Comments of the National Consumer Law Center,
East Bay Community Law Center,
Public Law Center,
New York Legal Assistance Group,
Housing and Economic Rights Advocates, and
Project on Predatory Student Lending,
Legal Services Center of Harvard Law School

In Response to the U.S. Department of Education Notice of Negotiated Rulemaking Committee and Notice of Public Hearings

Docket ID ED-2015-OPE-0103

Submitted: Sept. 16, 2015

The following comments are submitted on behalf of the National Consumer Law Center's low-income clients, as well as the East Bay Community Law Center, the Public Law Center, the New York Legal Assistance Group and the Project on Predatory Student Lending, Legal Services Center of Harvard Law School. The National Consumer Law Center (NCLC) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. NCLC's Student Loan Borrower Assistance Project provides information about rights and responsibilities for student borrowers and advocates. We also seek to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.[1]

The East Bay Community Law Center (EBCLC) is a nonprofit organization that provides free legal services to low-income residents of Alameda County, California. EBCLC is also a community-based clinic for Berkeley School of Law's Clinical Program, providing law students with a unique opportunity to learn practical lawyering skills while reflecting on the lawyer's role and the lawyering process. Since its founding in 1988, EBCLC has become the largest provider of free legal services in the East Bay and a nationally-recognized poverty law clinic.

The Public Law Center (PLC) is a non-profit organization that provides free legal services to low-income residents of Orange County, California. In 2014, PLC staff and volunteers provided over 67,000 hours of free legal services in handling more than 4,600

[1] See the Project's web site at www.studentloanborrowerassistance.org. NCLC also publishes and annually supplements treatises which describe the law currently applicable to all types of consumer transactions, including Student Loan Law (5th ed. 2015).

cases, benefiting more than 8,000 low-income children, adults and seniors in Orange County. Our Consumer Law Unit often assists low-income residents with their federal and private student loans, as well as the challenges that arise from attending for-profit schools.

Founded in 1990, the New York Legal Assistance Group (NYLAG) provides high quality, free civil legal services to low-income New Yorkers who cannot afford attorneys. NYLAG's comprehensive range of services includes direct representation, case consultation, advocacy, community education, training, financial counseling, and impact litigation. NYLAG counsels hundreds of low-income student loan borrowers each year, providing guidance on loan repayment options and borrower rights.

Housing and Economic Rights Advocates (HERA) is a California statewide, not-for-profit legal service and advocacy organization dedicated to helping Californians – particularly those most vulnerable - build a safe, sound financial future, free of discrimination and economic abuses. HERA counsels over 2000 individuals a year, and offers in-depth advocacy such as negotiation and representation to over 500 individuals on issues ranging from foreclosure prevention to debt collection and credit reporting abuse.

The Project on Predatory Student Lending, Legal Services Center of Harvard Law School is dedicated to helping low-income loan borrowers with debt from for-profit schools who are struggling with student loans they cannot pay and financial and legal systems they cannot navigate alone. Our clients come to us with crushing and unaffordable student loan debt, often in the form of federal student loans, borrowed to support enrollment in programs that have employed unfair, deceptive, and fraudulent practices against students. These comments are submitted on behalf of these clients, and based on their experiences.

The following recommendations for additional agenda items for the upcoming rulemaking focus on ensuring that borrowers who are harmed by illegal school practices are able to obtain the loan relief that the Higher Education Act (HEA) and regulations already entitle them to receive. Our key recommendations include the following:

Defense to Repayment ("DTR") Process

- Add DTR procedures for Federal Family Education Loan Program (FFEL) loans to the agenda. As with Direct Loans, the Department and other FFEL loan holders have a mandatory legal obligation to grant debt relief whenever a FFEL borrower establishes a valid defense to repayment. The Department must not waste this opportunity to create an accessible and fair DTR process for harmed FFEL loan borrowers who have no other avenue to relief.

- Provide some cohorts of borrowers with automatic relief, without requiring any application, particularly in cases where there are state or federal findings of widespread wrongdoing.

