

**Coalition Comments from 32 Organizations
to the Department of Education re:
Interim Final Rule Delaying, until July 1, 2018 (82 Fed. Reg. 49,114), and
Notice of Proposed Rulemaking to Further Delay,
until July 1, 2019 (82 Fed. Reg. 49,155),
Effective Date of the 2016 Final Regulations on Borrower Defense,
Closed School Discharge, False Certification Discharge, Financial
Responsibility, and Forced Arbitration by Schools in the Direct Loan
Program**

Docket IDs: ED-2017-OPE-0108, ED-2017-OPE-0112

November 19, 2017

Comments submitted on behalf of:

Americans for Financial Reform	National Association of Consumer Advocates
Center for Responsible Lending	National Association of Consumer Bankruptcy Attorneys (NACBA)
Community Legal Services of Philadelphia	National Center for Law and Economic Justice
Consumer Action	National Consumer Law Center (on behalf of its low-income clients)
Generation Progress	National Education Association
Higher Ed, Not Debt	Public Counsel
Housing and Economic Rights Advocates	Public Higher Education Network of Massachusetts
Kentucky Equal Justice Center	Public Law Center
LAF	Service Employees International Union (SEIU)
Lawyers' Committee for Civil Rights Under Law	Student Debt Crisis
League of United Latin American Citizens	U.S. Public Interest Research Group
Legal Aid Foundation of Los Angeles	UnidosUS
Legal Services NYC	Veterans Education Success
Maryland Consumer Rights Coalition	Woodstock Institute
Montana Organizing Project	Young Invincibles
National Association for College Admission Counseling	The Institute for College Access & Success

I. Introduction

These comments are submitted in response to the Department of Education’s two October 24, 2017 notices stating its intention to further delay implementation of the 2016 final regulations on borrower defense, closed school discharge, false certification discharge, financial responsibility, and forced arbitration by schools in the Direct Loan program (“Borrower Defense Rule” or “Rule”) to July 1, 2018,¹ and again until July 1, 2019.² The comments are submitted on behalf of legal aid, civil rights, consumer, and other non-profit organizations that work on behalf of students, student loan borrowers, veterans, consumers, low-income individuals, teachers, college counselors, and to advance the principles of college access and success, financial fairness, equal justice, and inclusive economies. These comments address the costs and the harm borrowers will continue to suffer if the Borrower Defense Rule remains delayed.³

We oppose delaying implementation of the Borrower Defense Rule. It was supposed to go into effect on July 1, 2017. Delay costs defrauded and cheated student loan borrowers dearly. By the Department’s own prior estimates, delaying the Rule would cost borrowers over a billion dollars each year.⁴ Worse, those costs will fall on the stakeholders least able to bear them—borrowers who are already underwater on their loans because of predatory school conduct and abrupt school closures. The Department’s Interim Final Rule and Notice of Proposed Rule fail to acknowledge the known costs of delay to student loan borrowers. Thus the Department’s assertion that these delays are supported by “a reasoned determination that [the] benefits justify [the] costs”⁵ is not supported by the record.

Delayed implementation of the Borrower Defense Rule prevents federal student loan borrowers from benefiting from the important rights conferred on them by the Rule. The protracted delay means that many harmed borrowers who have a right to relief from their schools or to have their student debt wiped clean under the Higher Education Act (“HEA”) will instead remain burdened by invalid—often unaffordable—debt and mounting interest. Many of these borrowers, who took out loans to attend schools that misled them or closed on them before they could graduate, are unsurprisingly in default on their federal student loans. While they await relief, debt collection activities cause cascading financial consequences for borrowers struggling to pay heating, electric, and housing bills. Ruined credit increases the cost of credit and

¹ Interim Final Rule, 82 Fed. Reg. 49,114 (Oct. 24, 2017).

² Notice of Proposed Rule, 82 Fed. Reg. 49,155 (Oct. 24, 2017).

³ Many signatories to these comments have previously submitted detailed comments regarding the importance and substance of the Borrower Defense Rule. To avoid repetition, and in light of the Department’s admonition that it will only consider comments on the delayed effective date and not the substance of the Rule, we focus these comments on the harm to students of delaying the Rule.

⁴ See 2016 Final Borrower Defense Rule, 81 Fed. Reg. 76,051, 76,059 (Nov. 1, 2016) (estimating \$2.5 billion annually in borrower defense discharges under the 2016 Rule, and \$381 million in additional closed school discharges for the 2013-2016 cohort).

