

Comment Submitted By
The Legal Aid Foundation of Los Angeles
and
The National Consumer Law Center
to the Department of Education
Re: Intent to Establish Negotiated Rulemaking Committee:
Title IV of the Higher Education Act of 1965, as amended (HEA)

Docket ID: ED-2021-OPE-0077

July 1, 2021

On behalf of the low-income clients of the Legal Aid Foundation of Los Angeles (LAFLA) and the National Consumer Law Center (NCLC), we submit these comments in response to the Department of Education’s Intent to Establish a Negotiated Rulemaking Committee.

Our comments are informed by our work as legal aid practitioners. NCLC¹ and LAFLA² strive to meet the legal needs of individuals and families with limited economic means, who otherwise would be without legal assistance. We provide direct legal services to low-income student loan borrowers—including veterans, single mothers, first generation students, people of color, and immigrants—many of whom have been harmed by deceptive and fraudulent practices of the for-profit college industry. We also consult with civil legal services organizations across the country that represent student loan borrowers in their local communities.

Unfortunately, our experience with borrowers has taught us that current federal aid policies cause financial devastation for many low-income students. In 2019 alone, more than 1.25 million federal student loan borrowers defaulted on their Direct Loans and even more were behind and at risk of defaulting.³ Current policies impose harsh penalties on defaulted borrowers that can trap them in poverty and prevent them returning to school and succeeding.

Additionally, student loan debt has not resulted in closure of the achievement gap. Rather, low-income students and students of color are often targeted by for-profit institutions that line their pockets with taxpayer dollars at the student’s expense. These students are less likely to complete

¹ NCLC is a nonprofit organization specializing in consumer law and consumer protection issues on behalf of low-income people since 1969. NCLC has nationally recognized expertise in student loan law and publishes a widely used treatise, *Student Loan Law* (6th Ed. 2019), updated at www.nclc.org/library. Relevant here, NCLC has particular expertise on state authorization reciprocity agreements, consumer protections for online students, and debt relief options for student borrowers harmed by fraudulent schools.

² LAFLA is a non-profit public interest leader on student loan work and seeks to achieve equal justice for low-income people. It provides critical outreach and education, self-help clinics, and quality direct legal assistance to financially distressed student loan borrowers. LAFLA’s policy and advocacy efforts are grounded in the legal assistance it has provided to the thousands of low-income students in Southern California for over thirty years.

³ U.S. Dep’t of Educ., Federal Student Aid Data Center, Default Rates, available at <https://studentaid.gov/data-center/student/default>; U.S. Dep’t of Educ., Federal Student Aid Data Center, Chart: Portfolio by Delinquency Status, available at <https://studentaid.ed.gov/sa/about/data-center/student/portfolio>.

school and more likely to default.⁴ Current federal aid collection policies hammer these students instead of helping them. Too many low-income students struggle to repay their loans. Too many suffer harm at the hands of predatory schools. Their struggles and suffering are preventable and unnecessary.

The topics that the Department of Education has included in the Intent to Establish Negotiated Rulemaking Committee are of critical importance to our low-income clients and are in sore need of re-regulation. However, the Department should not wait for new regulations to provide relief to desperate student loan borrowers.

Widespread debt cancellation is needed to remedy the failures of our student loan system. The student loan system has failed borrowers for too long. While they have waited, their debt has ballooned and their financial futures have grown more bleak. Over four million borrowers have been in repayment for over 20 years⁵ and we know few will ever repay their debt; only 32 borrowers have had their loans cancelled through income-driven repayment.⁶

We appreciate the steps the Department has already taken to provide relief to a subset of student loan borrowers, but far too many are still desperately waiting for relief. While a negotiated rulemaking may improve programs sorely needing regulatory fixes, those prospective fixes are not a replacement for widespread debt cancellation. The Department should also clear the books of borrowers who have been in repayment for more than 15 years, and automatically provide relief to all of the borrowers who are already entitled to cancellation under existing law.

We recommend that this rulemaking prioritize the needs of the most vulnerable student loan borrowers by do the following:

1. Ending punitive collection methods and creating better options for borrowers in default to ensure that falling behind does not threaten the financial security of borrowers and their families;
2. Ensuring that all borrowers have access to truly affordable income-driven repayment options;
3. Provide relief to borrowers who attended institutions that use predatory practices to lure students into programs that provide little or no value, and hold those institutions accountable for harming students; and
4. Ensure that cancellation programs truly reach the borrowers they are intended to serve.

Below, we discuss how the Department can accomplish each of these objectives.

⁴ The Institute for College Access & Success, *Casualties of College Debt* (June 2019), available at https://ticas.org/wp-content/uploads/legacy-files/pub_files/casualties_of_college_debt_0.pdf.

⁵ Laura Camera, *Progressives Up the Pressure on Biden over Student Debt Cancellation*, U.S. NEWS (April 14, 2021), available at <https://www.usnews.com/news/education-news/articles/2021-04-14/progressives-up-the-pressure-on-biden-over-student-debt-cancellation>, citing Education Department Responses to Data Request by Senator Warren, (April 2, 2021) available at <https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf>.

⁶ National Consumer Law Center & Student Borrower Protection Center, *Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt* (March 2021), available at https://www.nclc.org/images/pdf/student_loans/IB_IDR.pdf.

I. End Punitive Measures and Create Better Options for Borrowers in Default

We are disappointed that the Department of Education failed to include issues designed to help defaulted borrowers manage their loans. Current federal aid practices and policies hammer students that do not succeed the first time around. Roughly 9 million borrowers are in default on their federal loans.⁷ Defaulted borrowers experience extraordinarily punitive and expensive involuntary collection tactics, such as wage garnishment, social security offset, and tax refund offset. And as we know, these harsh realities are more likely to be felt by families of color. Because of decades of structural inequities and discrimination, student loans have burdened Black and Latinx borrowers more than other groups, and, as a result, these borrowers default at twice the rate of their white peers.⁸

Borrowers in default who are subject to the government's vast collection powers often pay thousands of dollars more per year than if they were in an income-driven repayment plan.⁹ Notably, complaints to the Consumer Financial Protection Bureau ("CFPB") and numerous lawsuits brought by the CFPB, state Attorneys General and private litigants show that problems with loan servicing cause many borrowers to have trouble accessing income-driven repayment plans, which leads many borrowers to default.¹⁰ The effect of these involuntary collection tactics can have devastating effects on families and, in aggregate, their communities. Worse yet, as the pandemic revealed, the Department is often unable to stop these tactics even when required by law.¹¹

Making higher education accessible primarily through individual debt financing for those who cannot afford it is flawed since it shifts most of the risk to a vulnerable borrower who is left substantially worse off when an education does not end up paying perfect dividends in the form of stable employment and decent wages. But needing to take such a dangerous gamble is exactly what is happening to our clients, who become even more vulnerable when they default.

The programs available to help borrowers in default are not sufficient to ensure that defaulting on one's student loans does not result in financial devastation for borrowers. Through

⁷ U.S. Dep't of Educ., Federal Student Aid Default Management, Official Cohort Default Rates for Schools, available at <https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html>.

⁸ Judith Scott-Clayton, The looming student loan default crisis is worse than we thought, Economic Studies at Brookings (Jan. 2018), available at <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/>; Ben Miller, The Continued Student Loan Crisis for Black Borrowers, Center for American Progress (Dec. 2 2019), available at <https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers>.

⁹ See Consumer Financial Protection Bureau, Annual report of the CFPB Student Loan Ombudsman (Oct. 2016), available at https://files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf.

¹⁰ Consumer Financial Protection Bureau, Office for Older Americans & Office for Students and Young Consumers, Snapshot of Older Consumers and Student Loan Debt (Jan. 2017). See, e.g., *Consumer Fin. Prot. Bureau v. Navient Corp.*, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017); *Lawson-Ross v. Great Lakes Higher Education Corp.*, No. 18-14490 (11th Cir. 2020); *Grewal v. Navient Corp.*, No. ESX-C-172-2020 (N.J. Super. Ct. Ch. Div. Oct. 20, 2020); *People v. Pa. Higher Educ. Assistance Agency*, No. 1:2019cv09155 (S.D.N.Y. Oct. 3, 2019); *Vullo v. Conduent Educ. Services* (Jan. 4, 2019) (consent order), available at www.dfs.ny.gov; *Nelson v. Great Lakes Higher Education Corp.*, No. 18-1531 (7th Cir. 2019); *People v. Navient Corp.*, No. CGC-18-567732 (Cal. Super. Ct. Nov. 1, 2018) (first amended complaint); *Mississippi v. Navient Corp.*, No. 25CH1:18-CV-00982 (Miss. Ch. Ct. Hinds Cty. July 17, 2018); *Commonwealth v. Navient Corp.*, No. 19-2116 (M.D. Pa. Oct. 5, 2017); *Marek v. Navient Corp.*, 2017 WL 2881606 (N.D. Ohio July 6, 2017); *People v. Navient Corp.*, No. 17CH761 (Ill. Cir. Ct. Cook Cty. Jan. 18, 2017) (complaint).

¹¹ National Consumer Law Center Student Loan Borrower Assistance, *Lawsuit Against DeVos Ends; Fight for Defaulted Borrowers Continues* (March 22, 2021), available at <https://www.studentloanborrowerassistance.org/lawsuit-against-devos-ends-fight-for-defaulted-borrowers-continues>

this rulemaking, the Department has the opportunity to rethink the way that it treats defaulted student loan borrowers. Borrowers should not need to jump through so many hoops in order to be in good standing on their loans and avoid harsh punishment. The Department of Education has the authority to do more for defaulted borrowers and in particular, it has the authority under the Higher Education Act to eliminate some of the most harmful collection practices and to provide more options for defaulted borrowers. This section outlines a multi-faceted approach to rethinking default by:

- Allowing defaulted borrowers into income-driven repayment (“IDR”);
- Creating additional pathways out of default;
- Eliminating the acceleration clause upon default;
- Refraining from using involuntary collection methods that cannot be controlled and imposing better systems for protecting vital safety-nets;
- Limiting the amount collected to the IDR amount when involuntary collection is used;
- Ensuring better access to bankruptcy by creating a process for predetermining when to consent to a borrower’s undue hardship claim; and
- Limiting collection fees.

A. Allow Defaulted Borrowers to Repay into Income-Driven Repayment

Currently, our low-income client borrowers have no affordable option to repay if they are in default. If they do make payments, those payments are rarely sufficient to cover collection fees and interest and thus do not meaningfully provide a path out of debt. This is inconsistent with the HEA and should be remedied through this rulemaking.

Both the statute and the implementing regulation explicitly permit the Secretary to place “any borrower who has defaulted on a loan made under this part to . . . repay the loan pursuant to an” income-driven repayment plan.¹² Nonetheless, when a borrower in default attempts to repay their loans in one of the IDR plans, their application is denied. Moreover, nothing in the plain language of either the income based repayment (“IBR”) or income contingent repayment (“ICR”) statute prevents defaulted borrowers from utilizing those repayment plans, and the IBR statute permits payments made while in default to count towards cancellation.¹³ Through this rulemaking, the Department should amend the IBR and ICR implementing regulations so that defaulted borrowers are eligible for IDR and amend the cancellation provisions of those regulations so that defaulted borrowers have an affordable path out of debt.

¹² See 20 U.S.C. § 1087e(d)(5); 34 C.F.R. 685.211(d)(3)(ii).

¹³ See 20 U.S.C. § 1098e(b)(1) (authorizing any borrowers to limit aggregate monthly payments when experiencing a partial financial hardship “whether or not the borrower’s loan has been submitted to a guaranty agency for default aversion or had been in default” with the only express limit on PLUS borrowers); id. § 1098e(b)(7) (describing cancellation conditions for IBR); § 1098e(c)(2)(B) (“The Secretary shall... carry out, with respect to borrowers of any loan made under part D (other than an excepted PLUS loan or excepted consolidation loan), procedures for income-based repayment plans”); id. § 1087e(d)(1)(D) (providing an income contingent repayment plan with the only listed exception “that the plan described in this subparagraph shall not be available to the borrower of a Federal Direct PLUS loan made on behalf of a dependent student”).