Other Agenda Recommendations

- Update false certification and other discharge regulations to provide relief to all eligible borrowers to complement the defense-to-repayment process.
- Ban mandatory arbitration clauses and class action waivers in enrollment agreements and prohibit schools from accepting funds from private lenders that include such clauses in their loan contracts.
- Prevent manipulation of cohort default rates and 90-10 rule calculations.
- Limit third party collection fees to fees that are reasonable, bona fide, and actually incurred.

I. Ensure that Student Loan Borrowers Harmed by Illegal School Practices Are Able to Obtain the Debt Relief Provided by Law

Over the years, NCLC and its legal aid partners have seen many clients whose dreams have been shattered by fraudulent for-profit higher education corporations. While many of these companies have used deceptive recruitment practices to earn billions in profits from federal aid programs, our clients are left with crushing debt burdens. Often these clients are not able to obtain loan discharges because the regulations are too narrowly drafted or the Department has imposed evidentiary burdens that are impossible for most borrowers to meet. As a result, they face a lifetime of student loan debt collection, including through wage garnishments, Social Security offsets and tax refund seizures. These debt burdens all too often prevent them from getting a fresh start in life.

The purpose of this rulemaking should be to rectify this problem and create the tools the Department needs to provide comprehensive debt relief through the most accessible, fair, transparent and efficient processes possible. While we commend the Department for proposing to create a defense-to-repayment (DTR) process through which some Direct Loan borrowers may seek relief, such a process will leave out too many harmed borrowers.

Rather than focusing only on the subset of DTR regulations applicable to Direct Loan borrowers, the Department should use this rulemaking to establish a cohesive set of loan relief regulations that complement one another. It should add to the agenda DTR processes for Federal Family Education Program loans. It should also include a comprehensive review of out-of-date and narrow discharge regulations that prevent many harmed borrowers from receiving the discharges that the Higher Education Act already entitles them to receive.

A. Update the Loan Discharge Regulations to Ensure that Borrowers Harmed by Fraudulent Schools are Able to Obtain the Debt Relief Mandated by the Higher Education Act

The DTR requirements were not intended to be the only way for borrowers harmed by for-profit school fraud to obtain debt relief. The Higher Education Act (HEA) requires the Department to grant full loan discharges to all borrowers whose financial aid eligibility was falsely certified by their schools, as well as borrowers who are unable to complete their education due to their schools' closures. The same provision includes discharges for borrowers whose schools fail to pay refunds after they have withdrawn from enrollment or whose eligibility was falsely certified as a result of identity theft.[2]

These discharges were intended both to provide relief to students injured by school fraud and to discourage illegal and abusive school practices. Under the statute and current regulations, the Department has clear authority to seek reimbursement from schools for all types of discharges. The HEA states that the Department "shall . . . pursue any [discharge] claim available to [a] borrower against the institution and its affiliates and principals . . . ."[3] Yet, these provisions have had little, if any, deterrent effect on illegal school practices. This is due in part to confusing forms, lack of notice about rights, and poor administration of the programs. Further, many borrowers are not able to qualify for discharges, even when they should, because of outdated and narrow regulations and Department policies.

These borrowers who should qualify for statutory discharges should not be forced into a potentially complex DTR process just because the regulations are outdated and unreasonably narrow. Instead, all borrowers who are harmed by school fraud should be able to obtain the loan cancellations to which they are already entitled by statute.

We urge the Department to add a comprehensive review of the discharge regulations to the rulemaking agenda. Although we have included the following important examples of issues that should be addressed in the rulemaking, these examples are not exhaustive.

1. False Certification Discharges

The statute broadly requires relief whenever a borrower's eligibility for financial aid is falsely certified. The Department created narrow eligibility categories through regulation and has imposed evidentiary standards that are impossible for most borrowers to meet. We strongly urge three key reforms to the false certification process:

- Retain the existing categories, but revise the regulations to update antiquated requirements such as handwriting requirements in the day and age of electronic signatures;

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[2] *See* 20 U.S.C. § 1087(c)(1).
[3] 20 U.S.C. § 1087(c).