⁵ 82 Fed. Reg. at 49,118; 82 Fed. Reg. at 49,157.

insurance, and is often a barrier to accessing employment and housing.⁶ Borrowers in default are also ineligible for additional federal student aid, preventing them from accessing the opportunity to succeed at a quality school. Thus, borrowers who are eligible for discharges will suffer significant, irreparable damage during the delay even if their claims are ultimately granted.

Delaying implementation of the arbitration provisions prevents borrowers with valid claims against their schools from attaining timely relief. Furthermore, because borrowers' legal claims against their schools must be brought before the limitation periods expire, delaying the provisions that restore access to the courts will fully deprive those borrowers whose limitation periods expire during the delay of their right to seek justice in the courts.

Finally, because the Department seeks to re-write the Borrower Defense Rule during the delay, the provisions of the Rule that would provide relief to harmed borrowers may never be implemented at all—at a cost of billions of dollars annually for harmed borrowers.⁷

II. Background

The Department of Education promulgated the now-delayed Borrower Defense Rule on November 1, 2016. For the preceding 20 years, borrowers harmed by illegal conduct at predatory schools had been entitled to relief under the HEA. For the first time, after an extensive rulemaking process, the Borrower Defense Rule finally provided those borrowers with a process for pursuing that relief. It also restored to borrowers the right to challenge school fraud in court, included deterrent measures to limit harm to future students, and created mechanisms through which borrowers harmed by abrupt school closures or false certification of their federal financial aid eligibility could attain prompt relief.

On June 16, 2017, just weeks before the Rule was scheduled for implementation, the Department published notice that it was delaying implementation indefinitely and intended to conduct a new rulemaking.⁸ The Department did not engage in negotiated rulemaking with respect to this rule delay. Although the Department stated that the delay was necessary to allow for resolution of litigation challenging the validity of certain provisions of the Rule,⁹ invoking section 705 of the Administrative Procedure Act (APA) as authority to delay the rule without notice and comment, the provisions that the Department selected for delay went beyond those explicitly challenged or clearly at issue in the cited litigation.¹⁰ For example, a provision ensuring that

⁶ See 81 Fed. Reg. at 76,051.

⁷ See, e.g., 81 Fed. Reg. at 76,059 (estimating that implementation of the Rule would increase successful borrower defense discharges to an annualized \$2.465 billion from \$637 million under the prior existing regulations that the Department currently seeks to preserve).

⁸ Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27,621 (June 16, 2017).

⁹ *Id.* at 27,621 (citing California Association of Private Postsecondary Schools v. DeVos, No. 1:17-cv-00999 (D.D.C. May 24, 2017)).

¹⁰ See *id.* (explaining that the litigation challenged “in particular those provisions of the regulations pertaining to the standard and process for the Department to adjudicate borrower defense claims, requirements pertaining to financial responsibility standards, provisions requiring proprietary institutions to provide warnings about their students’ loan

eligible students whose schools closed before they could complete their programs would receive automatic closed school discharges if they did not complete at another school within three years was not clearly at issue in the cited litigation, but was nonetheless delayed.¹¹ As discussed below, delay of this provision is particularly costly for student loan borrowers, and the Department has not put forth a valid reason for its delay. Further, the Department failed to acknowledge the requisite legal standard for delay under section 705, which requires assessment of harm caused by the delay—and thus should have assessed harm to the student loan borrowers whom the Rule was intended to protect. Additionally, while the Department asserted that the delay was justified based on the litigation, its notice and press release stated that the delay was “to consider and conduct a rulemaking process”¹² and to conduct a “regulatory reset.”¹³

Following lawsuits by 19 attorneys general and by borrowers alleging the Department unlawfully delayed the Rule, the Department announced on October 24, 2017 that it was issuing an interim final rule. This rule took immediate effect—without prior notice or prior opportunity to comment. It announced that the current delay of the Rule would last until July 1, 2018.¹⁴ The Department separately announced a notice of proposed rulemaking, proposing further delay of implementation until July 1, 2019.¹⁵

III. The Borrower Defense Rule is Needed to Protect Student Loan Borrowers from Pervasive School Fraud and Closures

According to testimony given by a former owner of a vocational training school:

*In the proprietary school business what you sell is dreams and so ninety-nine percent of the sales were made in poor, black areas, [at] welfare offices and unemployment lines, and in housing projects. My approach was that if [a prospect] could breathe, scribble his name, had a driver’s license, and was over 18 years of age, he was qualified for North American’s program.*¹⁶

repayment rates, and prohibitions against institutions including arbitration or class action waivers in their agreements with students”). But in addition to those provisions, the Department delayed other provisions that would expand access to student loan discharges based on school closures and false certification and providing for appeal of closed school discharge denials by guaranty agencies, among other things. The only portions of the Rule not delayed deal with issues ancillary to the core student protection purpose of the Rule, including technical corrections and minor amendments to the Nurse loan consolidation and death discharge documentation provisions. *Id.* at 27,622.