B. Create Additional Pathways Out of Default

Currently, there is a very limited number of pathways for defaulted borrowers to get out of default: rehabilitation, consolidation, settlement, and payment in full. Rarely can our low-income clients afford to settle their loans under current Department settlement guidelines, nor can they afford to pay their loans in full. Thus, for most borrowers rehabilitation and consolidation are the only two viable paths for getting out of default. Unfortunately, borrowers are limited in the number of times that they are allowed to consolidate or rehabilitate their loans, leaving many borrowers stuck in default with no way out. Concerningly, the CFPB found that the “vast majority (greater than 90 percent) of borrowers who rehabilitated one or more defaulted loans were not enrolled and making IDR payments within the first nine months after ‘curing’ a default.”¹⁴ Nowhere in the HEA does it say that rehabilitation and consolidation are the only pathways out of default. Rather, default is only defined with respect to how a borrower gets into default, but nowhere does it say what it means to get out of default.

The Department has the authority to create additional pathways for borrowers to exit default. In particular, the Department could utilize the authority in 20 U.S.C. § 1087e(d)(5), authorizing the Secretary to place “any borrower who has defaulted on a loan made under this part to ... repay the loan pursuant to an” income-driven repayment plan,¹⁵ to create a pathway out of default by placing borrowers who default into an income-driven repayment plan. There is no requirement under the HEA which requires that once the defaulted borrower is placed into an IDR plan that their loans be treated as if they are still in default.¹⁶ These payments should all be qualifying payments towards forgiveness and there should be no limit to the number of times a borrower can get out of default.

C. Only Hold Borrowers Accountable for Amounts Not Paid

Currently, when a borrower is more than 270 days behind, the loan goes into default and the entire loan balance becomes due and payable in full, otherwise known as an acceleration. Borrowers who default are almost always financially distressed and struggling with the affordability of their loans. Acceleration has the effect of making borrowers responsible for payment of their entire loan balance at a time when they can least afford it.

The government should not expect or require these struggling borrowers to pay more toward their loans than borrowers who have been able to stay current on their loans. The HEA does not require acceleration and, where discussed in the master promissory note, it is discretionary.¹⁷

¹⁴ Consumer Financial Protection Bureau, Update from the CFPB Student Loan Ombudsman: Transitioning from default to an income-driven repayment plan (May 16, 2017), available at https://files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf.

¹⁵ See 20 U.S.C. § 1087e(d)(5); 34 C.F.R. § 685.211(d)(3)(ii).

¹⁶ Alternatively, the Department could utilize its modification authority under 20 U.S.C. § 1082(a)(4) to modify the loan status of any borrower who is placed into an IDR plan after defaulting.

¹⁷ 20 U.S.C. § 1087dd(c)(1)(B) (loan terms “shall include provision[s] for acceleration of repayment of the whole, or any part, of such loan, at the option of the borrower[.]”).

D. Protect Vital Safety Nets and Cease Using Harmful Involuntary Collection Tactics

We are encouraged by President Biden’s campaign promise¹⁸ to end the use of Social Security offsets to repay defaulted student loans. Without engaging in rulemaking, the Department can and should commit to not taking Social Security or any other federal benefits.¹⁹ However, more reforms are needed to the involuntary collection system. Various lawsuits have exposed serious flaws inherent in the Department’s current involuntary collection system, adding to the growing body of evidence that shows this system to be unwieldy and out of control.²⁰ Under no circumstances should the Secretary of Education subject borrowers with defaulted debts to a system that has time and time again shown it cannot comply with the law. First, the time it took the Department to effectively shut down the administrative wage garnishment system following the passage of the CARES act during the COVID-19 pandemic raises serious due process concerns. Over 50,000 borrowers were subject to unlawful garnishment a month after Congress prohibited it, and some are still subject to garnishment nine months later despite an administrative extension of the payment suspension. Plainly, the system lacks adequate safeguards to ensure that workers’ wages are not illegally taken by the government.

Moreover, while the Debt Collection Improvement Act (“DCIA”) may mandate that the Department of Education do collection, it does not mandate all of the involuntary collection activities that are currently utilized by the Department. Under the DCIA, Congress authorized agencies to use administrative wage garnishment and administrative offset, but it does not require the Department to do so, and it left responsibility for devising the means of collection to the agencies.²¹ Similarly, although the Higher Education Act authorizes the Department to use administrative wage garnishment to collect amounts owed, it does not require the Department to do so.²²

Even where the DCIA does require some collection efforts, it still affords the Department with opportunities to preserve borrowers’ financial safety nets, like the Child Tax Credit (“CTC”) and the Earned Income Tax Credit (“EITC”). The government’s current policy of seizing CTC and EITC refund checks from the working poor to repay student loans that are in default runs counter to the goals Congress set for the CTC and EITC and its student loan programs—two extremely effective anti-poverty measures. The Department can do more prior to referring borrowers to the Department of Treasury to ensure that borrowers are better able to prevent these offsets from

¹⁸ Biden-Sanders Unity Task Force Recommendations, Education Unity Task Force Recommendations, Higher-Ed Priorities and Proposals, at 86, available at <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf>.

¹⁹ 31 U.S.C. § 3716(a).

²⁰ See *Barber v DeVos*, No. 1:20-cv-01137 (D.D.C. April 30, 2020) (complaint), demanding an immediate halt to the Department’s garnishment of student borrowers’ wages, which the Coronavirus Aid, Relief, and Economic Security (CARES) Act had prohibited since March 27, 2020. Following this lawsuit, the Department stopped seizing the wages of over 50,000 student loan borrowers and provided over \$186 million in refunds of illegally seized wages to over 380,000 borrowers. Yet tens of thousands of borrowers remain without refunds, and an unknown number are still subject to unlawful wage garnishment, now at the hands of the Biden administration. National Consumer Law Center Student Loan Borrower Assistance, *supra* note 11; see also *Calvillo Manriquez v. Cardona*, No. 17-7210 (N.D. Cal. Dec. 2017) (complaint).

²¹ See 31 U.S.C. § 3711(a) (mandating that agencies “shall try to collect claims”); *id.* § 3716(a) (an executive branch agency “may collect the claim by administrative offset.”); *id.* § 3720D (an executive branch agency “may” use wage garnishment procedures). Cf. *id.* § 3711(d) (noting that when acting to collect claims pursuant to the DCIA, an agency is acting under “regulations prescribed by the head of the agency” and “standards that the Attorney General, the Secretary of the Treasury, may prescribe”).

²² 20 U.S.C. § 1095a(a) (establishing that the Department “may garnish”).

occurring. For example, the Department has taken an extremely restrictive view of hardship for returning tax refunds to borrowers. Because of the current extreme financial hardship standard, several of our clients who were living in a homeless shelter were deemed to not have a financial hardship warranting the return of their tax refunds which included the EITC. This absurd standard should immediately be revised to better protect our low-income clients.

Finally, with the elimination of loan acceleration and, using the Secretary's authority to place defaulted borrowers into IDR, the Secretary can limit the amount of defaulted debt that is referred to Treasury to the amount that would be due utilizing the IDR formula. The Department should only hold borrowers liable for the amounts they would have paid under an IDR plan. Student loans are incredibly complicated and many borrowers default due to an inability to navigate the system. Only holding borrowers responsible for amounts that they would have paid under an IDR plan would balance the Department of Education's mandate to collect with its other responsibility to protect student loan borrowers.

E. Provide an Easier Path to Bankruptcy

The Department has broad discretion to consent to or not oppose a student borrower's request for a discharge of student loans based on undue hardship in a bankruptcy adversary proceeding. The Department's current regulations set out a two-step process for loan servicers to determine whether or not to oppose an undue hardship discharge request.²³ These regulations were adopted years ago under much different circumstances and at a time when borrowers could obtain a bankruptcy discharge after a waiting period without proving undue hardship.²⁴ The Department initiated in 2018 a further review of its policies for responding to undue hardship discharge requests, though that work was not completed. At present, the Department's regulations, policy statements, and aggressive and costly litigation tactics have failed to facilitate resolution of bankruptcy discharge proceedings and have actually deterred borrowers from even trying to get an undue hardship discharge. Barely 0.1 percent of student loan debtors in bankruptcy seek an undue hardship discharge, and those that do are far more likely to be forced to go to trial to get a decision in their cases as compared to other civil litigation.²⁵

We urge the Department to develop regulations that will result in equitable outcomes for student borrowers, and cost savings to the Department, in bankruptcy undue hardship cases. We have previously requested that the Department issue guidance adopting objectively defined criteria ("safe harbors") for undue hardship, instructing student loan servicers to consent to the discharge under those circumstances.²⁶ Adopting a revised regulation to create these safe harbors for determining whether loan repayment would impose an undue hardship on the borrower and dependents would be an immediate step forward in providing relief for our nation's student loan

²³ 34 C.F.R. § 682.402(i)(1); 34 C.F.R. § 674.49(c)(5). Guidance on undue hardship was also provided in the "Dear Colleague Letter Gen.-15-13" issued in 2015. See U.S. Dep't of Educ., Dear Colleague Letter Gen.-15-13, Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings (July 7, 2015).

²⁴ The regulation still requires the loan holder to "determine whether the first payment on the loan was due more than 7 years (exclusive of any applicable suspension of the repayment period) before the filing of that petition." 34 C.F.R. § 682.402(i)(1). The regulation has not been amended even though 11 U.S.C. §523(a)(8) no longer provides for discharge after the 7-year period.

²⁵ National Consumer Law Center, The Truth About Student Loans and the Undue Hardship Discharge (April 2013), available at <https://www.studentloanborrowerassistance.org/wp-content/uploads/2007/03/iulianoresponse.pdf>.

²⁶ Letter from National Consumer Law center and National Association of Consumer Bankruptcy Attorneys to Miguel Cardona, Secretary and Richard Cordray COO of Federal Student Aid, May 14, 2021.

borrowers in severe financial distress. For borrowers who are not within the safe harbors or in which repayment is otherwise determined not to constitute an undue hardship, the Department's current regulations provide that the servicer could still consent to discharge after conducting a cost assessment of opposing the discharge. The formula used in the regulations to assist this analysis, however, fails to provide sufficient guidance and should be revised by the Department through the negotiated rulemaking process.²⁷

F. Collection Fees

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 to calculate an individual borrower's collection fees. 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 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.

II. All Borrowers Should Have Access to Affordable Income-Driven Repayment

Income-driven repayment is supposed to provide borrowers with an affordable path out of debt. But for too many borrowers it has failed to accomplish that goal. Income contingent repayment has been an option for borrowers since 1995—more than 26 years ago. Yet, according to data the Department sent NCLC in January 2021, no borrower has ever received cancellation after 25 years of repayment under ICR, and a mere 32 borrowers had received cancellation by switching into the Revised Pay As You Earn plan (“REPAYE”), which shortened the cancellation period to 20 years for borrowers with only graduate loans.²⁸ Given that over 4 million borrowers have been in repayment for more than 20 years,²⁹ IDR has failed to deliver debt cancellation to too many borrowers.

Our clients come to us with crushing and unaffordable federal student loan debt. Many barriers stop them from enrolling in IDR. They are frequently unaware that they are eligible to enroll in more affordable income-driven repayment plans. Those who are already enrolled in IDR plans struggle to afford monthly payments, to meet onerous paperwork requirements needed to stay in IDR, and are often overwhelmed by growing balances and the feeling of never-ending student debt. For many of our clients, IDR feels like an eternity of bureaucracy, paperwork, and overwhelming debt that often grows over time and risks crashing down on them when they miss paperwork. Consequently, many default on their loans and are left to face dire consequences, including wage

²⁷ 34 C.F.R. § 682.402(i)(1); 34 C.F.R. § 674.49(c)(5).

²⁸ National Consumer Law Center & Student Borrower Protection Center, *supra* note 6.

²⁹ Camera, *supra* note 5.

garnishments, harassing collection practices, benefit offsets and adverse credit reports. Through this rulemaking, the Department can do tremendous good and help low-income borrowers like our clients by making several sensible changes to expand the reach and relief provided by IDR.

In particular, the Department should:

- Make repayment in IDR truly affordable and provide low-income borrowers with a meaningful path to resolving their student loan debt;
- Ensure that Parent PLUS loan borrowers have access to affordable IDR options;
- Treat FFEL borrowers fairly and provide them with similarly affordable repayment options as Direct loan borrowers;
- Provide defaulted borrowers with access to IDR; and
- Ensure meaningful oversight of student loan servicers in order to meaningfully implement any policy changes to IDR.

