

March 11, 2016

Dr. John B. King Jr.
Acting Secretary of Education
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Dear Secretary King:

As organizations and advocates working on behalf of students, consumers, veterans, faculty and staff, civil rights and college access, we write to urge the Education Department to discharge more quickly and efficiently the federal loans of defrauded students under current regulations and to propose regulations that will make it easier, not harder, for such borrowers to get the relief they are entitled to under existing law. We are deeply concerned by the slow pace and small number of discharges that have been processed and that many of the Department's proposals in the current negotiated rulemaking process move in the wrong direction, reducing eligibility for relief, pitting students against schools, and creating unnecessary burdens on students and the Department. Below we provide key recommendations to improve the proposed regulations for borrower defenses and the process under current regulations.

Recommendations to improve proposed borrower defense regulations

1. Provide automatic discharges when there is sufficient evidence of wrongdoing

Throughout negotiated rulemaking, the Department has advocated almost entirely for an individualized process for borrower relief. This approach places the onus on individual borrowers, who are often unaware of defense to repayment or their eligibility, to submit an application or attestation form even in cases where the Department knows of widespread fraud and abuse applying to a group of students. Given the low rate of individual attestation forms from Heald College students, this framework for providing much-needed relief to defrauded borrowers imposes obstacles that most borrowers will not overcome. It also creates an unnecessary administrative burden on the Department to review claims one-by-one, even in cases where there is clear evidence that a school misrepresented key information or otherwise committed widespread fraud against its students.

In cases where the Department has evidence that a school engaged in illegal or deceptive practices, it is unnecessary and unconscionable to force borrowers to *prove* they relied on this information to their detriment. In these and other cases where the Department has sufficient evidence of wrongdoing by an institution, the Department should provide borrowers with immediate, automatic relief without requiring individual attestations. Current regulations provide for false certification and closed school discharges without applications, and the regulations for borrower defense discharges should also allow for discharge without application when warranted.

2. Do not create a statute of limitations for borrower defenses when there is none for the collection of federal student loans

Imposing a statute of limitations on borrowers' defense to repayment, as the Department has proposed, is fundamentally inappropriate and unfair when there is no statute of limitations on the Department's collection of student debt. Many borrowers do not learn until years later that they were the victim of school fraud and may not learn of the availability of borrower defense discharges until later still.

3. Borrower relief should be independent from the Department's efforts to recoup funds from institutions

We strongly agree with the Department's goal of holding institutions engaged in fraud and abuse accountable for their actions. However, making borrower relief dependent on recoupment of funds from schools is not the way to do this. The Higher Education Act entitles borrowers to relief regardless of whether the Department collects funds from institutions. Linking recoupment to relief is inconsistent with the law and creates an adversarial process that pits students and schools against each other, exacerbating the already-skewed balance of power in favor of the institutions represented by attorneys. Linking the relief and recoupment processes would also delay relief for borrowers while schools fight recoupment. The school's misconduct, not the provision of borrower relief, should trigger school sanctions.

4. Do not reduce relief by denying borrowers access to their state's consumer protections

The Department should establish federal standards for evaluating borrower defense claims that are available to borrowers nationwide *in addition* to the standards available to borrowers under state law. In other words, federal standards should be a floor, not a ceiling. Instead, the Department's most recent proposal would eliminate borrowers' current eligibility for relief based on state law violations absent a court judgment in favor of the borrower. Rather than enhancing borrower relief, the Department's proposal would severely limit borrower relief. State laws are the foremost protections against predatory practices. However, court judgments as a result of state law violations are rare because many for-profit colleges impose forced arbitration clauses or class action bans on their students. This prevents borrowers from bringing claims against the institution in court and shifts the balance of power strongly in favor of the institution. Judgments are also uncommon even when borrowers are able to make it to court, as institutions almost always push for a settlement. Lawsuits by state attorneys general also are typically settled without findings or admissions of liability. Given that court judgments are thus extremely rare, the Department's proposal would needlessly prevent defrauded borrowers from receiving relief for which they are currently eligible.

5. Prevent fraud and ensure sound administration by prohibiting forced arbitration

One of the best ways to deter wrongdoing by schools and to protect taxpayers from bearing the cost of fraud and resulting loan discharges is to prevent colleges from forcing students to sign pre-dispute or forced arbitration agreements or imposing other restrictions on students' ability to raise and resolve complaints. In addition to dramatically reducing the ability of wronged students to recoup damages from their school, forced arbitration and class action bans thwart effective

government oversight by stopping student complaints from becoming public. For years, students filed lawsuits against Corinthian Colleges, only to have the courts compel them to arbitrate their claims against the company because of the arbitration clause in Corinthian enrollment contracts. The University of Phoenix's enrollment agreement has required students to agree not to "disclose the existence, content or results of any arbitration" without the written consent of all parties. After the first negotiating session, non-federal negotiators submitted a detailed proposal to prohibit schools receiving Title IV funding from including forced arbitration in enrollment and other contracts with students.¹ Public Citizen recently submitted a public petition urging the Department to do so, and nine U.S. Senators² and nearly 50 organizations³ (including some of the undersigned here) have urged the Department to act as well. We join all of these efforts in urging the Department to protect students and taxpayers in this way.

Recommendations to improve the process under current regulations

The Department should not wait for new regulations to improve the process for discharging the debt of wronged students or to better hold schools accountable under current regulations. Countless borrowers have been subject to fraud and abuse at the hands of Corinthian Colleges and other predatory institutions. As of the December 2015 Special Master's report, *only 2 percent* of the students who took out loans to attend Corinthian Colleges since 2010 have received a closed school or borrower defense discharge, with the vast majority receiving closed school discharges.⁴ In addition to those recommendations above that can be implemented under current regulations, such as providing automatic discharges where the evidence supports it, we make the following recommendations to improve the borrower defense process under current regulations.