- Restore the original intent of the discharge by adding other types of violations to trigger relief; and

- Revise Departmental policies to ensure that borrowers who should qualify for discharges are not denied relief due to unreasonably high evidentiary burdens and unwritten standards.

a. **Update Requirements for Existing Categories of False Certification Discharges**. Due to the narrowly defined and outdated eligibility criteria, we have numerous clients who have been harmed by the fraudulent practices of for-profit schools but cannot obtain the debt relief they are entitled to under the HEA, as detailed below.

i. **Update the Ability-to-Benefit Category**. The current false certification regulations allow discharges for borrowers who have not earned a high school diploma or GED only when the school did not properly administer an ability-to-benefit (ATB) test.[4] The HEA ATB provisions, however, have changed significantly since 2012. As of July 1, 2012, students without a high school diploma or GED were no longer eligible for financial aid by passing an ATB test. More recently, as of July 1, 2014, students can become eligible for financial aid if they pass an ATB test *and* enroll in an eligible career pathway program.[5]

Despite this change in the HEA, we have clients who enrolled after July 1, 2012, who did not enroll in a career pathway program, and whose schools falsely certified that they had earned a high school diploma. Although these borrowers were falsely certified, they are *not* eligible for a false certification discharge under current regulations. The Department should update the regulations to provide discharges for these borrowers.

We also urge the Department to add to the agenda both (1) regulations implementing the recent HEA provision regarding career pathway programs and (2) discharge eligibility criteria for career pathway program students who are falsely certified. This is an area requiring specific regulations further defining program eligibility, as non-high school graduates are a particularly vulnerable population easily preyed upon by unscrupulous schools. We do not yet know the number of non-high school graduates who will enroll in these types of programs and who may be falsely certified. Rather than waiting for problems to develop, the Department should establish clear regulations to protect students and taxpayers and ensure that only high-quality career pathway programs qualify for Title IV funds.

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[4] *See* 34 C.F.R. § 685.215.
[5] 20 U.S.C. § 1091(d)(1)(A).

ii. **Update the Forgery Category to Also Provide Relief to Borrowers Harmed by Electronic Fraud.** The current false certification discharge regulation for forgery only provides for relief when a school has manually forged the student's signature on a promissory note or a loan check. To obtain relief, the borrower must provide five specimens of his or her signature.[6] But in this day and age, the loan system is primarily electronic, allowing multiple loan disbursements over multiple years based on one electronically signed promissory note.

We have seen a number of borrowers whose schools electronically obtained more loan funds than the borrower authorized. For example, one legal aid office submitted a false certification discharge application on behalf of a veteran borrower who had exhausted his G.I. Bill benefits. He then electronically authorized the school to take out Title IV loans sufficient to cover his tuition and school fees. Over the remaining school term, the school electronically obtained $7,000 more than was authorized by the borrower and pocketed the money. Although this school is under investigation by the Department for doing this to multiple veteran borrowers, and despite the overwhelming evidence that this school was illegally stealing unauthorized federal loan disbursements, this borrower's discharge application was denied.

b. **Add New Types of School Violations that Trigger False Certification Relief**. The current narrowly defined false certification categories do not adequately account for the variety of common HEA violations that cause enormous harm to students. In order to help borrowers who have been harmed by other common illegal school practices, the regulations should be revised to include additional key types of HEA violations as triggers for false certification discharge. Such amendments would conform the regulations to the broader provisions of the statute.

For example, government investigations of and lawsuits against for-profit schools have revealed that some schools routinely falsify the academic progress of their students in order to keep them enrolled in school and eligible for certain types of federal student aid.[7] Additionally, discharges should be granted when schools have violated or failed other fundamental requirements under the HEA, including the incentive compensation ban and the gainful employment rules.

c. **Make the Standards and Evidentiary Burdens Required for False Certification Relief Fair for Borrowers**. Over the years, through Dear Colleague letters and unwritten policies, the Department has imposed a number of unrealistic

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[6] 34 C.F.R. §§ 682.402(e)(3)(iii), (iv) (FFEL) and 685.215(c)(2) (Direct Loans).

[7] *See, e.g.*, Kelly Field, *Faculty at For-Profit Colleges Allege Constant Pressure to Keep Students Enrolled,* Chronicle of Higher Educ. (May 8, 2011).

and unfair standards and evidentiary burdens. These policies, which have made it impossible for most borrowers to obtain the relief to which they are entitled by statute, should be revised.

i. Clarify Eligibility Standards and Criteria for Disqualifying Status Discharges. The Department should revise the definition of what constitutes a "disqualifying status" basis for false certification.[8] The regulations regarding disqualifying status allow discharge if "the student would not meet the requirements for employment [in the student's state of residence] in the occupation for which the training program supported by the loan was intended because of a physical or mental condition, age, or criminal record or other reason accepted by the Secretary."[9] Despite this broad regulatory language and the even broader false certification provision in the HEA, the Department does not provide relief for most borrowers who clearly enrolled in programs that do not permit them to obtain employment in the relevant occupations.