¹¹ *Id.*

¹² *Id.*

¹³ Press Release, Department of Education, *Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions*, (June 14, 2017) (“June 2017 Press Release”) available at <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>.

¹⁴ 82 Fed. Reg. 49,114.

¹⁵ 82 Fed. Reg. 49,155.

¹⁶ S. Rep. No. 102-58, at 12–13 (1991) (testimony), quoted in Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 Geo. L.J. 753 (2001).

As this testimony reflects, predatory recruitment targets specific communities with misleading or false information about higher education. Among those targeted are those who are the first in their family to pursue post-secondary education or who are unfamiliar with the intricacies of higher education and financial aid. Recruiters also target low-income students and students of color in disproportionately high numbers. Typical targets also include so-called “non-traditional” students who may already be in the workforce, have children to support, and are hoping that their education will position them to earn more and break out of poverty. Training materials from one for-profit college encouraged recruiters to target “Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experienced a Recent Death. Physically/Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future.”¹⁷ Training materials for other schools encouraged recruiters to identify sources of pain in prospective students’ lives and “poke the pain” and insist that enrolling at the school is the solution.¹⁸

In recent years, state and federal law enforcement actions, as well as the Government Accountability Office and the Senate HELP Committee, have all uncovered widespread use of predatory, unfair and deceptive recruiting tactics by for-profit schools.¹⁹ For example, a Senate HELP Committee report found that recruiters made false guarantees that students would be placed in a job, and misrepresented several material facts at enrollment. Those facts included the “cost of the program, the availability and obligations of federal aid, the time to complete the program, the completion rates of other students, the job placement rate of other students, the transferability of the credit, and the reputation and accreditation of the school.”²⁰

Misrepresentations during recruitment lead individuals to enter—and take on debt for—programs in which they otherwise would not enroll. For example, a group of Spanish-speaking clients of Legal Aid Foundation of Los Angeles sought help with debt for a medical assisting program in which they had enrolled because recruiters had told them that the program would be conducted entirely in Spanish. In fact, instruction and class materials were all in English, which they did not speak or read.²¹

Predatory schools are also likely to close abruptly when their scams are uncovered or when they lose accreditation. Over the past five years, thousands of schools across the country have closed.²² As a result, students who took out federal student loans for their education suffer

¹⁷ Senate HELP Report, *supra* n. 4, at 58 (quoting Vatterott, March 2007, *DDC Training* (VAT-02-14-03904)).

¹⁸ *Id.* at 60-63 (quoting materials from ITT, and Kaplan).

¹⁹ See National Consumer Law Center, Ensuring Educational Integrity, *supra* note 8. See e.g., U.S. Gov’t Accountability Off., GAO-10-948T, For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices (2010); Senate HELP Report, *supra* n. 4, at 53.

²⁰ Senate HELP Report, *supra* n. 4, at 53.

²¹ National Consumer Law Center, Comments to U.S. Dep’t of Educ. Re: Intent to Establish Negotiated Rulemaking Committee on Borrower Defense and Gainful Employment at 5, Docket ID ED-2017-OPE-0076 (July 2017).

²² See U.S. Dep’t of Educ., “Closed School Search File,” *at* <https://www2.ed.gov/offices/OSFAP/PEPS/closedschools.html>.

not just from wasted years, but from debt incurred for degrees they could not complete.

These predatory school practices are a tremendous source of frustration, financial loss, and loss of opportunity for students. Many students who are convinced to enroll based on false information about the value of the credential or the cost of attendance wind up worse off than they were before enrolling. Students who attend for-profit certificate, associate, and bachelor's degree programs earn *less* on average in the 5 to 6 years after attendance than they did before attending.²³ And with no earnings boost to show for it, these former students now owe significant federal student loan debt—averaging over \$14,000 in 2014—and sometimes also private student loan debt.²⁴ Given their low wages and high debt, many of these students are unable to keep up with their student loan bills, and default. Indeed, nearly half of for-profit students default on their student loans within five years of entering repayment.²⁵

IV. Delaying the Borrower Defense Rule Severely Harms Student Loan Borrowers

The Department's plan to delay and replace the Borrower Defense Rule through a new rulemaking process²⁶ would impose substantial costs on student loan borrowers who would receive relief under the Rule. As part of the rulemaking proceeding, we intend to advocate for strong, enforceable borrower protections, as weakening the 2016 final Rule would do great harm to borrowers. But even if the Department retains the 2016 final Rule at the end of the current rulemaking, delay of the Rule in the interim will cause profound harm to the students and borrowers who are intended beneficiaries of the Rule. As detailed below, delay ensures that, at minimum, many borrowers who have a right to discharge of their student loan debt under the HEA now could instead be burdened by such debt unless and until the provisions of the Rule implementing their HEA discharge rights go into effect. In the meantime, they face increasing interest, collection costs, and financial distress.

a. Delaying the Rule Harms Borrowers Entitled to Closed School Discharges

The Rule includes important new closed school discharge provisions. These include a new provision for automatic discharges for borrowers who did not complete a program at another school within three years of their school's closure. They also include a right to appeal closed school discharge applications denied by guaranty agencies to the Department of Education.

