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August 29, 2018

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

Re: Docket ID ED-2018-OPE-0027-0001

Dear Secretary DeVos:

Thank you for the opportunity to comment on the borrower defense rule.

Since 1989, the Children's Advocacy Institute has been working to improve the status, health, and well-being of children and youth in all areas of their lives, with special emphasis on transition age youth and improving the outcomes experienced by transition age foster youth and those aging out of foster care. It is with this demonstrated commitment to transition age foster youth that the Children's Advocacy Institute urges the Department to maintain a strong borrower defense rule.

Transition age youth (emerging adults) are particularly vulnerable to the predatory practices of unscrupulous postsecondary institutions. Strong borrower defense rules are vital to protect these students and taxpayers from deceitful, predatory institutions. Education is an important investment and most students take their education very seriously and embark upon it with the goal of improving their lives and improving their earning potential. Students do not have the same access to financial and legal resources as the educational institutions with which they have entrusted their educational future. The impact of predatory practices on vulnerable students, many of them veterans, former foster youth, and young single parents can be devastating and last for years.

We have several concerns about the Department's proposed changes to the borrower defense rule. Paramount among them is the factual error on which much of the Department's proposal is premised. The Department asserts that it changed its policy regarding borrower defense in 2015 and that this policy change led to a flood of frivolous borrower defense claims. This is not accurate. There was no policy change in 2015. The Department is asserting that prior to 2015, it would not consider borrower defense assertions from borrowers whose loans had not defaulted and who were not currently experiencing specified forms of collection. In fact, the Department accepted "affirmative" borrower defense claims well before 2015.¹ It is also worth noting here that the majority of the "flood" of borrower defense claims the Department received around 2015 were related to Corinthian Colleges, Inc.² Corinthian, a very large corporation with colleges throughout the country, sold or shut down all of its campuses and declared

¹ U.S. Department of Education, 81 FR 39353; U.S. Department of Education, 81 FR 75956; and Eileen Connor, Project on Predatory Student Lending, Letter to Jean-Didier Gaina, August 2, 2018.

² Yan Cao and Tariq Habash. The Century Foundation: College Complaints Unmasked. November 8, 2017. Available online at: <https://tcf.org/content/report/college-complaints-unmasked/>

bankruptcy in 2015 after a string of federal and state investigations and lawsuits related to its predatory practices.

The closures of the behemoth Corinthian Colleges and ITT Tech and the myriad of state and federal agency investigations into malfeasance alleged to have been perpetrated by these institutions on their students, shareholders, and the public, provide ample evidence that there is a need for strong federal oversight and accessible relief for victimized students.³

The Department states that its intention in implementing this rule change is to protect students and taxpayers and to protect institutions and taxpayers from frivolous claims. As noted in our comments below, the Department fails to establish that there is a problem with students filing frivolous claims. Further, the proposed rules do not achieve the stated goals. In fact, in many instances, these rules would create an environment that would achieve the opposite of the stated intent. By making it more difficult for victimized students to assert and prove a borrower defense claim, the rule would allow predatory postsecondary educational institutions to further victimize vulnerable students and taxpayers. By removing important prohibitions on forced arbitration and class action waivers, the Department's proposal puts up road blocks that remove transparency and deprive students of their day in court. By requiring students to attend a program chosen by the closing institution and by removing standards requiring troubled institutions to set aside funds to cover potential taxpayer costs, the Department's proposal provides unscrupulous institutions with tools to side-step important consumer protection provisions and leaves students and taxpayers to pay the price for these institutions' behavior.

We urge the Department to make the following changes to its proposed rule to ensure institutional predatory behavior is discouraged and students and taxpayers are protected:

1) Do not require borrowers to go into default prior applying for borrower defense

The Department's proposal would allow borrowers to file a claim only after going into default. As noted above, this is a departure from longstanding department policy. Requiring borrowers to go into default could result in damage to their credit and cause them further problems finding a job, among other serious consequences, many of which the Department has acknowledged.⁴ These consequences may be compounded because there is no guarantee that the student would eventually prevail. In fact, the Department proposes to put in place new evidentiary burdens and procedural obstacles, discussed below, that would ultimately prevent many harmed students with legitimate claims from obtaining relief.