A. Make Repayment Truly Affordable

There are a number of structural issues that prevent our low-income student loan borrowers from being able to fully realize the promised benefits of the income-driven repayment programs. For many borrowers the payments are too high and fail to take into consideration the actual cost of living in many places. Negative amortization and the accrual of interest increase the cost of IDR for low-income student loan borrowers, and give borrowers a sense of hopelessness as they see their loan balances grow overtime. Given the problems in administering IDR and other forgiveness programs, many borrowers are skeptical that their loans will be cancelled after 20 or 25 years in the program - an amount of time that feels like a lifetime away for many borrowers. Additionally, the different treatments of interest and spousal income make it impossible for borrowers to predict which of the repayment plans are actually in the borrower's best interest.

In order to create a repayment plan that is truly affordable, we recommend that the Department make the following regulatory changes to the IDR programs:

- Lower the payment amount by increasing the discretionary income threshold and decreasing the percentage of remaining income taken;
- Address growing loan balances by ending interest capitalization and restraining interest growth;
- Shortening the cancellation period; and
- Allow married borrowers to calculate their payments based upon their tax filing status.

1. Lower Payments for Very Low-Income Borrowers

Although current income-driven repayment plans are more affordable for our clients than the standard ten-year repayment plan, many of our clients still struggle to afford these reduced payments in combination with other critical expenses like housing, childcare or medical costs, and payments on private student loans. The Department should adjust how payments are calculated under IDR to ease the burden of student loan repayment for low-income borrowers. We were encouraged by President Biden's campaign promise to reduce IDR payment to 5 percent of a borrower's discretionary income and hope that the Department makes that promise a reality.

In addition to decreasing how much of a borrower's income should go towards their loans, it is also critically important for the Department to increase the percentage of the federal poverty

guideline used to calculate a borrower's monthly payments. 150% of the current federal poverty guideline is too low to meet our clients' basic needs. Research suggests that families need an income of nearly three times the current federal poverty guideline to afford basic living expenses.³⁰ One study determined that a single parent with two children living in a moderate-cost city must make about \$53,400 a year to pay for basic living expenses.³¹ If that parent has an income of \$40,000, barely covering basic living expenses, and outstanding federal student loans, she will pay up to \$59 per month under REPAYE. Diverting nearly \$60 from this family's monthly budget is extremely harmful and can leave the family short on money for basic necessities, such as food or rent. To make matters worse, many of our clients also have private student loans, which are ineligible for IDR. These private loan payments end up stretching already thin budgets even further.

The Department should target IDR relief to low-income borrowers by increasing the discretionary income threshold from 150 to at least 250 percent of the federal poverty guideline. Income that is within 250 percent of the federal poverty guideline is a lifeline for borrowers and goes towards covering their family's basic needs. This change would overwhelmingly benefit lowest-income borrowers, providing much-needed relief to those barely earning enough to get by. By making this change, the Department can target relief to low-income borrowers who suffer as a result of the federal poverty guidelines.

Finally, the Department needs to fully utilize the alternative repayment plan for borrowers who cannot afford IDR.³² There will never be a repayment formula that will work for all borrowers, especially for those with very high medical or childcare expenses. Borrowers in this position consistently report that servicers deny them access to the alternative repayment plan. The Department should ensure a fair and consistent path for borrowers to utilize the alternative repayment plan, and any payments made in the alternative repayment should count towards cancellation.

2. End Interest Capitalization and Restrain Interest Growth

For many of our low-income clients in IDR, their monthly payments do not cover the accumulating interest on their loans causing their loans to negatively amortize. These ballooning loan balances can be distressing, can add costs for borrowers, and can dissuade borrowers from enrolling in IDR even if they would benefit from doing so.³³ Negative amortization has also been

³⁰ See, e.g., Kinsey Dinan, Nat'l Ctr. for Children in Poverty, *Budgeting for Basic Needs: A Struggle for Working Families*, (2009), http://www.nccp.org/publications/pdf/text_858.pdf ("It takes an income of about 1.5 to 3.5 times the official poverty level . . . to cover the cost of a family's minimum day-to-day needs"); Mark Greenberg, Center for American Progress, *It's Time For a Better Poverty Measure* (2009), http://cdn.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/better_poverty_measure.pdf ("The dollar figures used to determine if families are in poverty are low and in many ways arbitrary."); Nat'l Acad. of Sciences, Panel on Poverty and Family Assistance, *Measuring Poverty: A New Approach 1* (Nat'l Acad. Press 1995) ("Our major conclusion is that the current measure needs to be revised: it no longer provides an accurate picture of the differences in the extent of economic poverty among population groups or geographic areas of the country"); Insight Ctr. for Cmty. Econ. Dev., *2011 California Family Economic Self-Sufficiency Standard* (2011), www.insightcced.org (finding a family of four in California would need nearly triple the federal poverty guideline to cover basic needs).

³¹ See Nat'l Ctr. for Children in Poverty, "Basic Needs Budget Calculator" (2020), available at <http://frs.nccp.org/tools/frs/budget.php>.

³² See 34 C.F.R. § 685.208(l).

³³The Institute for College Access & Success, *Make it Simple, Keep it Fair* (May 2017), available at https://ticas.org/wp-content/uploads/legacy-files/pub_files/make_it_simple_keep_it_fair.pdf.

shown to disproportionately affect borrowers of color.³⁴

Worse yet, in all existing IDR plans, interest capitalization is triggered by different events (trigger events vary depending on the plan). When capitalization occurs, all of a borrower's unpaid accrued interest is added to their outstanding principal balance. As a result, borrowers may end up paying much more in total, over a longer period of time, or have larger amounts forgiven. The effect of interest capitalization is most pronounced for borrowers with low incomes relative to their debt for many years, during which time their IDR payments are lower than accruing interest.

We encourage the Department to restrain unpaid interest growth by providing a full subsidy of unpaid accrued interest for all borrowers enrolled in IDR for the duration of their enrollment, regardless of their loan type. Restraining the accrual of unpaid interest for borrowers with negatively amortizing loans is a targeted benefit that helps minimize the growth of loan balances for borrowers with low incomes relative to their debt. The Department should also eliminate interest capitalization in order to limit the growth of loan balances for borrowers whose incomes are low for extended periods of time, as well as for borrowers who need to take a deferment or forbearance while in IDR due to unexpected life events or expenses.

3. Shorten the Time to Cancellation

Twenty and twenty-five years is too long of a repayment period. This is especially true for low-income borrowers who tend to have lower balances, very rarely see their loan balances decrease, and struggle to jump through IDR's bureaucratic hoops year after year. Low-income student loan borrowers need a shorter and easier path to resolving their student loans. The current cancellation period is failing to provide relief to borrowers and leading to borrowers feeling discouraged and crushed under the weight of their debt for decades. We recommend that the Department shorten the cancellation period for all student loan borrowers in IDR to no longer than fifteen years. The Department should also consider exploring different cancellation models that will allow borrowers to make progress towards cancellation faster.

The Department should also reconsider the types of payments that count towards cancellation. We urge the Department to allow borrowers who consolidate their loans to get appropriate credit for what may be years of qualifying payments toward loan forgiveness under IDR or public service loan forgiveness ("PSLF"). Under current regulations, qualifying payments are not counted toward forgiveness in any of these programs if the loans are later consolidated. This can and should be changed through regulations for IDR, as well as for PSLF. The Department should also allow payments made based upon the borrowers' income while in default count towards cancellation. This should include at a minimum, any IDR payments made, any AWG payments, federal benefit offsets, and any tax offsets. As described in the default section, these payments are nearly always larger than the amount a borrower would make under IDR.

Finally, given the number of administrative barriers and servicing abuses known to have impeded the success of the IDR program, the Department should amend the cancellation regulations to ensure the flexibility to give borrowers credit for time in which they should have been able to access IDR.

³⁴ JPMorgan Chase & Co. Institute, Policy Brief, Student Loan Debt: Addressing Disparities in Who Bears the Burden (Oct. 2020), available at <https://institute.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/jpmcinstitute-student-loan-debt-policy-brief.pdf>.

4. Treat Married Borrowers Fairly

We urge the Department to allow married borrowers to calculate their IDR payment based upon the borrower's adjusted gross income, even if the borrower files a separate tax return from their spouse. While some borrowers may take advantage of this arrangement by filing taxes separately to lower their IDR payment amount, the Internal Revenue Code already discourages married borrowers from filing separately. For example, borrowers who are married but file separately pay the highest marginal tax rate; limit their retirement options; and forgo valuable tax breaks such as education credits, the child care tax credit, and interest deductions on student loans. Moreover, the ability to file separately is critical to certain vulnerable borrowers.

The current REPAYE regulations have created an additional barrier to borrowers being able to access IDR. Married borrowers who file separately and want to enroll in IBR, ICR, or PAYE, are being told that they must also provide their spouse's income documentation. Finally, this policy is unnecessary. According to statements made by Department negotiators during the REPAYE negotiations, roughly 4% of taxpayers file as married filing separately.³⁵ Yet, only 2% of borrowers in an income-driven repayment plan file separately. This suggests that not only are people not choosing this filing status in greater numbers to avoid student loan payments, but in fact a disproportionately low number of people are choosing this option.

B. Provide Parent PLUS Access to IDR

Parents who seek our help with debts incurred for their children's education—especially Parent PLUS loans—are often in particularly dire circumstances. The PLUS loans they have obtained have higher interest rates than other types of student loans, lack Department-imposed limits on amount borrowed, are not eligible for the income-driven repayment plans, and can rarely be discharged in bankruptcy. As a result, low-income Parent PLUS borrowers come to us with much larger debts, and fewer options for averting or resolving defaults.

Parent PLUS loans are not currently eligible for REPAYE, PAYE, IBR or ICR.³⁶ The only way for over-indebted parent borrowers to obtain any relief is by consolidating into a Direct Consolidation Loan, which can be repaid in ICR.³⁷ This is often insufficient to help our clients. The Department must ensure that any new IDR plan be available to Parent PLUS borrowers.

C. Equal Access for FFEL Borrowers

Federal Family Education Loan ("FFEL") borrowers deserve and need equal access to an affordable repayment option alongside that provided for Direct Loan borrowers. In our experience, borrowers rarely know whether their loans are Direct or FFEL—they simply know that they were told to sign paperwork to obtain financial aid, and that now they owe student loans. Borrowers whose federal student loans happened to be made through the FFEL program rather than the Direct program should not be required to make higher monthly payments or pay for longer as a result. Pursuant to § 455(a) of the Higher Education Act, Direct Loans and FFEL loans are to have the

³⁵ Statement by Brian Siegel, U.S. Department of Education, Negotiated Rulemaking, Session 1, Feb. 24, 2015. See Attachment A Memo to Negotiating Committee by Negotiators Suzanne Martindale, Toby Merrill, Shannon Sheaff, Johnson Tyler, Prepared with Persis Yu, Re: Married Borrowers (April 8, 2015).

³⁶ See 34 C.F.R. § 685.209(a)(1)(ii); 20 U.S.C. § 1087e; 20 U.S.C. § 1098e.

³⁷ See Dep't of Educ., Federal Student Aid Announcements, Income-Driven Repayment, available at <https://studentaid.ed.gov/about/announcements/interest-rate> (last visited Oct. 27, 2014).

same terms, conditions, and benefits. Borrowers similarly deserve equitable access to affordable repayment plans regardless of which program their federal loans were made through. Unfortunately, the Department's notice only included the income-contingent statute, and thus would fail to deliver such equity and would leave many FFEL borrowers out in the cold. We therefore urge the Department to include the IBR statute in its rulemaking.

D. Provide Defaulted Borrowers with Access to IDR

As more fully described previously, defaulted borrowers need access to an affordable pathway out of debt. The HEA provides the Department with the statutory authority to allow borrowers in default to repayment in an IDR, and the implementing regulations should be revised accordingly.

E. Changes to IDR Will Not Benefit Borrowers Without Quality Loan Servicing

New IDR regulations will provide little benefit to borrowers if federal student loan servicers do not provide quality service. The Department must improve oversight and enforcement and provide borrowers with basic rights to ensure borrowers receive quality service.