²³ Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data*, National Bureau of Economic Research Working Paper at 3 (May 2016), available at <http://www.nber.org/papers/w22287>.

²⁴ A recent report calculated that the median borrower at a for-profit schools owed \$12,700 in 2013. Adam Looney & Constantine Yannelis, Brookings Papers, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributes to Rising Loan Defaults* 41 Tbl. 6 (Fall 2015), available at <https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/>.

²⁵ *Id.* at 50.

²⁶ 82 Fed. Reg. at 27,622 (announcing that the delay is intended to allow the Department to conduct a new rulemaking prior to implementation of the Rule).

Delaying implementation of these discharge provisions means that borrowers whose school closed and who have a right to have their student debts wiped clean under the HEA will instead be burdened by hundreds of millions of dollars in invalid and often unaffordable debt and mounting interest. Further, the validity of the closed school discharge provisions was not clearly at issue in the litigation the Department has cited as the justification for delaying the effective date of this provisions. There is simply no reasonable justification for imposing this costly delay on harmed borrowers.

The HEA requires the Department to discharge federal student loans for borrowers who are unable to complete their programs due to a school's closure.²⁷ However, the vast majority of eligible borrowers are unaware of this right and suffer unnecessarily with debt. Legal aid offices frequently see clients whose schools closed as many as 30 years ago and who have no idea they are eligible for a discharge.²⁸ The Department has estimated that it received closed school discharge applications from only 6 percent of eligible borrowers.²⁹

To the extent that borrowers are aware of this right and have FFEL loans, if they apply for a discharge to a guaranty agency which then improperly denies the discharge, they will have no way to appeal to the Department. Current FFEL loan regulations are silent as to borrowers' right to seek review of guaranty agency denials of closed school discharges.³⁰ The Administrative Procedure Act does not provide for judicial review of decisions by private, non-governmental entities such as guaranty agencies. Nor is there any explicit right to judicial review of guaranty agency decisions in the Higher Education Act. As a result, FFEL borrowers whose loans are held by guaranty agencies have no clear way to challenge an erroneous closed school discharge decision from a guaranty agency.

The Rule addresses these issues by, among other things, providing automatic closed school discharges to eligible borrowers whose schools closed on or after November 1, 2013, and who do not re-enroll in another school within three years of their school's closure. Delaying this provision means that borrowers whose loans would have been automatically discharged when the Rule was scheduled to be implemented—as well as those whose loans would be discharged later during the delay—will instead continue to be burdened with debt for programs they could not complete. The Rule also provides FFEL loan borrowers who apply to a guaranty agency for a closed school discharge a right to seek review from the Department. Delaying this provision means that borrowers whose discharges are erroneously denied will also be burdened with debt that should legally have been discharged. They will have no recourse to correct a decision that

²⁷ 20 U.S.C. § 1087(c)(1).

²⁸ See Comments from the Legal Aid Community to the U.S. Dep't of Educ. re: Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations at 53, Docket ID ED-2015- OPE-0103 (August 1, 2016), available at https://www.nclc.org/images/pdf/special_projects/sl/comments_legal_aid_docketid-ED-2015-OPE-0103.pdf [hereinafter, Comments of the Legal Aid Community on Borrower Defense NPRM].

²⁹ See Paul Fain, *Best of a Bad Situation?*, Inside Higher Ed, (Dec. 9, 2014), available at <https://www.insidehighered.com/news/2014/12/09/feds-respond-criticism-bid-ecmc-buy-most-cornithian>.

³⁰ 34 C.F.R. § 682.402(d).

may be contrary to law.

The Department estimates reflect that if the Rule is not delayed, then between July 1, 2017 and July 1, 2019, borrowers whose schools shut down before they could complete their studies would have an estimated \$381 million of loans cancelled as a result of the automatic closed school discharge provision.³¹ While the Department has noted that the federal government will save this amount by delaying the effective date,³² it fails to account in its cost-benefit analysis for the fact that this will necessarily be at the cost of the borrowers who were the intended beneficiaries of the Rule. In short, the Department’s current and proposed delay of the closed school provisions of the Rule mean that borrowers whose schools closed suddenly will be left owing \$381 million in debt for which Congress has decided they should not be legally responsible.