The Department has narrowed the relief so that only licensing requirements are considered "requirements for employment." But many occupations include other conditions of employment that borrowers cannot meet. For example, many for-profit schools enroll non- or minimally-English proficient students in programs taught exclusively in English. Although it is impossible for such students to obtain jobs because they lack the necessary skills, under current Department policy, they cannot qualify for false certification discharges. Similarly, the Department will not grant relief to borrowers who cannot find employment because their program lacked the accreditation necessary to qualify them for licensing or private certification exams.

The Department has also imposed unwritten criteria to deny relief to borrowers who should be eligible. For example, the Department appears to require that a borrower with a felony conviction show that he made the school aware of the disqualifying status at the time of enrollment and that the school told the borrower that the condition would not be a hindrance to seeking employment. The Department has also required that the disqualifying condition is long-term and unchangeable. As a result, borrowers with felony records must show that a licensing statute prohibits their employment. This ignores the reality that criminal records prevent employment in many occupations and imposes requirements with no basis in law.

As another example, in a denial provided to NCLC by a legal aid attorney, the Department pointed to information on the school's web site

[8] 34 C.F.R. §§ 682.402(e)(iii)(B) (FFEL); 685.215(a)(1)(iii) (Direct Loans).
[9] *Id*.

that stated that individuals with a felony conviction "may find exceptional difficulty finding employment." Because of this disclosure, and because the catalog advised students to do their own research, the Department denied the false certification discharge application. A borrower should not be denied relief based on a school's catalog and web disclosures, particularly when the school aggressively marketed its courses even to those who could not work in the field due to state licensing requirements.

These and many other non-licensing employment requirements should trigger relief. Borrowers should qualify for false certification discharge as long as they can show that a condition prevents them from meeting basic job requirements.

ii. **Make Burdens of Proof Fair for Borrowers**. The Department's process for investigating and adjudicating false certification discharge applications should be amended to shift the burden of proof from borrowers to the Department. Currently, borrowers may submit a sworn statement as evidence establishing their eligibility for a false certification discharge.[10] The Department, however, routinely requires borrowers to provide additional evidence. For example, the Department requires borrowers to present evidence of an oversight agency investigation that has uncovered fraud before it will grant a discharge.[11] Often no such investigations have occurred, leaving injured borrowers with no way to seek redress. The Department unfairly treats an absence of oversight agency findings as sufficient to raise an inference that no improper practices took place.[12] When oversight agencies fail to undertake investigations, as they frequently do, such an absence of findings does not indicate that fraud did not take place, but nonetheless cripples borrowers' ability to prove that it did.

The Department should specify that borrowers who submit a sworn statement establishing their eligibility for a false certification discharge are presumptively eligible for discharge. Once presumptive eligibility is established based on a borrower's application, the burden should then shift to the Department to disprove the borrower's eligibility. Absent any evidence contradicting the borrower's sworn statement or disputing the borrower's credibility, the regulations should specify that the Department must grant the discharge. The text of the HEA states that the Department "<u>shall</u> discharge the borrower's liability on a loan" in situations where a school has falsely certified a student's eligibility to borrow.[13] This language plainly requires discharge even in the absence of agency findings, and the Department is in a

[10] *See* 34 C.F.R. § 682.402(e)(3); 34 C.F.R. § 685.215(c).
[11] *See* U.S. Dep't of Educ., Dear Colleague Letter Gen-95-42 (Sept. 1995).
[12] *Id*.
[13] *See* 20 U.S.C. § 1087(c)(1).

far superior position to obtain the evidence it currently demands from applicants.

The regulations should clarify this evidentiary standard and also require that the Department should look not only for evidence of findings from oversight agencies, but examine other evidence as well, including any student complaints or other false certification applications with similar sworn student statements.