This lack of oversight leaves borrowers powerless against harmful and common practices. Our clients routinely receive outdated and inaccurate information about their loans from servicers. As a result, they make duplicate payments and miss important opportunities and deadlines. When our clients who are Parent PLUS borrowers call their servicers to request more affordable payments, they are routinely told that they are ineligible for any of the income-driven repayment plans. They are not told that they can consolidate their Parent PLUS loans to become eligible for ICR.

Servicers also tend to push borrowers into the most readily available solutions, such as forbearance, instead of helping borrowers choose a plan that will be beneficial in the long term. Unfortunately, most borrowers are unaware that their loans accrue significant interest while in forbearance, or are unaware of viable alternatives like income-driven repayment plans, and are left much worse off.

Even if the Department acted more aggressively to police the contractors through termination or sanctions, this would not necessarily lead to relief for individual borrowers harmed by these servicers. Borrowers need adequate remedies when they have been harmed by illegal servicer abuses. The Department can address this need both by broadening the cancellation provisions of IDR as previously mentioned, more consistently and robustly provide borrower compromises and modifications, and finally support borrower efforts to recoup damages through private litigation by withdrawing its notice of interpretation on preemption³⁸ and by prohibiting its servicers and debt collectors from asserting preemption and governmental contractor immunity defenses.

III. Provide Relief to Harmed Borrowers and Hold Institutions Accountable

We urge the Department to act quickly to revise the rules regarding the school-related discharge programs. These programs provide federal student loan discharges based on school misconduct and closures that too often leave already-vulnerable student borrowers with piles of debt

³⁸ Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (March 12, 2018).

and no return on their investment. Because we work with and on behalf of low-income borrowers, we are acutely familiar with the harm these borrowers experience as a result of their experiences with failing and often fraudulent educational programs—which prey upon and then shatter their dreams, hard work, and investment in a better life for themselves and their children. Student loan debt from these institutions compounds that harm and contributes to ongoing financial distress.

Our clients often fit within the populations targeted by predatory schools. They are often the first in their family to pursue higher education. Many are people of color, immigrants, veterans, and older students—many of whom are parents. And for too many of them, relief from unfair student loan debt has been elusive.

The existing regulations and their implementation have created barriers between struggling borrowers and the relief they are entitled to under the Higher Education Act. We therefore focus primarily on the need to open up access to relief under these programs to do right by those already harmed by abuses of the student loan system. But these discharge programs also have the potential to improve accountability and deter school misconduct and risky practices going forward.

The borrower defense discharge rules are the most gravely in need of revision, but the Department can and should revise the closed school and false certification discharge regulations during the same rulemaking, as it did in 2016 and again in 2019. In revising the borrower defense rules, the Department should also restore the limits on forced arbitration that were eliminated under the last borrower defense rulemaking, as arbitration clauses prevent us from challenging illegal conduct by for-profit schools in court—resulting in greater losses for taxpayers. Additionally, we recommend that the Department improve student borrower protections through implementation of gainful employment rules and revisions to state authorization rules.

A. Borrower Defense

The 2019 borrower defense regulations were strongly opposed by the legal aid community. We knew well that the regulations would prevent the vast majority of borrowers who are taken advantage of by predatory schools from getting relief from their federal student loans—including our clients and the many more borrowers without access to legal assistance. Access to relief was already a challenge under the previous 2016 rules, and the 2019 rules erected a number of challenging and unnecessary barriers that make it unlikely most defrauded borrowers will attain loan relief. Indeed, the Department estimated that the share of loans associated with school misconduct that would be discharged due to borrower defense would drop to 3% as a result of the 2019 rule change. This is a travesty that the new Secretary of Education should address immediately to protect and provide much-needed relief to student borrowers most harmed by the flaws of our past student loan policies, and to help reduce school fraud going forward.

While simply reinstating the 2016 borrower defense rules would help eliminate some of the most egregious barriers to relief erected by the 2019 rules, we do not recommend a simple reversion to those rules. NCLC and other legal aid organizations submitted comments on the proposed 2016 rule warning of shortcomings that threatened the promise and intent of delivering relief to all borrowers entitled to it, and the risks posed by the wide discretion afforded to the Secretary under the rules. Unfortunately, our worst fears were realized. Even before the 2019 rules took effect, the Department, under then-Secretary DeVos, halted individual claim processing, declined to adjudicate group claims, changed subregulatory relief policies to deny loan relief in whole or in part to Corinthian borrowers whose classmates had previously been awarded full loan relief on the same

claims under the prior administration, and utilized a claims adjudication process that appeared designed to rapidly generate denials—all without ever establishing a reconsideration process contemplated under the 2016 rules. The 2016 rules hardly demanded such a problematic implementation, and there are ongoing challenges to the legality of its implementation. But, given a second shot at designing the best rules possible in light of what we know now, we encourage the Department to design rules that would better prevent such disastrous implementation, including by building in more protection against conflicts of interest, less Department discretion to act in ways that reduce access to relief for borrowers, and more hard and fast rules and triggers to provide rights student borrowers can count on and processes they can trust.

1. Process for Borrower Defense

A new borrower defense rule should be guided by a number of procedural goals and protections, including the following:

- The process for assessing defenses to repayment should be transparent, fair, and accessible to borrowers and designed with an eye toward assisting borrowers—the vast majority of whom will be unrepresented—in recognizing their rights and navigating the process and accessing relief, rather than in finding bases for denying relief;
- The process should provide for written determinations that clearly explain the basis for determinations and how to seek reconsideration, and provide for a robust, readily accessible reconsideration process;
- The process should reflect the reality that borrowers who apply will not have attorneys and should be held to liberal pleading standards and guided in how to put together an application;
- The rules should include automatic triggers, timelines, and other guardrails to ensure that both individual and group borrower defense claims are promptly and fairly investigated and resolved;
- The rules should make explicit the Secretary’s authority and responsibility to provide for discharges without requiring individual applications where a school has engaged in a policy, pattern or practice of relevant misconduct or fails to meet Department standards; and provide that other government officials (including state attorneys’ general) and nonprofit attorneys may file group borrower defense claims;
- The rules should protect against conflicts of interest and political opposition to administer the borrower defense relief provided by Congress;
- The process should not pit individual, unrepresented borrowers in an adversarial posture against much better represented and resourced schools, and should not condition relief to borrowers on a final finding of school liability for the discharge;
- The rules should not deny defrauded borrowers much-needed relief based on arbitrary time limits; borrowers should be able to continue to assert borrower defenses to repayment at least as long as their loans remain in repayment or subject to collection, and preferably with no time limits at all, as is the case for many of the Department’s other loan discharge programs.

2. Standards for Borrower Defense Relief

A new borrower defense rule should also adopt more borrower-friendly standards for relief, and should:

- Establish a federal borrower defense standard that encompasses important consumer protections available under state law, including by making the federal standard for relief a floor rather than a ceiling. The standard should retain bases for relief predicated on illegal conduct and should specify that practices prohibited under state and federal law as unfair and abusive, and not just deceptive, are bases for borrower defense;
- Consider additional eligibility standards related to programmatic and institutional failures that harm borrowers, such as failures to satisfy program integrity, accreditation, and gainful employment requirements;³⁹
- Provide clarity and equity by applying the same standards to all claims, regardless of when the borrowers' loans were originated or consolidated;
- Specify that consistent with the weight of consumer protection law, proof of the school's scienter, or the intent behind its misrepresentation or other misconduct, is unnecessary to establish a claim for relief (requiring otherwise, as the 2019 rules do, poses unnecessary and often insurmountable barriers to relief for harmed borrowers);
- Reflect the reality that borrowers will not have discovery rights and cannot be expected to provide documentary evidence to prove their claims, and accept that a borrower's own testimony or application is evidence that may be sufficient to establish a basis for discharge;
- Provide for full discharges of relevant federal student loans for borrowers with meritorious claims to ensure that they get real relief and a fresh start, without requiring any proof or calculations of specific harm beyond that of the loan debt itself. Borrowers should not have to shoulder the unnecessary burden, complexity, and inconsistency of outcomes that would result from proposals to provide only partial relief.

3. Access to Relief for FFEL Borrowers

Additionally, we urge the Department to open the borrower defense process and relief to FFEL borrowers without requiring consolidation or proof of any special relationships between their schools and FFEL lenders. Both the 2016 and 2019 rules limit relief to FFEL borrowers who consolidate into Direct loans. This approach is insufficient to address the needs of borrowers under the FFEL program for a number of reasons, including that some FFEL borrowers are ineligible to consolidate into a Direct Loan, that consolidating is very risky for borrowers in IDR who are not assured of relief, that consolidation is an extra administrative hurdle, and that consolidation requirements complicate the ability of the Department to issue group relief to FFEL borrowers.

4. Actions the Department Should Take Now

Finally, while re-regulation is critical, the Department does not need to wait to take steps to correct its course with regard to previously filed borrower defense applications and needed group relief. For example, the Department should comprehensively address the unfair and unlawful process used during the previous administration, which subjected borrowers to multi-year waits and

³⁹ For more on what this approach could look like, see Toby Merrill & Eileen Connor, *Delivering on Debt Relief: Relief for Borrowers with a Defense to Repayment* (Nov. 2020), available at <https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf>

improper denials. Redress for these harmful errors could include discharging prior applicants' loans, and announcing a fresh start and new approach to applications going forward—which could not only provide some remedy for the past harms, but also free up Department officials and attorneys to focus on new applications and restore confidence among the many borrowers, counselors, and attorneys who have lost faith in borrower defense. The Department should also provide automatic, group relief to all borrowers who attended schools covered by existing findings, such as Corinthian and ITT students, rather than providing relief only to the fraction of those borrowers who found out about their right to relief and successfully navigated the paperwork processes. The application-only approach utilized for schools other than ACI has unfortunately meant that the most vulnerable borrowers, who could most benefit from relief, have not received it. We urge the Department to seize the opportunity to deliver relief to these borrowers now.

B. Arbitration

As in the past two borrower defense rulemakings, the Department should also address the related issue of limits on school imposition of arbitration requirements and class action bans. We urge the Department to restore the conditions on participation in the Direct Loan Program related to arbitration and class action bans included in the 2016 Borrower Defense rule and to further consider ways to strengthen those provisions.

In particular, in light of problems we have seen with the implementation of the 2016 arbitration provisions, we urge the Department to ensure that schools are not able to evade or flout the intended conditions, such as through contorted interpretations of the regulatory language claimed in some litigation by schools to compel arbitration, or exploiting Departmental discretion to overlook violations. Indeed, while the 2016 arbitration rules were in effect between October 2018 and July 2020, some schools were still compelling students to arbitrate claims that could be raised as borrower defenses, and it does not appear the Department ever took action despite these flagrant violations of the regulations.⁴⁰ The regulatory language should be clarified, and the Department should consider measures to ensure that violations of the arbitration provisions in the PPA trigger real consequences rather than leaving enforcement to the whims of political leadership.

We also urge the Department to restore provisions from the 2016 Rule requiring schools to submit arbitral and judicial documents regarding borrower-defense-related claims. These documents are important as both early warning signs and potential evidence of a school's fraud or other wrongdoing that the Department can and should use to detect and investigate fraud on the Title IV program.

The Department has both the legal authority and the demonstrated need to address school exploitation of the Direct Loan program and externalization of the costs of its illegal conduct through conditioning participation in the Direct Loan program on agreement not to bind students to pre-dispute arbitration or class waivers. Unscrupulous schools have used arbitration clauses to discourage students from raising their claims, prevent them from doing so on a class-wide basis, and to hide evidence of illegal school conduct from the public. The result has been not only a barrier to student access to justice in the courts, but also an unfair shifting of the burden of illegal conduct from schools to the taxpayers, all while hiding school misconduct and thus allowing it to continue.

⁴⁰ See, e.g., *Young v. Grand Canyon Univ.*, 980 F.3d 814 (11th Cir. 2020); *Kourembanas v. InterCoast Colls.*, 373 F. Supp. 3d 303 (D. Me. 2019).

This implicates borrower defense policy: because borrowers facing forced arbitration clauses cannot obtain redress from the schools that defrauded them, the government and taxpayers are often left on the hook for the fraud. This is why so many representatives of borrowers and accountability interests have stated that an agreement not to use forced arbitration should be a condition for accessing Title IV funding—as a way to promote relief for borrowers and to protect taxpayers. Conditioning access to federal funding programs on an agreement not to shirk accountability for misconduct relating to those funds sensibly protects taxpayers and student loan borrowers.

