-out. For example, students may have concerns over program quality, or face challenges attending due to a lack of transportation, inconvenient class times, or an illness. This provision therefore only serves to punish the student for institutional mismanagement.

The proposal also establishes a two-tiered standard for the amount of time the borrower has to file a claim, depending on whether it is a defensive or affirmative claim. While the nature of the standard itself appears arbitrary, what's most troubling is that students who have defaulted on their loans have only a tiny window in which to file their claims: 30-65 days after receiving a notice of collection. This places significant undue burden on the borrower and decreases the likelihood that they will file a claim at all. A multiple year window—or no time limit—is in the best interest of borrowers.

General Concern Given Other Pending ED Proposals

Our final concern is the potential negative impact that implementing this rule could have in combination with other changes proposed by ED (specifically, Docket IDs ED-2018-OPE-0042 and ED-2018-OPE-0076). Given that these rulemaking processes are advancing in tandem, it is difficult to ascertain what the collective impact of these changes will mean for students.

ED-2018-OPE-0042 would repeal the gainful employment rule without a replacement accountability system. The repeal would make college enrollment less transparent and cause students to enroll in low quality programs, including those that have already been identified as low quality under the existing rule. Presumably, poor outcomes in these programs are linked to a lack of focus on student success and to harmful practices that could serve as a legitimate borrower defense to repayment. The gainful employment rule can stop federal student loan funds from flowing into a low-quality program in the first place. ED's rescission would lead to more bad debt and, given the draconian changes proposed by the rule that is the focus of this letter, debt that borrowers may be stuck with for a lifetime.

ED-2018-OPE-0076 would alter accreditation, the credit hour standard, distance education, and a host of other measures that are not clearly defined. If implemented, it would have untold impacts on students who may need to make a borrower defense to repayment claim. For example, one area of consideration is "the arrangements between an institution and another institution or organization to provide a portion of an educational program." Allowing for a freer flow of title IV aid to private organizations creates new opportunities for fraud. Even if borrowers are able to identify that fraud after the fact, the proposed borrower defense rule would offer them no support.

In addition, that notice proposes discussion of the "roles and responsibilities of institutions and accrediting agencies in the teach-out process, " which as we mention earlier in the letter, is an area directly related to borrower defense.

In total, these changes would generate a cost impact much different from what is calculated here. Such an extensive accountability rollback would lead to even more bad loans plus fewer discharges compared to current baseline. It is very likely that the estimated $10.5 billion in forgiveness taken away from borrowers by the defense to repayment rule would be much higher. While some might think it is good to save so much taxpayer money, this "savings" is a quirk of government accounting and does not have such a meaning for those affected.

Under this proposed rule, low-income students and students of color would incur billions of dollars of additional debt while producing few, if any, tangible benefits for students. This student loan debt limits their ability to be full participants in our economy and care for themselves and their families. The rule also holds the potential to exacerbate existing wealth inequities faced by students of color.

Postsecondary education and training can be a transformative experience, one so powerful that it can lead to permanent financial stability. However, it is the responsibility of the Department of Education to ensure that students receive quality education and to protect students from low-quality programs that only deliver debt. There are some things that ED can’t recoup for students — like the time away from their families while commuting to and attending school, or their own hard-earned money that went toward their education. But ED should never make it harder for students to get back what they deserve.

We therefore strongly urge ED to abandon what will ultimately be a giveaway to undeserving institutions and allow the final 2016 rule to go into full effect.

Sincerely,

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