1. Make clear that FFEL loans are eligible for defense to repayment

The Department should make clear that borrowers with FFEL loans are eligible for relief. In 1995, the Department clearly stated that FFEL borrowers could assert "that he or she has a defense against repayment of his or her loan because of some action or failure of the borrower's school."⁵ The FFEL promissory notes have also explicitly protected borrowers' rights to make a defense to repayment. The Department has also stated its intent to provide equivalent rights to Direct Loan borrowers and FFEL borrowers.

Many former students of Corinthian Colleges have FFEL loans: more than 90 percent of the federal loans disbursed to Heald College students in 2009-2010 were FFEL loans. Yet the

¹ See non-federal negotiator proposal submitted to the U.S. Department of Education on Feb. 11, 2016, available at <http://bit.ly/1p7oQil>.

² See Letter from Sen. Durbin, et al., to Department of Education Under Secretary Ted Mitchell, Feb. 11, 2016, available at 1.usa.gov/1M0ibeG.

³ Letter from 47 organizations to the U.S. Department of Education, March 4, 2016, available at <http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=5821>.

⁴ According to the U.S. Department of Education, nearly 350,000 students took out federal student loans to attend Corinthian schools since 2010. From "U.S. Enlists Monitor for Corinthian Student Loans," *Wall Street Journal*, June 25, 2015. <http://on.wsj.com/1OWfACI>. The December 5, 2015 report of the Special Master is available at <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-2.pdf>.

⁵ U.S. Department of Education, "Notice of Interpretation," Federal Register, July 21, 1995, pp. 37769-70. <http://www.gpo.gov/fdsys/pkg/FR-1995-07-21/html/95-17988.htm>.

Department has not made clear that FFEL loan borrowers are eligible for defense to repayment or articulated the process for FFEL loans. The Department’s regulations say that any lender holding a loan is subject to the defenses that the borrower could assert against the school with respect to the loan if the school refers borrowers to the lender, the school is affiliated with the lender by a business arrangement, or the loan was made by the school.⁶ To clarify the effect on defrauded FFEL borrowers, the Department should stipulate that all FFEL lenders had referral relationships with institutions for the purposes of defenses to repayment. Alternatively, the Department could presume a referral relationship whenever a specified high percentage of borrowers at a school have the same lender. Without such clarification, borrowers may have to prove that their FFEL lender had a referral relationship with their school, which borrowers are ill-equipped to do and should not be necessary.

2. Make clear that consolidation and parent PLUS loans are eligible for defense to repayment

The Department should clarify that borrowers who have consolidated their loans and parent PLUS borrowers are eligible for relief based on their defenses. Studentaid.gov contains an unspecific warning to borrowers that consolidation could result in borrowers losing loan cancellation benefits, but does not clearly advise defrauded borrowers with consolidated loans of their protections.⁷ We urge the Department clarify that all loans, including consolidation and parent PLUS loans, are eligible for defense to repayment discharges.

3. Make forms for defense to repayment available for all borrowers

The only Department form available for borrowers wishing to assert a defense to repayment claim is for Direct Loans received on or after July 1, 2010, by students who enrolled in certain Heald College programs. All other borrowers are directed to either wait for a form to become available or submit their materials without a form by mail or email. A simple, clear form for other borrowers—that works on computers, phones and offline—is urgently needed to ensure debt relief is available to every defrauded student regardless of where and when they attended school.

4. Servicers and debt collectors should inform borrowers of their eligibility for relief

The Department pays servicers and debt collectors hundreds of millions of dollars to interact with borrowers each month. To the extent that borrowers need to apply for relief, the Department should be using monthly servicer and debt collector communications to inform borrowers who may be eligible of the availability of defense to repayment and send them applications. Servicers and debt collectors have an obligation to provide borrowers with their full range of options, and many former Corinthian students are being inundated with emails and calls from scams offering “debt relief,” so they may not trust emails from unfamiliar email addresses. The Department should immediately advise servicers and debt collectors of their responsibility to notify and accurately advise borrowers who may be eligible for a defense to repayment discharge.

⁶ 34 C.F.R. 682.209(g) available at <https://www.law.cornell.edu/cfr/text/34/682.209>.

⁷ <https://studentaid.ed.gov/sa/repay-loans/consolidation#should-i>.

These recommended changes would provide fair and common-sense relief to defrauded borrowers and better hold institutions accountable for their actions. Thank you for considering our views as you work to provide borrowers with the relief they deserve and are entitled to under current law.

Sincerely,

American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
American Federation of Teachers, AFL-CIO
American for Financial Reform
Association of the United States Navy (AUSN)
Consumer Action
Consumer Federation of California
Consumers Union
Demos
The Education Trust
Empire Justice Center
Faculty Forward Network
Initiative to Protect Student Veterans
The Institute for College Access & Success
League of United Latin American Citizens (LULAC)
Mississippi Center for Justice
NAACP
National Consumer Law Center, on behalf of its low-income clients
National Consumers League
NCLR (National Council of La Raza)
New York Legal Assistance Group (NYLAG)
NYPIRG
Public Advocates Inc.
Public Counsel
Public Good Law Center
Public Law Center
Service Employees International Union (SEIU)
Student Debt Crisis
University of San Diego School of Law Veterans Legal Clinic
Veterans for Common Sense
Veterans' Student Loan Relief Fund
VetJobs
VetsFirst, a program of United Spinal Association
Vietnam Veterans of America
Young Invincibles

cc: Hon. Ted Mitchell, Hon. James Cole, Joseph Smith, Robert Kaye, Rohit Chopra
Hon. Shaun Donovan, Hon. Cecilia Muñoz, Hon. Jeffrey Zients