2. **Closed School Discharges**

As the Department has itself admitted, few of the borrowers who should be eligible for closed school discharges actually apply.[14] This is likely due to a number of factors, including that many borrowers are not aware of their potential eligibility. In addition, the closed school application, which has not been subject to consumer testing or readability analysis, can be daunting to borrowers. In our experience, the application is difficult for many borrowers to understand and complete without the assistance of an attorney.

After a school closes, the current regulations require the Department to identify potentially eligible borrowers and send them a discharge application and "an explanation of the qualifications and procedures for obtaining a discharge."[15] Many eligible borrowers fail to apply in response. The time immediately succeeding a school closure is often confusing and many borrowers are focused on finding another school that will accept their credits.

In order to increase borrower applications, the regulations could require the Department to provide an additional closed school discharge application and information to potentially eligible borrowers with their first monthly loan statement. In addition, the regulations could require the Department to automatically discharge the loans of all borrowers it knows are eligible for closed school discharge, based on its own records, without any borrower application. While the Department currently has the discretion to provide closed school discharges without an application,[16] we know of no circumstances in which it has done so.

3. **Unpaid Refund Discharges**

Like the false certification discharges, but lacking any written guidelines or policies, the Department and guaranty agencies apply an evidentiary burden to unpaid refund discharges that is impossible for most borrowers to meet. The Department and guaranty agencies often deny unpaid refund discharges and require that the borrower provide some type of documentary evidence to supplement

[14] *See* Paul Fain, *Best of a Bad Situation*, InsideHigherEd.com (Dec. 9, 2014).
[15] 34 C.F.R. § 685.214(f).
[16] 34 C.F.R. § 685.214(c)(2).

his/her written attestation. Yet, borrowers have difficulty obtaining this evidence, either because they withdrew without written notice or because the school records are no longer available. The Department and guaranty agencies should apply standards similar to what we recommend above with respect to false certification discharges.

B. Create a Fair, Accessible and Efficient Defense-to-Repayment Process for All Federal Loan Borrowers

In order to avoid repetition, we are not submitting detailed comments regarding defense-to-repayment (DTR) claims procedures or standards. We instead incorporate the written comments that were jointly submitted to Special Master Joseph Smith on July 24, 2015[17], and to the Department of Education in response to Docket ID No. ED-2015-ICD-0076 on August 12, 2015.[18]

Although we are incorporating prior comments, we want to highlight several recommendations. This rulemaking should focus on ensuring that all Title IV loan borrowers have access to debt relief in the case of school misconduct through a transparent and streamlined process that is accessible to all borrowers with valid claims. The agenda should therefore include DTR processes for FFEL loan borrowers and group relief in appropriate circumstances.

1. **Create DTR Processes for All Federal Loan Borrowers Who Are Entitled by Law to Assert Defenses to Repayment, Including FFEL Loan Borrowers.** It is essential that the upcoming rulemaking establish a uniform DTR process for all types of Title IV loans, not just Direct Loans.

Many borrowers harmed by deceptive for-profit schools obtained loans under the Federal Family Education Loan Program (FFEL), which was not phased out until 2010. As with Direct Loans, the Department and other loan holders have a mandatory obligation to cancel the loans of most FFEL borrowers who establish illegal for-profit school practices. Starting on Jan. 1, 1994, the FFEL Master Promissory Note (MPN) included language making loan holders subject to "all claims and defenses" that a borrower could assert against his or her school, as long as the school "refer[red] [borrowers] to the lender" or was "affiliated with the lender by common control, contract, or business arrangement." These provisions were codified in the federal regulations in 2007.[19]

Indeed, in 1995 the Department itself acknowledged that both types of borrowers may raise the same types of defenses to repayment, stating that "[b]orrower defenses will

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[17] Available at http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/letter-joseph-smith-2015.pdf.
[18] Available at http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/comments-borrower-defenses-2015.pdf.
[19] 34 C.F.R. § 682.209(g) (published in 72 Fed. Reg. 32,410 (June 2, 2007)).

raise the same potential for liability for both FFEL and Direct Loan schools."[20] The Department also stated that it "committed during negotiated rulemaking to apply the same borrower defense provisions to BOTH the Direct Loan and FFEL programs."[21] This did not happen because the negotiated rulemaking committee determined that regulations were unnecessary at that time.[22]

This rulemaking should therefore establish a defense-to-repayment process for *all* Title IV loan borrowers, including FFEL Loan borrowers. To do anything less will ignore the plight of the many FFEL loan borrowers who were defrauded by their schools, but have no avenue to debt relief.