Recognizing these problems, and the threat they pose both to student borrowers and the integrity of the Direct Loan program, the Department promulgated regulations in 2016 conditioning school participation in the Direct Loan program on agreement not to use pre-dispute arbitration clauses, class action bans, and mandatory internal dispute resolution processes against students participating in the program with claims that could constitute borrower defenses.

In rescinding the arbitration provision of the 2016 Rule, the Department ignored its previous findings about the cost of allowing forced arbitration, focusing instead on baseless arguments that borrowers may prefer arbitration—when, in fact, the 2016 rule never barred students from arbitration, but only barred schools from effectively forcing it through pre-dispute arbitration clauses. Rescinding the protections against forced arbitration was a mistake that put the interests and financial security of borrowers and the Direct Loan program at risk, and the Department should act promptly to restore and strengthen these protections now.

C. Closed School

From the beginning of 2014 through the end of 2018, close to half a million students were blind-sided by the sudden closure of over 1,200 college campuses.⁴¹ Of those campuses, 88 percent were operated by for-profit colleges.⁴² The students whose lives were upended were disproportionately women, low-income Pell-Grant recipients, and people of color.⁴³ These students are not alone, and abrupt for-profit school closures are not a new malady. Since the HEA was first amended to make financial aid available to for-profit postsecondary schools, hundreds of thousands of other students have been displaced by school closures.⁴⁴

Recognizing that, through no fault of their own, these borrowers did not receive the benefit of their bargain, Congress mandated that the Department “shall discharge a borrower’s liability on a loan” if the student “is unable to complete the program in which such student is enrolled due to the closure of the institution”⁴⁵ The HEA’s closed school discharge mandate applies to loans disbursed on or after January 1, 1986, and covers FFEL Loans and Direct Loans, including Parent

⁴¹ Michael Vasquez & Dan Bauman, How America’s College-Closure Crisis Leaves Families Devastated, *Chron. of Higher Educ.* (Apr. 4, 2019), available at <https://www.chronicle.com/article/how-americas-college-closure-crisis-leaves-families-devastated/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See, e.g., David Whitman, The Century Found., Vietnam Vets and a New Student Loan Program Bring New College Scams (Feb. 13, 2017), available at <https://tcf.org/content/report/vietnam-vets-new-student-loan-program-bring-new-college-scams>.

⁴⁵ 20 U.S.C. § 1087(c)(1).

PLUS Loans, as well as Perkins Loans.⁴⁶

But despite this clear Congressional mandate, unnecessary regulatory barriers to relief have left too many former students burdened with dischargeable debt and no degree. Indeed, the Department previously reported that only a small fraction of borrowers eligible for closed school discharge actually received it.⁴⁷ The Department should seize this opportunity to remove all overly burdensome barriers to closed school discharges to effectuate the will of Congress and provide much-needed relief to borrowers who have borne the cost of risky school practices and lapses in oversight. Fixing this is low-hanging fruit, but important to do.

At a minimum, we urge the Department to restore the closed school regulations in effect prior to the July 1, 2020 rollbacks, while strengthening them in the following ways to better ensure that borrowers whose school closed before they could complete actually receive the relief afforded them by the Higher Education Act:

1. Strengthen Automatic Discharge

First, the Department should prioritize strengthening the automatic discharge provision that provides for discharges without application for eligible borrowers who do not obtain financial aid within three years after the date of closure. The 2016 rule provision was a good start, but only applied to borrowers whose schools closed on or after November 1, 2013. While the Secretary has the authority to provide automatic discharges to borrowers whose schools closed prior to that date—and should use it—leaving automatic cancellation to discretion has historically meant that no cancellation occurs. Further, the Department’s own data regarding the low rates of eligible borrowers who actually apply for closed school discharges demonstrate that there are likely thousands of borrowers, if not hundreds of thousands, who are eligible for a closed school discharge but who have suffered for decades under the burdens of defaulted federal loans. These are disproportionately people of color, women, immigrants and children of immigrants who never obtained the education they paid for. We therefore urge the Department to amend the regulations to mandate automatic discharges for all eligible borrowers regardless of the date of school closure.

Additionally, the Department should improve the value of automatic discharge by providing the discharge no more than one year after the school closure, rather than waiting for three years to provide relief. Waiting for three years to deliver relief leaves borrowers in unnecessary financial distress for too long—indeed, long enough to go into default and suffer damaged credit, loss of eligibility for student aid to return to school and try again, and seizure of key antipoverty payments like the Earned Income Tax Credit and Child Tax Credit. While a short waiting period may be reasonable given that some borrowers may complete a teach out or transfer their credits and complete their program of study elsewhere, a longer period is unnecessary as few borrowers begin that process more than a year after their school closure, and indeed credits from schools that experience precipitous closure often have short shelf-lives—if they are accepted elsewhere at all.

⁴⁶ 20 U.S.C. § 1087(c)(1) (FFEL Loans); 20 U.S.C. § 1087e(a)(1) (Direct Loans have the same terms and conditions as FFEL Loans unless otherwise specified); 20 U.S.C. § 1087dd(g)(1) (Perkins Loans, including National Direct Student Loans).

⁴⁷ Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39,330, 39,369 (proposed June 16, 2016).

2. Lengthen the Pre-Closure Eligibility Period to 1 Year

Second, the Department should lengthen the presumptive eligibility period for students who withdraw prior to school closure to one year, and apply it retroactively so that more borrowers who withdrew during the period of school disintegration leading to closure receive relief. While the regulations provide discretion to lengthen this period, a longer presumptive period would be more protective and less burdensome to administer, and would reflect the reality that school closures do not occur when things have been going swimmingly, but instead after a sustained period of systemic failures in the administration of the institution. These failures both reflect and contribute to deteriorating quality of education for students. A one-year period better captures the minimum period of substantial degradation in school quality and student confidence, and is straightforward to understand and apply.

3. Rescind Relief Restrictions Relating to Credit Transfers

Third, the Department should eliminate the regulatory presumption that students who enroll in a new program after a school closes are ineligible for a closed school discharge unless they can prove that they either did not transfer to the same or similar program or that they did not successfully transfer even one credit to such program. This presumption is unduly burdensome and is not justified given the reality that very few for-profit school students are ever able to transfer credits after a school closure and, even if they do, they typically only transfer a few—and thus still experience a tremendous financial loss as a result of their school closure despite being held fully responsible for all the loans they took out to attend the school that closed on them. This requirement should be repealed, and such repeal should apply retroactively.

4. Equitable Relief for FFEL Borrowers

Fourth, the Department should ensure that FFEL borrowers have the same eligibility and access to closed school discharge relief as Direct Loan borrowers. The Department should therefore promulgate parallel protections and amendments in the FFEL regulations as it provides in the Direct Loan regulations.

D. False Certification

For decades, predatory schools have enrolled students who did not graduate from high school or who otherwise did not qualify for federal student aid without regard for whether the student could actually benefit from its programming, and filled out paperwork on those students behalf, falsely certifying their eligibility for federal student aid.⁴⁸ The students, unaware of the student aid eligibility requirements and rushed through an enrollment and financial aid process, did not know that they are not actually eligible for federal student loans, or that their ineligibility is because they will not be able to benefit from investment in the educational program. Many borrowers impacted by these practices are still struggling with their debt and unaware of their right to relief. Indeed, the student borrowers we have worked with to access false certification discharges had no idea that they were ineligible for their loans, that their eligibility was falsely certified, that loan

⁴⁸ [S. Rep. No. 58](#), 102nd Cong., 1st Sess. 6 (1991) (hereinafter, “Nunn Report”); Middle Income Student Assistance Act, Pub. L. 95-566, Sec. 6, 92 Stat. 2403 (1978) (codified at 20 U.S.C. § 1088); *U.S. v. FastTrain College*, No. 1:12-cv-21431-MGC (S.D. Fl. Dec. 2, 2014) (complaint).

application materials were often falsified by their school, or that they were eligible for discharge on this basis.

False certification discharge offers important relief to students exploited for their federal aid dollars, but the current regulations make that relief too hard to come by for most of these borrowers. We urge the Department to improve access to discharges by:

- Expanding eligibility for relief;
- Ending the presumption against false certification discharge;
- Requiring group discharges where schools are found to engage in a pattern or practice of false certification;
- Rescinding the 2019 regulatory provisions that limited access to discharges.

1. Expand Eligibility For Relief

The HEA provides broadly that student loan borrowers are entitled to discharge if their eligibility to borrow from the federal government was falsely certified by their school.⁴⁹ Existing regulations implementing this statutory discharge mandate focus on falsification of the student-specific eligibility requirements, but this ignores the more systemic problem of school falsification rooted in its institutional or programmatic ineligibility to participate in the federal student loan program.

Addressing this gap would create a valuable opportunity for the Department to provide widespread relief to students at programs and institutions that engaged in systemic violations or misconduct that render them ineligible to participate in the federal student loan program, including providing another avenue for granting relief to more borrowers whose schools lost Title IV eligibility and closed, as well as borrowers whose programs were later found to be failing to satisfy student outcome measures, such as gainful employment and cohort default rates.

We urge the Department to consider adopting regulations providing for discharges based on school falsification of eligibility to borrow related to a finding of programmatic or institutional ineligibility to participate in the Title IV or Direct Loan programs. In addition, the Department should make smaller fixes to its existing eligibility criteria, including allowing borrowers to apply for relief when their schools falsely certify their satisfactory academic progress.

2. End The Presumption Against False Certification Discharge

The Department should address the problematic evidentiary burden it places on borrowers to prove that their school falsely certified they were eligible for aid and to presume that no violation occurred in the absence of corroborating evidence. The impact of this burden is that many false certification applications are denied not because it is more likely than not that no violation occurred, but simply because no one has ever investigated it.

Let us be clear: borrowers have no access to discovery in the administrative discharge process, and rarely have access to attorneys who might be able to track down potentially corroborating evidence (which could include false certification applications from other

⁴⁹ 20 U.S.C. § 1087(c) (“[I]f such student’s eligibility to borrow under this part was falsely certified by the eligible institution . . . then the Secretary shall discharge the borrower’s liability on the loan (including interest and collection fees) by repaying the amount owned on the loan.”).

borrowers, student complaints, statements from former employees, investigations and audits). Moreover, while the Department may conduct its own inquiry into evidence of false certification by the school, in practice this inquiry has generally been limited to a check for whether there is a prior finding of false certification violations by the school. But the absence of such a finding is not meaningful evidence that false certification violations did not in fact occur because the Department historically has not had a practice of investigating and actively monitoring for such violations. The absence of findings, with only a small number of exceptions, reflects the absence of investigations rather than the absence of violations.

We therefore recommend that the Department adopt an evidentiary burden structure that reflects these realities: Borrowers who submit a sworn application for a false certification discharge that attests to facts supporting a finding that they were ineligible for student aid but were falsely certified as eligible should be considered presumptively eligible for discharge. Absent any credible evidence contradicting the borrower's sworn statement or disputing the borrower's credibility, the Department should grant the discharge.

3. Require Consideration of Group Discharges

Only a small fraction of the borrowers whose loans were falsely certified ever find out about this violation or their right to discharge, and schools that engage in false certification have often done so as a pattern or practice. The Department should therefore establish a robust group discharge process to ensure that more borrowers receive the relief they are entitled to, and that relief is not limited to the lucky few who obtain legal counsel.

The Department has existing authority to provide group discharges, including without application, for false certification and has used a group-based approach at times in the past.⁵⁰ For example, in the 1990s, it identified schools that engaged in widespread ability-to-benefit ("ATB") fraud and granted false certification discharges for all borrowers from those schools who submitted discharge applications, without pursuing the typical individual adjudication.⁵¹ Yet, since then, the Department has only issued false certification group discharges when pushed to do so by litigation.⁵² As a result, students who attended schools like FastTrain, which was subject to federal litigation for false certification violations, struggle with their student debt even though they are likely eligible for relief. We urge the Department to use its existing discretion to provide group false certification discharges where appropriate. But given the historical lack of appetite to use such discretion, we also urge the Department to consider incorporating a false certification group process into regulation that includes triggers for when the Department must investigate and determine the eligibility of groups of borrowers for relief based on widespread false certification by an institution.

⁵⁰ 34 C.F.R. § 685.215(c)(8).