Borrowers face the risk that during the delay and re-write, the Department could eliminate the new closed school discharge provisions, costing these borrowers approximately \$381 million plus future interest and consequential costs. But even if the Rule is only temporarily delayed, in the meantime borrowers will be subject to the wholly unnecessary financial stress and real costs of responsibility for debt that Congress has decided they are not and should not be legally responsible for. As long as the delay lasts, these borrowers will continue to be subject to monthly bills and mounting interest. For many low-income borrowers struggling to pay for basic necessities, including heating and housing bills, continued student loan bills and collections will cause cascading financial consequences.

Additionally, the many harmed borrowers who cannot afford the debt and are in default face potentially devastating consequences. Defaulted borrowers are subject to snowballing collection fees and aggressive debt collection practices that can trap them in poverty, including garnishment of their wages and seizure of Social Security and Earned Income Tax Credit payments. Defaults also tarnish borrowers’ credit histories—which often drives up insurance and borrowing costs and creates barriers to employment and housing. Borrowers who default are also ineligible for further federal student aid, preventing them from getting a second chance at an education. Thus, even if borrowers are later approved for discharges, the delay will cost them severely.

b. Delaying the Rule Harms Borrowers Entitled to False Certification Discharges

³¹ See 82 Fed. Reg. at 27,621 (citing estimate of “\$381 million for cohorts 2014-2016 attributable to the regulations providing for a three-year automatic closed school discharge”); see also 82 Fed. Reg. at 49,118 (same), 82 Fed. Reg. at 49,157 (same).

³² See 82 Fed. Reg. at 27,621 (“Postponing the effectiveness of the final regulations will help to avoid these significant costs to the Federal government . . .”).

Similarly, delaying implementation of the false certification discharge provisions in the Borrower Defense Rule harms borrowers whose eligibility for federal student loans was falsified by schools taking advantage of them to access federal loan dollars. Delaying these provisions means these borrowers will at minimum be left burdened by mounting invalid debt during the delay, and will bear the cost of the invalid loans in their entirety if the provisions are not included in a revised rule. As with the closed school discharge provisions, delay of the false certification provisions is unjustified because the Department has not considered the cost of delay to borrowers. Further, the legality of the false certification provisions is not clearly at issue in the pending litigation cited as justification for the delay.³³

While the HEA requires that the Department “shall discharge” the loans of borrowers whose eligibility for federal student loans was falsified by their schools,³⁴ false certification regulations had not kept pace with changes to eligibility criteria for federal student loans. As a result, while the law now provides that after July 1, 2012, most students without high school diplomas or equivalencies are ineligible for federal aid, the implementing regulations failed to recognize that borrowers were entitled to false certification discharges if their schools falsely certified that they had a high school diploma or equivalent for purposes of loan eligibility.³⁵

This type of false certification has become increasingly common. Unscrupulous higher education companies either simply lie and say that students have high school diplomas, or direct students to online diploma mills that the school knows to be fraudulent, but uses to certify the student for loans.³⁶ For example, in 2016, the Department took enforcement actions against 23 Marinello Schools of Beauty campuses for precisely these sorts of violations.³⁷ In 2017, a court entered a \$20 million judgment against another school, FastTrain College, and its president for repeatedly and knowingly submitting fake high school diploma and GED information to receive improper federal Title IV funds.³⁸ The court described the impact of FastTrain’s fraud on students, to whom the school lied about their eligibility for aid and the validity of fake diplomas, as “abhorrent” and observed that “[t]he student victims” were “aggressively recruited” and were “vulnerable . . . young people who, for whatever reasons, had not graduated high school.”³⁹ It further found that the school’s scam left students with “debt that will be enormously difficult to

³³ See 82 Fed. Reg. at 27621 (citing judicial review of some portions of borrower defense rule in *CAPPS v. DeVos*, No. 17-999 (D.D.C. filed May 24, 2017) as basis for delay).

³⁴ 20 U.S.C. § 1087(c); see also 34 C.F.R. §§ 682.402(e)(3)(ii)(A); 685.215(c)(1)(i).

³⁵ Pub. L. No. 112-74, 125 Stat. 786 (Dec. 23, 2011); 20 U.S.C. § 1091(d). See also 81 Fed. Reg. 39,330, 39,377 (June 16, 2016).

³⁶ See Press Release, Fed. Trade Comm’n, *FTC Action Halts Online High School Diploma Mill That Made \$11 Million Selling Worthless Diploma to Students* (Sept. 19, 2014).