The Department asserts it is basing this recommendation, in part, on its stated goal of dissuading frivolous claims and thereby protecting the taxpayers. However, the Department does not quantify or document any evidence of the frivolous claims on which it is basing its proposal. Further, the Department's proposal here would discourage the filing of many legitimate claims, of which there has been substantial documentation.

We recommend that the Department continue to accept defense to repayment claims from borrowers in good standing and all other repayment statuses.

2) Ensure harmed students have access to a fair process to obtain relief

The Department's proposal constructs several unnecessary obstacles to relief for harmed students. The Department is proposing new, narrower standards regarding what is recognized as an illegal act. The proposal eliminates breach of contract and judgment as a basis for claims, leaving "substantial misrepresentation" as a basis for filing a claim.

These new, narrower standards would harm students by removing claims based upon misrepresentation or breach of contract. Further, with regard to "substantial misrepresentation," the proposal puts the burden

³ See <https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/> for a list of actions taken and investigations initiated by state and federal agencies

⁴ <https://ifap.ed.gov/fregisters/attachments/FR110116.pdf>, p. 76051

on the harmed student to prove that the school “acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth.” This is extremely difficult to prove, and would result in harmed students being left without relief or recourse.

We recommend that the final rule retain the 2016 borrower defense provisions.

3) Maintain a preponderance of the evidence standard of evidence

The Department is considering applying a clear and convincing standard of evidence, which is a higher threshold than the current standard. The current standard is preponderance of the evidence, which is the standard consistent with consumer protection law and most of the Department’s other proceedings.

Applying a higher standard of evidence would put in place yet another obstacle to harmed students with legitimate claims who are seeking relief. Applying a clear and convincing standard would provide predatory institutions with another tool to avoid consequences of predatory behavior and continue to engage in unscrupulous practices, unhindered. Taxpayers and students ultimately pay the price when this predatory behavior is left unchecked.

We recommend the final rule retain the 2016 borrower defense provisions, including retention of the preponderance of the evidence standard of evidence.

4) Continue to accept group applications

The Department proposes to eliminate the practice of considering applications as a group. This proposal is antithetical to the Department’s reasoning that considering individual applications is burdensome and costly to the tax payer. Eliminating group applications would seriously impact the efficiency with which applications are considered.

There are groups of students, like the students that attended Corinthian Colleges, who have experienced substantially similar harm. Processing the applications as a group is beneficial to the students and to the Department because it allows for efficient, timely processing of similar claims.

We recommend that the final rule retain the 2016 borrower defense provisions and the Department continue to accept group applications.

5) Ensure that students have access to the courts to seek relief

The Department proposes to remove prohibitions on forced arbitration and class action waivers and would instead require schools that use pre-dispute arbitration agreements or class action waivers as a condition of enrollment to disclose that information in writing in an easily accessible format to students, prospective students, and the public. This is problematic for several reasons.

Forced arbitration and class action waivers will stop students from bringing claims against schools that engage in abusive practices and will thwart attempts to hold these schools accountable. For example, the results of private arbitration are usually kept confidential, which is problematic. It prevents harmed students from proving a pattern of illegal behavior, and it keeps the institution’s unscrupulous actions under wraps. Schools can use forced arbitration to keep cases out of the courts, which may result in more publicity and more rulings that benefit the harmed students.

We recommend that the final rule retain the current prohibition against colleges that receive federal funds from using or enforcing with any of their students a pre-dispute arbitration agreement or class action waiver.

6) Retain students’ ability to make their own decision about how to proceed with their education when the institution they are attending closes

The Department proposal includes a provision that would require students to attend a program chosen by their school if the school closes. This would require students to take part in a program chosen by the

closing school, regardless of whether that program meets the student's needs. There are any number of reasons a student will choose a particular program, some of those reasons may be related to location and class schedule or a number of other factors relevant to that student's unique situation. In addition, there is no guarantee that the program the closing school chooses is a quality program. The student may be jumping from one bad program to another at the behest of the failing institution.

We recommend that the final rule continue to allow students to obtain a student loan discharge if they are unable to complete their programs due to the closure of the institution in which they enrolled and choose not to continue their studies at another institution.

Sincerely,

The image shows two handwritten signatures in black ink. The signature on the left is 'Melanie Delgado' and the signature on the right is 'Robert C. Fellmeth'. Both signatures are written in a cursive, flowing style.

Melanie Delgado
Senior Staff Attorney
Children's Advocacy Institute

Robert C. Fellmeth
Executive Director
Children's Advocacy Institute