⁵¹ For a list of schools for which ED has granted group discharges, see Nat'l Consumer Law Center, Student Loan Law, Section 10.4.2.7 (6th ed. 2019).

⁵² In 2017, the Department agreed to group discharges for as many as 36,000 students who attended the Philadelphia campus of the Wilfred Academy of Hair and Beauty Culture and the New York campus of Robert Fiance to settle a lawsuit filed by New York Legal Assistance Group. Patricia Cohen & Emily Rueb, U.S. To Help Remove Debt Burden for Students Defrauded by For-Profit Chain, NY Times (Aug. 9, 2017) available at <https://www.nytimes.com/2017/08/09/business/wilfred-student-debt.html>

4. Rescind the 2019 Amendments

In 2019, the Department amended the false certification regulations in ways that made it harder for borrowers to obtain relief, including by limiting relief for students whose schools falsely certified that the student met requirements for employment in the program field and making borrowers ineligible for discharge if they signed an attestation that they had a high school diploma.⁵³ The Department should rescind these new barriers to relief. As NCLC explained when the new rule was proposed, there is rampant documentation falsification at institutions that commit false certification violations—indeed, that is the core of false certification.⁵⁴ Students at predatory schools do not typically prepare their own financial aid applications or documents. Instead, recruiters and financial aid representatives fill out the documents for students and instruct them to sign.⁵⁵ These schools may disqualify students from relief—and avoid oversight—by inserting attestations into the mound of paperwork (or, commonly, electronic paperwork) that borrowers are instructed to sign, or that are improperly signed for them by school employees. These regulations do not exclude undeserving students from obtaining relief; instead, they provide the instructions for institutions to continue to game the federal student loan system. This has already proven to be a problem, as legal aid clients have recently been denied false certification discharges on the basis that their FAFSA applications (almost always completed by the predatory school) stated that they had completed high school. The Department should remove such barriers to relief created by the 2019 amendments.

E. Other Critical School Accountability and Oversight Measures

While we urge the Department to direct its immediate attention to addressing the existing student debt crisis, including through expanding access to debt cancellation and affordable payment plans as described above, we also recommend that the Department act to protect current and future students from being exploited or made worse off by federal student loans. Improving the discharge programs is an important part of that: by requiring the Department and/or schools participating in Title IV to bear the cost of school misconduct and risky behavior, these entities will have financial incentive to prevent and promptly halt such misconduct. In addition, the Department may increase school accountability by pursuing the other regulatory reforms set forth in the accountability coalition's comments. As discussed below, these priorities include implementing the Higher Education Act's requirement that career education wishing to receive federal student aid must prepare students for gainful employment, and protecting online students by revising the state authorization regulations.

⁵³ 34 C.F.R. § 685.215(e)(1)(ii).

⁵⁴ Comments from the Legal Aid Community, Comments on Proposed Regulations on Borrower Defenses and Used of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations (Aug. 30, 2018), available at https://www.nclc.org/images/pdf/student_loans/comms-proposed-rule-arb-closed-sch-false-cert.pdf.

⁵⁵ These institutions often utilize high pressure sales tactics where students are pressured to enroll immediately and presented with large stacks of documents to sign with limited time to review. In addition, some recruiters may provide loan contracts to students in English when they do not speak English. All of these practices can lead to students unknowingly signing documents that contain false or inaccurate information. Furthermore, since most of the financial aid forms are completed electronically, a borrower need not even be present to review or sign the financial aid documents before they are submitted.

1. Gainful Employment

Among the hundreds of clients we have represented over the years who have enrolled in for-profit schools, only a small fraction have reported finding a job in the field related to their program of instruction, and among those few, almost none have earned the income they were made to expect or that would be sufficient to afford their student loan debt. To stop the ongoing exploitation of student loan borrowers by for-profit schools that consistently leave their students worse off and unable to pay back their loans, we recommend that the Department prioritize issuing rules effectuating the statutory requirement that all career education programs must “prepare students for gainful employment in a recognized occupation.”

We recommend that the Department consider reinstating the 2014 GE rule with modifications to strengthen it and to provide loan relief to borrowers who attended programs during periods for which the Department later determines the programs failed to prepare students for gainful employment. Working from the 2014 rule has the benefit of efficiency, as that rule was the result of extensive input and review, and, in its limited time in effect, had a measurable positive impact, with schools eliminating over 300 poor-performing programs and reducing costs or otherwise improving the value proposition for many other programs.

We do not, however, see the 2014 rules as the only possible effective approach. The Department may reasonably also consider alternative approaches to achieve the goal of ensuring that career education programs deliver sufficient career value to students to make their student loan investment worthwhile.

Any approach the Department takes on gainful employment should be mindful of several key principles:

1. Career education programs’ eligibility for federal aid dollars should be conditioned on delivering sufficient value to students to make their student loans worthwhile and repayment affordable.
2. Providing information regarding school cost, average earnings, debt, and GE metrics is worthwhile but is not a substitute for substantive protections and the requirement that the Department cut off a school’s participation in federal student aid when it fails to comply with GE standards;
3. The gainful employment standards should start from a reasonable assessment of what value federal student loan borrowers should derive from career education programs, rather than starting from what value schools are currently providing—which, in many cases, is far too low and is contributing to the student debt crisis, particularly among working class borrowers and borrowers of color.
4. Gainful employment rules should be designed to allow for and require the Department to make a clear, transparent, and straightforward assessment of whether a program is in compliance and should minimize opportunities for schools to evade detection of noncompliance.
5. Similarly, the rules should be designed to ensure that noncompliance has prompt and consistent consequences to protect and provide relief for students that cannot be forestalled by Department inaction or endless appeals.
6. Because gainful employment metrics focused on student outcomes multiple years after students have taken out loans are a lagging indicator of program adequacy, and federal aid is

cut off only after a school has already been determined to have failed multiple cohorts of student borrowers, simple fairness requires that these failed borrowers be provided relief from loans taken out to attend programs that the Department itself determined failed to offer sufficient value to warrant extension of federal student loans. There are various legal avenues available for the Department to regulate this relief, including pursuant to false certification and borrower defense authority, as discussed in the attached comments.

Additionally, based on experiences in the education and student loan industries, and the fact that the for-profit school sector relies almost entirely on continued access to federal funding—which GE threatens—we are acutely aware that some school operators will attempt to game the system, and will come up with creative and unexpected ways to do so. The rules simply cannot anticipate all possibilities. This is why it is so critical to require reviews and audits of this system to measure whether it is meeting the intended goals.

2. State Authorization

In recognition of the rapid growth of the for-profit online education model, and the Department’s recent regulations that weakened protection of online students and facilitated a structure encouraging states to contract out of enforcing student protections, we urge the Department to amend the state authorization regulations to restore and further strengthen protections for students generally, and online students in particular.

For too long, state authorization requirements have fallen short in the goal of protecting the integrity of the federal student aid program and students’ investment in education. In recent years, the rise of online education, particularly in the for-profit sector, and the creation of the National Council for State Authorization Reciprocity Agreements (“NC-SARA”), have dramatically raised the stakes. First, the number of online students has exploded, particularly in the for-profit sector: nearly half (47 percent) of for-profit college students are enrolled exclusively online, with 83 percent of those students enrolled at schools based in a different state.⁵⁶ Second, with 49 states plus the District of Columbia signed onto NC-SARA, private regulation of online, for-profit higher education has largely displaced state oversight.

Unfortunately, in 2019, the Department weakened state authorization protections for distance education students in three ways. First, contrary to the consensus of the rulemaking committee, the Department amended the definition of “state authorization reciprocity agreement” to allow agreements to require states to waive their ability to enforce their educational laws on behalf of their residents enrolled in online programs physically located within another member state.⁵⁷ In practice, this means that the primary reciprocity agreement, NC-SARA, shields online schools from state laws specifically designed to protect students and prevent for-profit school fraud and abuse. It also exacerbates the risk that predatory schools can choose a state with lax authorization and oversight standards for their legal domicile, while marketing and operating their online distance education across the country, risking a race to the bottom for state oversight of schools participating in Title IV, and leaving the growing numbers of online students without adequate protection against risky and unlawful school conduct. Second, the Department rescinded the requirement that states

⁵⁶ See The Institute for College Access and Success, *Going the Distance Consumer Protection for Students Who Attend College Online*, available at https://ticas.org/files/pub_files/going_the_distance.pdf.

⁵⁷ 84 Fed. Reg. 58,834, 58,915 (Nov. 1, 2019).

must have a process to resolve student complaints.⁵⁸ Third, it narrowed what must be disclosed and how.⁵⁹

The weakening of these regulations, which went into effect in July 2020, came at exactly the wrong time, as the pandemic drove huge numbers of students to online education. The mass movement to online education, though unavoidable in the short-term, is likely to lead to a long-term expansion of distance education, underscoring the need for regulations that will ensure that online students receive affordable, high-quality education.

We therefore urge the Department to reverse the 2019 rollbacks in online student protections described above and to:

- Restore and further clarify the prior 2016 state authorization reciprocity agreement definition to ensure that agreements may not shield schools from industry-specific consumer protection laws, including but not limited to laws specifically applicable to higher education institutions that cover the following: disclosures to current and prospective students; the contents of any documents provided to students or prospective students; prohibited practices; refunds; cancellation rights; student protection funds or bonds; private causes of action; and student complaint standards and procedures.
- Restore the student complaint process requirements and further clarify that distant states that are members of reciprocity agreements may receive, handle and resolve those complaints from their residents through their own state law procedures, and take action against a school for violation of their state laws pursuant to the procedures provided in their laws.
- Require reciprocity agreements to allow states to take action against individual out-of-state schools for violations of applicable state laws or by following its own state law procedures, without having to withdraw from reciprocity agreements entirely (a requirement that significantly deters state action) or rely on the home state to act.

For more details on our recommendations, please see our previously submitted comments on state authorization and distance education:

- [NCLC and Legal Aid Foundation of Los Angeles comments to the U.S. Dept. of Education supporting the Department’s proposed distance education regulations, May 4, 2020](#)
- [Comments to the Dep’t of Education re: Proposed Regulations on Recognition of Accrediting Agencies and Recognition Procedures for State Agencies, July 11, 2019](#)
- [Comments from NCLC and 10 other legal aid groups to the Dep’t of Educ. re Proposed Regulations Regarding State Authorization of Distance Education Programs, Aug. 24, 2016.](#)

IV. Ensure Disability and Identity Theft Cancellation Programs Reach Intended Borrowers

The statutory cancellation programs provide a vital safety net for our low-income clients. But data released by the Department of Education demonstrates that these programs have

⁵⁸ 84 Fed. Reg. 58,834, 58,845–58,846 (Nov. 1, 2019) (discussing the elimination of the state complaint process requirements).

⁵⁹ 84 Fed. Reg. 58,834, 58,889 (Nov. 1, 2019). Compare 34 C.F.R. § 668.50 (Apr. 2019), with 34 C.F.R. § 668.43 (July 1, 2020). 84 Fed. Reg. 58,834, 58,889 (Nov. 1, 2019). Compare 34 C.F.R. § 668.50 (Apr. 2019), with 34 C.F.R. § 668.43 (July 1, 2020).

systematically failed to reach the borrowers they are intended to benefit.⁶⁰ The primary reason is that the Department has created overly restrictive eligibility and proof requirements and placed a series of unnecessary bureaucratic hurdles between borrowers and relief. In addition to the statutory discharge provisions discussed previously, the Department must also fix identity theft, public service loan forgiveness, and disability discharge programs—so that they actually reach the borrowers they are intended to help. Relief should be expanded and automated as much as possible.

A. Total and Permanent Disability Discharge

In enacting the total and permanent disability (“TPD”) discharge program, Congress sought to provide relief to borrowers who cannot afford to pay back their student loans due to their disability.⁶¹ The TPD program is vital for the economic security of borrowers with disabilities who are twice as likely to live in poverty as people without disabilities.⁶² Furthermore, many disabled borrowers live on a fixed income that is barely enough to cover their basic living expenses. Requiring them to pay back student loans that they can no longer benefit from would push them further into poverty. Congress understood this issue, and it created the TPD program to relieve disabled borrowers from the burden of student debt.