2. **Provide Automatic Loan Cancellations for Cohorts of Borrowers Covered by Government Findings of Wrongdoing**. Even if the Department adds defense-to-repayment procedures for FFEL loans to the rulemaking agenda, many borrowers may have difficulty accessing a defense-to-repayment claims process. For this reason, it is critical to create a fair and efficient defense-to-repayment process that provides some cohorts of borrowers with automatic relief, particularly in cases where there are state or federal findings of widespread wrongdoing.

Not all borrowers should be required to individually prove a DTR claim. Instead, the Department should establish a process through which state attorneys general, state oversight agencies, and other federal agencies may report to the Department findings or evidence that a school has violated the established federal or state standards. Whenever a government agency reports that such evidence exists or such a finding has been made, the Department should work with the reporting agency to identify all borrowers who were likely affected by the school violations. It should do the same whenever it finds state or federal law violations based on its own investigations. The Department should then grant a group discharge to all identified borrowers. Under these circumstances borrowers should not be required to submit applications, but should receive automatic loan cancellations.

In addition, when a borrower, a government agency, or an advocate presents evidence suggesting that a group of borrowers is entitled to a loan cancellation based on a DTR claim and requests that the Department initiate an investigation on behalf of that group, the Department should be required to investigate the evidence, notify affected borrowers, and grant group discharges where appropriate.

C. Prohibit Binding Arbitration Clauses and Class Action Waivers in School Enrollment Agreements and Private Student Loan Contracts

Many of our clients enroll in for-profit colleges unaware that their enrollment contracts contain sweeping arbitration clauses. These clauses prevent clients from

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[20] Dep't of Educ., Dear Colleague Letter GEN-95-8 (Jan. 1995).
[21] *Id*.
[22] 60 Fed. Reg. 37768 (July 21, 1995).

vindicating their rights in court and limit the rights that may be vindicated through arbitration.

Forced arbitration clauses are becoming increasingly common in enrollment agreements. They are used to unfairly disadvantage students by: (1) limiting discovery; (2) mandating an arbitration forum hand-picked by the lender; (3) allowing the lender to determine how arbitration costs will be allocated; and (4) waiving the borrower's right to court review.[23] Forced arbitration clauses also commonly prohibit class action proceedings. Pursuing individual claims in arbitration is prohibitively expensive and beyond the reach of most borrowers proceeding individually. Bans on collective action shield schools and from liability nearly completely by functionally prohibiting individual actions and explicitly prohibiting class actions.

Other federal agencies have acted to protect consumers from contracts containing mandatory pre-dispute arbitration clauses. For example, in a report to Congress, the Department of Defense ("DOD") noted that: "[s]ervice members should retain full legal recourse against unscrupulous lenders. Loan contracts to service members should not include mandatory arbitration clauses . . . and should not require the service member to waive his or her right of recourse, such as the right to participate in a plaintiff class."[24] To protect service members, the DOD recently broadened its existing ban on forced arbitration clauses to significantly more credit products offered to service members and their families.[25]

The Department should follow the DOD's lead by limiting participation in Title IV programs to institutions that prohibit mandatory pre-dispute arbitration clauses and class action waivers in enrollment contracts. It should also limit participation in Title IV programs to institutions that do not accept the proceeds of private student loans with contracts that include mandatory arbitration agreements or class action waivers. The Department could do so by amending the regulation regarding the terms of Program Participation Agreements.

II. Amend the Regulations to Halt the Manipulation of Cohort Default Rates and 90-10 Calculations

We also urge the Department to amend a number of regulations to ensure that schools that violate the HEA are held accountable for illegal practices. In September 2014, the Department announced it had adjusted the Cohort Default Rates (CDRs) of colleges that would otherwise be subject to sanctions, removing from the numerator of those colleges' CDRs "certain borrowers who defaulted on a loan but who had one or more other Direct or

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[23] *See* Strengthening the Federal Student Loan Program for Borrowers: Hearing Before the S. Comm. on Health, Education Labor & Pensions 113th Cong. (2014) (Statement of Deanne Loonin, National Consumer Law Center).
[24] *See* Department of Defense, Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents 7-8 (2006).
[25] *See* 32 C.F.R. §§ 232.8(a)(2), (3).