³⁷ Press Release, U.S. Dep’t of Educ., *U.S. Department of Education Takes Enforcement Against Two School Ownership Groups* (Feb. 1, 2016).

³⁸ *United States v. FastTrain II Corp.*, Case No. 12-CIV-21431, 2017 WL 606346, at *9-10 (S.D. Fla. 2017).

pay off with what they can earn working the low-level jobs for which they are qualified.”⁴⁰ While the Department was able to recoup loan amounts it disbursed to FastTrain, the false certification rules in place before the 2016 amendments fail to ensure that the student victims can receive relief from these same loans.

The 2016 Rule closes this loophole and brings the false certification discharge regulation in line with current statutory requirements for loan eligibility by making it clear that borrowers are eligible for discharges if their schools falsely certified that they had high school diplomas for purposes of loan eligibility.⁴¹ The Rule also provides a clear pathway to relief in some circumstances when a school falsified loan eligibility by falsely reporting that a student had satisfactory academic progress—a measure of the value the student is getting from the loan investment.⁴²

While the Rule is delayed, these borrowers are unlikely to obtain discharges that they should receive under the HEA. The Legal Aid Foundation of Los Angeles has clients in precisely this situation: their eligibility for federal loans was falsely certified by Marinello Schools of Beauty. The Department determined that Marinello arranged sham diplomas to access federal aid, yet has recently denied a number of student applications for discharge based on the Department’s interpretation of existing regulations.

The Department fails to consider the cost to these borrowers of denying discharges they are entitled to and would clearly receive, absent the delay. As part of the rulemaking proceeding, we intend to advocate for retention of these false certification amendments, rather than a return to the narrow policies that deny relief to borrowers who were defrauded and now face mounting, unaffordable debt. But, even if the Rule is only temporarily delayed and borrowers are able to obtain false certification discharges following the delay, in the meantime borrowers will bear significant costs stemming from the liability for a debt they should and could have had discharged now absent the delay.

c. Delaying the Rule Harms Students with Meritorious Borrower Defenses

Despite the long-standing existence of a right to loan relief on the basis of unlawful school conduct, the Department for over 20 years failed to provide any process through which student loan borrowers could exercise this right. As a result, the Department reports that prior to 2015, it was aware of only “a handful” of borrowers—out of hundreds of thousands likely eligible—who submitted borrower defense claims.⁴³ The Borrower Defense Rule promulgated in 2016 addresses this problem by setting forth a path for defrauded, misled, and deceived

³⁹ *Id.* at *10.

⁴⁰ *Id.*

⁴¹ 81 Fed. Reg. at 76,082.

⁴² *Id.*

⁴³ U.S. Dep’t of Educ., First Report of the Special Master for Borrower Defense 5 (Sep. 3, 2015).

students to seek relief.⁴⁴ The Rule also clarifies the authority of the Department to pursue automatic group-wide relief in cases of systemic fraud.⁴⁵

Delaying the borrower defense provisions of the Rule will harm defrauded and misled student loan borrowers in several ways. First, it deprives students with borrower defenses of enforceable procedural rights established by the Rule, as well as of valuable rights to forbearance and stopped collections while their applications are pending. Borrowers have an interest in the fair adjudication of their applications under the process set out by the Rule; this interest is plainly impaired by the delay. Valuable process rights established by the Rule include: (i) a fact-finding process that includes consideration of Department records; (ii) use of a preponderance of the evidence standard; (iii) access to records the Department considers relevant to the borrower defense; (iv) written decisions that for denials include “the reasons for the denial” and “evidence that was relied upon”; (v) reconsideration; (vi) appeals; and (vii) forbearance and suspension of collection of defaulted loans while borrowers’ applications are pending or being reconsidered.⁴⁶

These rights are especially critical given that under the old regulations borrowers’ requests for relief have often sat pending for years and been ignored or “resolved” without acknowledging the borrower’s evidence or arguments regarding school fraud. For example, a district court recently observed that the Department appeared to be attempting to evade a conclusive ruling on plaintiff’s borrower defense that had been raised over two years prior, while continuing to garnish plaintiff’s wages.⁴⁷ The Department also summarily denied the borrower’s objection to garnishment premised on the borrower defense and supported with a 29-page letter brief and 254 pages of exhibits, without even acknowledging the defense or evidence.⁴⁸ In contrast, under the new Rule, a borrower is entitled to stopped collections—and thus prevention of wage garnishment—while a borrower defense application is pending. A borrower also has enforceable procedural rights to have the Department apply a preponderance of the evidence standard and state the evidence relied upon in adjudicating borrower defenses, as well as clear rights to seek reconsideration and appeal.