The current TPD regulatory framework erroneously assumes that all disabled borrowers are similarly situated and will have equal access to the information, resources, and abilities needed to apply for TPD – irrespective of the unique challenges posed by their disability and socioeconomic status. This rulemaking process presents an opportunity for the Department to adopt reasonable regulations that will finally make the TPD program work for all statutorily qualified disabled borrowers. Therefore, we join with the Consortium for Citizens with Disabilities (“CCD”) and recommend that the Department implement the following changes to the rulemaking process and the TPD program regulations to simplify the TPD program and provide complete loan discharge for all eligible disabled borrowers.

1. The Department Should Create a Disability Advocate Seat on The Negotiated Rulemaking Committee

Equity and fairness require the Department to create a seat for a disability advocate on the negotiated rulemaking committee. It would be inherently unfair for the Department to reserve several seats for lenders and schools but deny a seat to members of the disability community whose rights are on the line. The disability community has a vested interest in the rulemaking process, and they deserve a representative on the Committee.

The Department's failure to include a disability advocate in the previous negotiation panel resulted in regulations that proved to be impractical and confusing for qualified disabled borrowers – many of whom live in poverty and/or whose disabilities prevent them from accessing the TPD process. Having a disability advocate seat on the Committee is needed to bring the voices and experiences of the disabled borrowers to the negotiation table. The disability advocate will provide subject matter expertise on complicated social security and disability-related issues that the

⁶⁰ See U.S. Dep’t of Educ., Federal Student Aid Data Center, available at <https://studentaid.gov/data-center>.

⁶¹ Higher Education Act of 1965, § 430, 20 U.S.C § 1087(a).

⁶² Nat’l Council on Disability, National Disability Policy: A Progress Report (2017), available at https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf, (“[P]eople with disabilities live in poverty at more than twice the rate of people without disabilities (29 percent compared to 12 percent.”).

Committee may not otherwise have the expertise to identify and address. The Department must include a disability advocate at every step of the rulemaking process to ensure adequate representation for disabled borrowers.

2. The Department Should Broaden the Scope of TPD Eligibility Beyond the SSA MINE Category, Which Is Not an Adequate Measurement of How Long an Individual's Disability Lasts

The TPD statute is clear that Congress intended to make disability discharge available to all disabled borrowers who cannot engage in substantially gainful employment activity due to a disability lasting or expected to last for a continuous period of at least 60 months.⁶³ There are more than 600,000 Social Security Administration (“SSA”) disability beneficiaries with SSA documented disabilities that likely meet this statutory requirement.⁶⁴ However, they are not eligible for a TPD discharge based on their SSA information because current Department regulation only accepts SSA documentation from borrowers within SSA's medical improvement not expected (“MINE”) category.⁶⁵ Borrowers not identified as being in the MINE category must go through the burdensome and redundant process of chasing down a physician or qualified medical professional to certify a disability that SSA has already documented.⁶⁶ This creates numerous issues for disabled borrowers, many of whom have limited mobility and find it difficult to get transportation.

The Department's reliance on the SSA MINE category reflects a misguided understanding of the purpose of the SSA MINE category. The Department erroneously equates the MINE five to seven year disability review schedule with the 60 months minimum statutory requirement for a TPD discharge. However, SSA does not use the MINE category to measure the duration of a disability but rather to determine when SSA should review the records to see whether an individual has regained any functionality.⁶⁷ Therefore, they are not an accurate measure of the duration of a particular disability.

To make the TPD program work for all statutorily qualified borrowers, we recommend that the Department expand the list of acceptable evidence for TPD to include documentation showing that the borrower fits into one of the following categories (1) SSA beneficiaries who have an onset of disability date at least five years ago; (2) SSA beneficiaries on the compassionate allowance list; (3) beneficiaries currently receiving retirement benefits who were receiving disability benefits at the time

⁶³ 20 U.S.C. § 1087(a)(1) (“The Secretary may develop such safeguards as the Secretary determines necessary to prevent fraud and abuse” and “the Secretary may promulgate regulations to reinstate the obligation of, and resume collection on, loans discharged under this subsection. . .”) (emphasis added).

⁶⁴ Office of the Inspector Gen., Social Security Administration Beneficiaries Eligible for Total and Permanent Disability Federal Student Loan Discharge, (Nov. 2020), available at <https://www.oversight.gov/sites/default/files/oig-reports/A-06-17-50281.pdf> (“[A]pproximately 648,000 Federal student loan borrowers receiving Disability Insurance benefits in December 2018 whom SSA had not identified with MINE status in its June or September 2017 data matches.”); see also Bethany Lilly & John Whitelaw, Relief for Borrowers with Disabilities, in *Delivering on Debt Relief: Proposals, Ideas, and Action to Cancel Student Debt on Day One and Beyond*, 94 (2020), available at <https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf#page=94> (noting that “[t]his is likely an undercount since it is limited to just SSA Title II disability insurance and does not include some of the lowest income SSA disability beneficiaries who only receive payments under the SSI program.”).

⁶⁵ 34 C.F.R. § 685.213(b)(2)(ii).

⁶⁶ 34 C.F.R. § 685.213(b)(2)(i). See also U.S. Dep’t of Educ., Fed. Student Aid, Total and Permanent Disability (TPD) Discharge, available at www.disabilitydischarge.com.

⁶⁷ Lilly & Whitelaw, *supra* note 61 at 100.

of transition to retirement benefits; (4) older disability beneficiaries who will not have their disability status reviewed again; and (5) certain beneficiaries engaged in limited work activity.⁶⁸

The Department should also consider additional criteria based upon other sources of information.

3. The Department Should Eliminate the Post-Discharge Monitoring Period, Which Has Reverted Many Low-Income Borrowers into The Trap of Student Loan Debt

Congress tasked the Department with developing the necessary safeguards to prevent fraud and abuse in the TPD program.⁶⁹ However, some of the regulatory safeguards implemented by the Department over the last several years, specifically the three-year post-discharge monitoring period, have prevented many disabled borrowers from obtaining a total and permanent discharge of their student loans – a result that is contrary to the TPD program's statutory purpose.⁷⁰

Under the post-discharge monitoring period, statutorily qualified disabled borrowers must strictly comply with rigorous reporting requirements every year or face reinstatement of the previously discharged loan.⁷¹ Many of these borrowers cannot comply fully with the yearly reporting requirement due to limitations caused by disabilities that are often enhanced by poverty. The monitoring period yearly reporting requirement reflects the Department's willful blindness to the constraints caused by poverty and each borrower's respective disability.

Reinstating loans that have already been forgiven due to a borrower's disability is inherently unfair and frustrates the purpose of the TPD statute. The reporting requirement is unnecessary since the Department can likely obtain the reporting requirement data from SSA under the data-sharing agreement with SSA.⁷² Furthermore, the low risk of fraud in the TPD program does not justify the burdensome post-discharge monitoring period that has reinstated the loans of many statutorily qualified borrowers.⁷³ Eliminating the post-discharge monitoring period will provide total and permanent loan discharge for all statutorily qualified borrowers. Furthermore, it will allow the Department to devote much-needed resources to improving other aspects of the TPD program. Therefore, we recommend that the Department eliminate the burdensome and unnecessary three-year post-discharge monitoring period.

⁶⁸ For a more detailed explanation of these recommendations, see Lilly & Whitelaw, id.

⁶⁹ 20 U.S.C. § 1087(a)(1).

⁷⁰ Clare Lombardo & Cory Turner, Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised, NPR (Dec. 4, 2019), available at <https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve>.

⁷¹ 34 C.F.R. § 685.213(b)(7).

⁷² Press Release, U.S. Dep't of Educ., U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities (Apr. 12, 2016), available at www.ed.gov.

⁷³ Alex Elson, Action Memorandum: Automating the Discharge of Federal Student Loan Debt for Individuals who are Totally and Permanently Disabled, (2020), available at <https://www.defendstudents.org/news/body/docket/100-Day-Docket-Disability-Relief-Report-December-Update.pdf>, (noting that “[b]ecause SSA has already gone through its process to designate these borrowers as ‘Medical Improvement Not Expected,’ the risk of fraud in the system is low.”).

4. The Department Should Streamline the TPD Process by Providing Automatic Discharge to Borrowers Who Presumptively Qualify for Disability Discharge Based on Their Social Security Disability Status

For the TPD program to work as intended by Congress, the Department must streamline the process by providing automatic discharge to all borrowers who qualify for TPD based on their SSA disability status. Currently, over half a million borrowers are eligible for a TPD discharge based on their SSA disability status, but under current Department regulations, these borrowers will not get a discharge unless they submit a TPD application.⁷⁴ This is so, even though the Department is aware of the identity of these individuals and has evidence of their entitlement to a loan discharge through its data-matching program with SSA.⁷⁵ It is morally unacceptable for the Department to continue to subject these borrowers to the rigorous TPD application process when it has documented evidence of their statutory eligibility for a TPD discharge. It is also contrary to the TPD statute which states that “the Secretary shall discharge the borrower’s liability on the loan by repaying the amount owed on the loan” in cases where the borrower meets the TPD qualifications.⁷⁶

To improve the TPD program and provide immediate relief to all SSA statutorily qualified borrowers, we recommend that the Department automatically discharge the loans of all eligible borrowers within its data matching program with SSA. In doing this, the Department should send a notice of loan discharge to all eligible borrowers with an opt-out option for SSA beneficiaries who do not want to participate in the automatic discharge process. We believe that adopting these reasonable recommendations will help the Department quickly fulfill the Congressional intent of the TPD program and provide much-needed relief to statutorily qualified disabled borrowers.

B. Identity Theft

The Higher Education Act states that a loan that was “falsely certified as a result of a crime of identity theft” shall be discharged by the Secretary. 20 U.S.C. § 1087(c)(1) Nothing in the statute itself requires that there be a court judgment to justify the defense of identity theft. However, the regulations at 34 C.F.R. § 685.215(c)(5)(i)(C) require that the borrower provide “a copy of a local, State, or Federal court verdict or judgment that conclusively determines that the individual who is named as the borrower of the loan was the victim of a crime of identity theft.”

For all borrowers, but low-income borrowers in particular, getting a lawsuit filed and then litigating that lawsuit to judgment, even if by default, is an undertaking beyond their capabilities and resources. Some states have laws that victims of identity theft can utilize to bring a lawsuit to obtain declaratory and injunctive relief. However, the borrower often must be able to identify the alleged identity thief. In many cases, the borrower does not know who stole their identity, or has a strong reason why initiating contact with the alleged identity thief is inappropriate. In at least one case, the alleged identity thief was an ex-partner who was abusive. Reinitiating contact with a former abuser, solely in order to obtain relief from the Department of Education is too high a burden and could potentially put the borrower at risk of physical, mental, and emotional harm. Additionally, in those state court cases, if that relief is even available, the Department of Education would be a defendant,

⁷⁴ Letter to Richard Cordray, COO Office of Federal Student Aid, from National Student Legal Defense Network (June 21, 2021), available at <https://subscriber.politicopro.com/f/?id=0000017a-2c29-dc85-a77f-fd3f97ad0000>.

⁷⁵ Id.

⁷⁶ 20 U.S.C. §1087(a)(1) (emphasis added).

which would require attorneys representing the Department to appear in state courts across the country, costing taxpayers thousands of dollars.

A better solution would be to provide an alternative method of proof for the identity theft discharge, and to make a judgment optional, but not required, or to reconcile the recently created common law forgery discharge with the requirements of the identity theft discharge.

We appreciate the recent addition of the common law forgery discharge and believe that will be an option for some borrowers who cannot prove the elements of an identity theft discharge as currently written. However, the Department has an opportunity to revise the identity theft regulation itself to provide actual relief to borrowers who are already facing a substantial, uphill battle reclaiming their financial identity. As the Department itself stated in the announcement for the forgery discharge, “a process that would enhance individuals’ ability to resolve their claims at the lowest possible cost to the taxpayer” is justified.

We suggest that the Department either clarify the forgery and identity theft discharges, to ensure that borrowers understand the differences between the two, and the reasons why they would use one instead of the other, or combine the two discharges and reconcile the requirements to allow for better access to relief, particularly for low-income borrowers.