FFEL Program loans . . . that did not default."[26] This allowed some schools whose former students experienced high rates of default to avoid sanctions. The Department's explanation was that problematic "split servicing" made it inappropriate to hold the schools accountable for their students' high default rates.

We join The Institute of College Access and Success (TICAS) and others in noting that, if the Department has determined that the servicing of some loans in recent years was so flawed that it was inappropriate to hold the schools accountable, then it is equally inappropriate to hold the borrowers accountable for them. Yet the Department left borrowers in default, subject to high fees, damaged credit, and other penalties, while "bailing out" the schools from negative consequences. If borrowers' defaults are removed from schools' CDRs due to faulty servicing, they should be eliminated from borrowers' records as well.

We believe that doing so is well within the Department's existing authority. The Department has clear authority to provide forbearances to borrowers in default,[27] and servicers can and do provide borrowers with retroactive forbearances to erase prior delinquencies. Separate federal rules already provide precedent for reversing determinations of default, as well as for updating reports to consumer credit agencies to reduce the harm of an earlier default determination.[28] If the Department believes that current regulations do not permit the removal of borrowers' defaults where those defaults are removed from colleges' CDRs, then this issue should be added to the negotiated rulemaking panel's agenda.

Similarly, as detailed in the comments of TICAS, many for-profit schools manipulate their rates under the 90-10 Rule by, for example, delaying the disbursement of federal aid to students and by combining campuses under comment OPEID numbers.[29] We urge the Department to amend its regulations to prevent deceptive practices that mask violations of the 90-10 Rule.

III. Charge Borrowers Only Bona Fide, Reasonable and Incurred Collection Charges

We urge the Department to terminate its use of private collection agencies to collect student loans. To the extent that the Department continues to use collection agencies, we ask that the Department consider revising its collection fee system so that it is more fair and equitable to borrowers.

Borrowers should only be charged for collection fees that are bona fide and reasonable and actually incurred. Currently, the Department uses a "cost-averaging" basis

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[26] U.S. Department of Education, Federal Student Aid, *Adjustment of Calculation of Official Three Year Cohort Default Rates for Institutions Subject to Potential Loss of Eligibility* (Sept. 23, 2014), http://1.usa.gov/1r830tQ.
[27] *See* 20 U.S.C. § 1080.
[28] 34 C.F.R. § 685.206.
[29] 20 U.S.C. § 1094(a)(24).

to calculate an individual borrower's collection fees.[30] The Department calculates the fees, which may be as high as 25% of outstanding principal and interest, based on the average collection cost per student loan borrower. The fees are not in any way related to the actual costs incurred in collecting from any particular borrower. This "cost-averaging" approach often leads to unfair results since the number of defaulting borrowers from whom recovery is made bear the brunt of all the government's collection expenses.

In many circumstances the Department adds these exorbitant collection fees to the principal balance, a practice known as capitalization. Capitalization leads to ballooning loan debts even in cases where collection activity is minimal. This practice of adding collection fees, which are often unrelated to the minimal amount of work actually performed by the collection agency, to the principal balance makes it even harder for borrowers to make a dent in paying off their debts.

In light of these negative consequences, the Department should abandon the "make whole" approach and instead adopt a collection fee system based on actual costs, with a ceiling that limits collectors to charging fees that are reasonable, bona fide and actually incurred. Charging reasonable and bona fide fees will provide desperately-needed relief to borrowers and will ensure borrowers are not deterred from repaying their loans by excessive collection fees.

Collectors charge fees they have not yet incurred, which is illegal and deceptive. Even though the Department forbids collectors from assessing collection fees in advance, collectors often send bills to borrowers that include fees that have not been earned. The Department has clarified that fees must be based upon the amount collected; collectors may apportion these fees to borrowers as a percentage of each payment.[31] Borrowers are not legally obligated to pay costs that have not been incurred, and fees are incurred by borrowers and earned by collectors only if the borrower makes a payment.