Second, delaying the borrower defense provisions harms borrowers because it leaves them once again in the dark about how the Department will handle their claims for relief. They could wait it out—awaiting further guidance, potential restoration of their procedural rights and the new federal standard for eligibility, or yet another rulemaking and new set of rules—to provide clarity and potentially restore procedural protections that could enable them to effectively vindicate their rights. But waiting by itself causes many borrowers injury. Because the Department has stated that it will apply statutes of limitation to limit refunds of amounts

⁴⁴ See 81 Fed. Reg. at 76,083-86.

⁴⁵ *Id.* at 76,080, 76,084-85.

⁴⁶ 81 Fed. Reg. at 76,080-86.

⁴⁷ *Dieffenbacher v. DeVos*, Case 5:17-cv-00342-VAP-KK at 6-7 (C.D. Cal. June 9, 2017).

⁴⁸ See *id.* at 2-4.

already paid or collected on loans later found to be unenforceable,⁴⁹ waiting could prevent many defrauded borrowers with valid defenses from recovering amounts paid or collected from them on their loans during the delay. More generally, if defrauded borrowers wait to submit applications for relief pending implementation of the 2016 Rule or a replacement, they will in the meantime be left on the hook for debt that is legally unenforceable. These borrowers will suffer negative financial consequences as a result of continued liability for a debt that would be dischargeable under the Rule.

Third, because the Department has stated that its delay will also mean that borrowers with Direct loans issued during the delay cannot assert the new federal standards bases for borrower defense relief, it denies relief to those new borrowers and existing borrowers (who could consolidate to access the new federal standard) who could satisfy the federal standard but not the state law standard.

Finally, notwithstanding the Department's implication that borrowers would not be harmed by the delay of implementation because "the Department will continue to process borrower defense claims under existing regulations," the Department's own impact analysis reflects that processing claims under the existing regulations rather than the new regulations would reduce the amount of student loan debt discharged annually by nearly \$2 billion.⁵⁰ Moreover, the evidence reflects that the Department has not, in fact continued to process borrower defense applications since the change in administration on January 20, 2017, but rather that processing has come to a standstill. As the Department confirmed in its July 2017 letter to Senator Durbin, at that point there were at least 64,301 outstanding borrower defense applications and the Department had failed to approve a single application since January 20, 2017.⁵¹ More recent reports from the Department indicate that there are now more than 95,000 outstanding borrower defense applications.⁵²

d. Delaying the Rule Leaves Defrauded and Misled Students Without Access to the Courts While Statutes of Limitations on Their Claims Run

⁴⁹ 81 Fed. Reg. at 75,956 ("[T]he Department will continue to apply the applicable State statute of limitations to claims relating to loans disbursed prior to July 1, 2017.")

⁵⁰ *See, e.g.*, 81 Fed. Reg. at 76,059 (estimating that implementation of the Rule would increase successful borrower defense discharges to an annualized \$2.465 billion from \$637 million under the prior existing regulations that the Department currently seeks to preserve).

⁵¹ Letter from James F. Manning, Acting Under Secretary of Education, to Sen. Dick Durbin (July 7, 2017).

⁵² Statement of James F. Manning, Acting Under Secretary of Education, to Borrower Defense Negotiated Rulemaking Committee (Nov. 14, 2017); *see also* Danielle Douglas-Gabriel, "DeVos Calls for Another Delay of Rule to Protect Students from Predatory Colleges," Washington Post (Oct. 24, 2017), *available at* https://www.washingtonpost.com/news/grade-point/wp/2017/10/24/devos-calls-for-another-delay-of-rule-to-protect-students-from-predatory-colleges/?utm_term=.5b5554896ed5 (discussing standstill and noting approximately 87,000 outstanding applications at the time).

To insulate themselves from liability for wrongdoing, and to prevent the Department of Education, accreditors, and law enforcement agencies from learning about complaints and settlements, predatory schools have increasingly used forced arbitration clauses and class action bans that require students to waive their rights to bring claims in court or to join together with other aggrieved students in class actions challenging systemic fraud. Delaying the arbitration provisions in the Rule leaves millions of students without the opportunity to hold lawbreaking schools accountable in court or to realistically access full relief for their injuries, and in the meantime the statutes of limitations on their claims continue to run.

Arbitration clauses and class action bans cause enormous harm to student loan borrowers. Yet schools require students to waive their rights as part of the fine print of their enrollment agreements, long before students know what disputes they might have with the school. A recent analysis revealed that the majority of for-profit schools now include arbitration clauses in their student enrollment agreements, though almost no public and very few non-profit schools do.⁵³ Requiring defrauded students to pursue their claims individually against their schools significantly limits access to justice.