V. Structure of the Rulemaking

For this rulemaking session, we again ask the Department to reconsider the structure and process of negotiated rulemaking. Student loan borrowers are diverse by virtually every measure: age, income, race, gender, family status, employment history, and familial wealth. Borrowers’ diverse experiences and needs must be fully understood and explored to improve the loan repayment and the cancellation programs. Although students are the beneficiaries of the higher education system, representatives who represent educational and financial entities within the higher education systems are not solely focused on students’ and borrowers’ best interests. Instead, their voices often drown out the few borrower and student voices at the negotiating table. To ensure that the diversity of borrowers’ experiences and voices are adequately heard during the upcoming rulemaking process, the Department must allocate multiple negotiator seats to borrower advocates, legal aid organizations, and state attorneys general. The Higher Education Act mandated the minimum constituency that must be represented during negotiations, but did not instruct how many representatives from each group should participate.⁷⁷ Yet, institutions of higher education, servicers, and contractors have outnumbered borrower representatives at all past negotiated rulemakings.

As the Department prepares to negotiate on a wide range of topics impacting many different constituencies of students and borrowers, it can and should ensure that a diversity of borrower perspectives are reflected in the negotiated rulemaking process. Importantly, the Department should not impose unnecessary barriers or restrictions on participation by qualified legal services providers.

Finally, given the wide range of topics proposed in this notice, it is important that the voting members of the committee be able to fully and adequately consider the topics they are negotiating. In recent years, the Department has convened omnibus rulemakings that cover multiple disparate issues. While the omnibus-subcommittee process allowed the Department to negotiate a wider array of regulations, it shortchanged negotiation discussions. The main committee was not fully apprised of the full content of subcommittee conversations and subcommittee members did not have voting powers. In addition, voting negotiators often did not have sufficient time to discuss different

⁷⁷ 20 U.S.C. § 1098a(b).

proposals or explore the nuances of the regulations being amended. While we see the value in expediting changes to the regulatory topics proposed by the Department, we caution the Department to use a process that allows the negotiators to fully understand the regulations and their problems and to robustly discuss solutions.

VI. Conclusion

We thank the Department for its consideration of our comments. Please feel free to contact Persis Yu at 617-542-8010 or pyu@nclc.org with any questions or comments.

ATTACHMENT A

To: U.S. Department of Education; Negotiated Rulemaking Committee
From: Suzanne Martindale, Toby Merrill, Shannon Sheaff, Johnson Tyler
Prepared with: Persis Yu, National Consumer Law Center
Date: April 8, 2015
Re: Married Borrowers

The Department has proposed to require married student loan borrowers to provide both spouses' income for REPAYE calculations, regardless of their tax filing status. Currently a borrower who files separately can exclude a spouse's income from all other income-driven repayment plan calculations. We oppose this proposal.

Removing the option for married borrowers to file their taxes separately and count only the borrower's AGI will substantially harm some of the most vulnerable borrowers and is antithetical to the President's goal of targeting struggling borrowers.

As described in detail below, there are many legitimate reasons why low-income taxpayers choose to file their taxes separately, often at great financial cost. Requiring these borrowers to provide their spouse's income to calculate their income-driven repayment amount will have disastrous effects, from the administrative nightmare of trying to determine an uncooperative spouse's income to potentially compromising the safety of survivors of domestic abuse.

Moreover, this "fix" is unnecessary. According to statements made by Department negotiators, roughly 4% of taxpayers file as married filing separately.¹ Yet, only 2% of borrowers in an income driven repayment plan file separately. This suggests that not only are people not choosing this filing status in greater numbers to avoid student loan payments, but in fact a disproportionately low number of people are choosing this option. As will be explained further, for most borrowers, filing separately and excluding a spouse's income from the student loan payment does not result in a financial gain. Although there may be a small number of borrowers for whom this option does provide a benefit, they represent a tiny fraction of student loan borrowers and should not dictate good student loan policy.

Therefore, we recommend that the Department use PAYE's existing regulatory language to calculate the repayment amount for married borrowers who file separately. We suggest that the Department promote consistency by excluding from its calculation of family size the spouses of married borrowers who file separately and exclude their spouses' income.

There are Multiple, Legitimate Reasons for Low-Income Married Taxpayers to File Separately.

Physically but Not Legally Separated

Under the tax code, married taxpayers who are not legally separated must file as married even though they are no longer living together.² However, depending on the state, obtaining a

¹ Statement by Brian Siegel, U.S. Department of Education, Negotiated Rulemaking, Session 1, Feb. 24, 2015.

² IRS, Publication 17 Filing Status (2014) <http://www.irs.gov/publications/p17/ch02.html>. The exception is taxpayers who qualify as head of household.

separate maintenance decree can be complicated and expensive. Few of our low-income clients have the resources to get legally separated.

Furthermore, for our clients experiencing domestic violence, obtaining a separate maintenance decree may not be possible due to safety concerns. These borrowers do not have access to their spouse's income, yet are married under the law. Calculating these borrowers' income-driven repayments amounts by including the income of a spouse with whom they are no longer living will impose an unnecessary hardship.

Spouse's Income is Unavailable

In order to file a return jointly, both spouses must agree and sign the tax return.³ A spouse cannot be compelled to complete a joint return or to provide his or her income documentation to the other spouse. Where one spouse refuses to (or otherwise does not) provide income information, the other spouse must file separately.

Some of these taxpayers are in violent or otherwise abusive relationships. Other spouses simply maintain separate finances.

Requiring borrowers who do not have access to their spouses' income to report this information will put these borrowers in an impossible situation. Neither the Department nor the borrower has the ability to compel a spouse who is not liable on a loan to disclose her income information.

Spouse's Income is Unreliable

When a taxpayer signs a tax return, she is responsible for any liability on that return, even if it is due to a spouse's mistake or omission.⁴ Some married taxpayers choose to file separately because they do not trust the veracity of the spouse's reported income. This situation can arise in situations where one spouse has nontraditional, inconsistent, or cash-based employment. Like the situation described above, these borrowers will be in an impossible situation if required to provide their spouses' income. All Department of Education forms are signed under penalty of perjury. A borrower who has reason to believe that her spouse's stated income is inaccurate cannot legally provide it to calculate his or her payment amount.

Negative Tax Consequences Already Deter Student Loan Debtors From Filing Separately Except When Unavoidable.

The Department has expressed concern that married borrowers will choose to file their taxes separately in order to reduce their student loan payments. An examination of the tax consequences of filing separately shows that this fear is unfounded.

³ IRS, Publication 17 Filing Status (2014) <http://www.irs.gov/publications/p17/ch02.html>.

⁴ Center for Economic Progress, Tax Relief for Divorced and Separated Taxpayers, http://www.economicprogress.org/sites/economicprogress.org/files/divorced_separated.pdf

According to the IRS, taxpayers generally pay more combined tax on separate returns than they would on a joint return.⁵ This is because many tax benefits and credits are not available to married taxpayers who file separately. Consequences of filing separately include:⁶

- The tax rate generally is higher than on a joint return.
- Neither spouse can take the credit for child and dependent care expenses in most cases.
- Neither spouse can take the earned income credit.
- Neither spouse can take the education credits (the American opportunity credit and lifetime learning credit), the deduction for student loan interest, or the tuition and fees deduction.

The following examples show the effect of filing separately for five different income levels. These examples show the total amount paid through student loans and the amount paid in taxes depending on tax filing status. In each example, only one spouse has a student loan. The balance on the student loan is \$30,000,⁷ and the loan has a 5% interest rate. Where the spouses' incomes differ, the loan belongs to the spouse with the lower income. Each family has two children, one requiring full time childcare. In all scenarios, the standard deduction is taken along with the applicable interest rate deduction (interest rates calculated based upon second year of repayment) and childcare expenses. **In all scenarios, the negative tax consequences of filing separately are greater than any savings on the student loan payments.**

Examples

Scenario 1

In this scenario, both spouses have \$10,000 in income. Due to their low income, they qualify for a full childcare voucher and did not make payments on their student loan interest.

	Tax liability ⁸	Required student loan payments ⁹
Joint	-\$7,460 (refund)	\$0
Separate	-\$1,050 (refund)	\$0
Difference	-\$6410 (refund)	\$0

⁵ IRS, Publication 501, Exemptions, Standard Deductions, and Filing Information (2014), <http://www.irs.gov/publications/p501/ar02.html>.

⁶ For a full list of the tax consequences of filing separately see: IRS, Publication 501, Exemptions, Standard Deductions, and Filing Information (2014) *Special Rules, http://www.irs.gov/publications/p501/ar02.html#en_US_2014_publink1000220768.

⁷ According to the Brookings Institute, less than 75% of borrowers have more than \$29,000 of student loan debt. The average student loan debt of graduation seniors is \$29,400. Rounding those number to \$30,000, we assume will provide the best picture for most student loan borrowers.

Beth Akers, Brookings Institute, Typical Household Student Loan Debt (July 2014), <http://www.brookings.edu/research/papers/2014/06/19-typical-student-loan-debt-akers>; TICAS, Quick Facts About Student Debt (March 2014) http://ticas.org/sites/default/files/legacy/files/pub/Debt_Facts_and_Sources.pdf.

⁸ Calculated using H & R Block, Tax Return Calculator & Estimator, <http://www.hrblock.com/get-answers/tax-calculators.html>.

⁹ Calculated using U.S. Department of Education, Federal Student Aid, Repayment Estimator, <https://studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action>.

This family will lose \$6410 by filing separately and gain no student loan benefit.

Scenario 2

In this scenario, both spouses have \$20,000 in income. Due to their moderately low income, they qualify for a partial childcare voucher and paid \$1000 in childcare expenses. Based upon the size of the loan payment, the loan is negatively amortizing and all of the payments (\$360) went towards interest.

	Tax liability	Required student loan payments
Joint	-\$2,964 (refund)	\$360
Separate	-\$781 (refund)	\$0
Difference	-\$2,183	\$360

This family will lose \$1,823 by filing separately.

Scenario 3

In this scenario, one spouse has \$30,000 in income while the other spouse has \$10,000 in income. Due to their moderately low income, they qualify for a partial childcare voucher and paid \$1000 in childcare expenses. Based upon the size of the loan payment, the loan is negatively amortizing and all of the payments (\$360) went towards interest.

	Tax liability	Required student loan payments
Joint	-\$ 2,964 (refund)	\$360
Separate	-\$661 (refund)	\$0
Difference	-\$2,303	\$360

This family will lose \$1,943 by filing separately.

Scenario 4

In this scenario, one spouse has \$120,000 in income while the other spouse has \$30,000 in income. Due to their high income, they do not qualify for a childcare voucher and will claim the maximum possible childcare expense, \$6000. Based upon the size of the loan payment (for filing jointly), approximately \$1350 will have been paid toward student loan interest in the second year of repayment.

	Tax liability	Required student loan payments
Joint	\$20,850	\$3,816 (\$318 monthly)
Separate	\$25,764	\$0
Difference	\$4,914	\$3,816

This family will lose \$1,098 by filing separately.

Scenario 5

In this scenario, one spouse has \$70,000 in income while the other spouse has \$50,000 in income. Due to their high income, they do not qualify for a childcare voucher and will claim the maximum possible childcare expense, \$6000. Based upon the size of the loan payment (for filing jointly), approximately \$1350 will have been paid towards student loan interest in the second year of repayment.

	Tax liability	Required student loan payments
Joint	\$11,575	\$3,816 (\$318 monthly)
Separate	\$13,413	\$1992 (\$166 monthly)
Difference	\$1,838	\$1,824

This family will lose \$14 by filing separately.

The Department Should Use Procedures Currently in Place for Married Borrowers Filing Separately.

For the reasons reviewed in this memo, we ask the Department to remove the burdensome restrictions it proposed for married borrowers filing separately, while excluding spouses of married borrowers filing separately from its calculation of family size. While we appreciate the Department's suggestion of an application to help handle some of the additional hardship that would ensue for victims of domestic violence, we believe that such a solution would be inadvisable and insufficient. First, it would only address a subset of vulnerable borrowers who would be harmed by the Department's proposed change. Second, operationalizing a definition of domestic violence would be nearly impossible.¹⁰ We believe that such an application would pose an additional burden on and potentially revictimize some of the most vulnerable borrowers. A separate application would also impose additional delays, and would put servicers and the Department in the position of evaluating and adjudicating difficult and deeply personal circumstances of individual borrowers.

¹⁰ The Department of Justice defines domestic violence as domestic violence as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviors that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone. U.S. Dep't of Justice, Office of Violence Against Women, Domestic Violence (July 23, 2014), <http://www.justice.gov/ovw/domestic-violence>.