Nevertheless, bills from collectors typically include "projected fees" in bills to borrowers, including fees the collector has not earned. The inclusion of these unearned fees suggests without basis in law or fact that borrowers owe these projected fees. In addition to the unfairness and deception of bills that include unearned fees, this practice harms borrowers by discouraging repayment.[32] To address these problems, the Department

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[30] 34 C.F.R. § 30.60(d).
[31] *See, e.g.,* Final Rule, FFELP Due Diligence Requirements, 61 Fed. Reg. 60478-01, 61481-82 (Nov. 27, 1996) (codified at 34 C.F.R. § 682) ("the proposed change precludes agencies from continuing to assess collection costs upfront at a time when the agency has not yet incurred those costs. The Secretary notes that the borrower is not legally obligated to pay costs which have not been incurred. This regulatory change is intended to require the guaranty agencies to charge only those costs that have been incurred and to prohibit the upfront loading of collection costs on a borrower's account because it discourages repayment and does not reflect the agencies' actual collection expenses").
[32] *See* 61 Fed. Reg. 60478-01, 60482 (Nov. 27, 1996).

should prohibit the inclusion of projected fees on federal student loan collections communications.

IV. Conclusion

We appreciate the Department's intention to provide more relief, through a DTR process, to Direct Loan borrowers harmed by illegal school practices. We urge the Department, however, to take this opportunity to add the above-described items to the agenda in order to ensure that all borrowers who are already entitled to relief by law are able to obtain it.

We also want to raise a few issues that, although not addressed by regulation, are important to ensure that the DTR process will result in actual relief to borrowers. The negotiated rulemaking process will likely not result in final regulations until July 2017. But harmed borrowers need debt relief as soon as possible, including Corinthian and borrowers who attended other fraudulent schools. For this reason, the Department should clarify that until new DTR regulations are implemented, all FFEL and Direct Loan borrowers harmed by any school's fraud may submit DTR claims and obtain relief pursuant to the process established by Special Master Joseph Smith.

In addition, unless the Department ensures that borrowers have access to legal services attorneys, or well-trained counselors who are supervised by attorneys, few borrowers may be able to obtain relief through a potentially complex DTR process. Due to inadequate resources, there are few neutral, comprehensive, and expert student loan assistance services. This lack of free or affordable assistance for student loan borrowers has led to a growing industry of predatory "student debt relief" companies which capitalize on borrowers' confusion and need for assistance. These scam companies utilize various deceptive practices to profit from borrowers, such as advertising debt forgiveness programs, mischaracterizing their affiliation with the government, charging borrowers thousands of dollars in fees to apply for consolidation loans, and providing borrowers with inaccurate information about their rights.[33]

The Department could, for example, use funds it obtains from Zenith and from the Corinthian bankruptcy to fund free legal services for Corinthian borrowers. But we caution the Department to avoid referring borrowers to or funding organizations that have a superficial knowledge of student loan issues. Most borrowers can only truly be helped by attorneys or well-trained counselors who are familiar with student loan law and who will obtain and carefully review borrowers' legal documents and factual circumstances. Non-legal counselors should be under the supervision of a lawyer who is knowledgeable about student loan law and keeps abreast of new developments. Due to the complexity of student loan law, discharge regulations, and the likely complexity of a DTR process, even well-intentioned counselors may give erroneous advice about loan repayment and relief programs.

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[33] *See* National Consumer Law Center, Searching for Relief: Desperate Borrowers and the Growing Student Loan "Debt Relief" Industry (2013).

Finally, we urge the Department to more aggressively enforce existing regulations that would help curb deceptive practices, for example the incentive compensation rules and the regulations regarding substantial misrepresentations.[34] Enforcement is necessary to reduce the rampant fraud and abuse in the for-profit school sector and ensure that federal dollars are spent at schools that provide quality education. It is also necessary to protect future students and prevent them from having to use a DTR or loan discharge process to obtain federal student loan relief in the first place.

We thank the Department for its consideration of our comments. Please feel free to contact Robyn Smith with any questions or comments. (Phone: (617-542-8010); E-mail: rsmith@nclc.org).

[34] 34 C.F.R. §§ 668.71 to 668.74 (to the extent still in effect after *APSCU v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012).)