Most students who have a valid legal claim against their school are unaware of their rights and lack the time and money necessary to pursue their claims individually against schools that have far more financial and legal resources than they do. Indeed, the Supreme Court has repeatedly recognized the importance of class actions in providing legal redress for violations of the law that may be too time- and resource-intensive to realistically challenge through individual claims.⁵⁴ Arbitration provisions make proving claims against schools all the more difficult because discovery is often limited, and borrowers and their advocates typically do not have access to prior arbitration decisions or evidence developed in those cases. Even when such decisions and evidence do exist, they are typically shielded by confidentiality requirements. Additionally, arbitration clauses and class action bans prevent information about valid disputes from reaching the Department, accreditors, and other law enforcement agencies, meaning indicators of a failing or predatory school are suppressed.

The Borrower Defense Rule would restore federal student borrowers' rights to challenge school fraud claims in court and to do so on a collective basis through class actions. The Rule thus benefits borrowers who have already been defrauded or scammed by ensuring that their opportunity to obtain relief through the courts is not unfairly denied. It also protects future students by improving the odds that school misconduct will be brought to light and by restoring the risk of liability for wrongdoing—and thus law's deterrent effect.

⁵³ See, e.g., Tariq Habash & Robert Shireman, *The Century Foundation Report: How College Enrollment Contracts Limit Students' Rights*, available at <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/>.

⁵⁴ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

As the Department previously observed, “banning class action waivers as they pertain to potential borrower defense claims would promote direct relief to borrowers from the party responsible for the injury” and “encourage schools’ self-corrective actions.”⁵⁵ While the borrower defense discharge process—if implemented—would provide an administrative means for borrowers to achieve *partial relief* for their injuries caused by illegal school conduct through discharge of their federal student loans, access to the courts would still be necessary for students to attain full relief. Full relief may include compensation for their out-of-pocket educational expenses and private student loan debts incurred, loss of Pell Grant eligibility, lost time and other consequential economic damages, as well as punitive damages and damages for emotional distress.⁵⁶

Further, delaying implementation of the arbitration provisions will not only prevent borrowers with valid claims against their school from attaining *timely* relief, but for many borrowers the delay will prevent them from accessing the courts and attaining relief *at all* due to statutes of limitations. For borrowers whose valid claims are subject to limitations periods that expire during the delay, the delay will extinguish their opportunity to bring their claim in court.

e. Delaying the Rule Harms Students Who Will Enroll in Predatory Schools and Schools at Risk of Abrupt Closure

The Rule also protects current and future student loan borrowers by deterring abusive conduct by schools, reducing the risk to students of abrupt school closures, and requiring schools to warn prospective students of poor student outcomes. School misconduct is deterred through provisions that restore school accountability for such misconduct, including limits on forced arbitration and class action bans and provisions specifying how the Department can recoup the cost of borrower defense discharges from schools that engage in misconduct. Financial responsibility standards reduce the risk to students of abrupt school closures by providing information that will help the Department to identify schools at risk of abrupt closure and take action to protect students, and by deterring irresponsible school conduct that makes abrupt closures more likely.⁵⁷ Future students are protected by new requirements to “warn students in advertising and promotional materials if the typical student experiences poor loan repayment outcomes” so that students can make more informed enrollment and financing decisions.⁵⁸

Without these provisions, financially unstable schools can continue to recruit new

⁵⁵ 81 Fed. Reg. at 39,383.

⁵⁶ See Comments of the Legal Aid Community on Borrower Defense NPRM, *supra* n. 51, at 34-36.

⁵⁷ See, e.g., U.S. Dep’t of Educ., Office of Inspector General, ED-OIG/A09Q0001, Final Report: Federal Student Aid’s Processes for Identifying At-Risk Title IV Schools and Mitigating Potential Harm to Students and Taxpayers at 15 (Feb. 24, 2017); see also 81 Fed. Reg. at 76,050 (explaining that the financial responsibility provisions “introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist”).

⁵⁸ 81 Fed. Reg. at 75,926.

students and load them up with loans without adequate protections in place to alert students to the risk that their schools may close, or to ensure that any closure will be adequately managed. In short, delaying these provisions allows the widespread predatory school conduct and abrupt school closures that prompted the rulemaking to continue unabated, harming more students, particularly those students who are already most financially vulnerable.

V. Conclusion

Thank you for consideration of these comments. If you have any questions about these comments, please contact Abby Shafroth (ashafroth@nclc.org) or Robyn Smith (rsmith@lafla.org).