

MEMORANDUM

Date: October 22, 2021

To: U.S. Department of Education

From: Persis Yu and Joshua Rovenger, Negotiators for Legal Assistance Organizations that Represent Students and/or Borrowers

Re: Borrower Defense Regulatory Proposals

We support many of the changes that the Department has included in issue papers 6-8 and we appreciate its stated commitment to protect borrowers. As discussed at session 1 of the negotiations, and summarized below, there are a number of ways to dramatically improve the efficacy of the borrower defense proposals. Moreover, there are a number of additional reforms that the issue papers do not currently address that are warranted, including: (1) the Department should provide more detailed justifications for borrower defense decisions, (2) it should clarify that it can reopen a denied application at any time, and (3) it should improve transparency by routinely releasing borrower defense data.

Proposals made orally during Session 1.

As discussed at Session 1 of the negotiation, there are a number of ways to strengthen the Department's proposals that would both protect borrowers and taxpayer dollars. Specifically:

- A borrower should not be forced to have their claim denied before they can assert a borrower defense under state law. Instead, a borrower should be able to do so in the first instance.
- We applaud the Department's inclusion of a group discharge process. We ask that the Department include additional advocates for borrowers – such as municipalities, legal aid organizations, and consumer advocates – in the regulation, and include guardrails to ensure that relief for groups of similarly-situated borrowers is properly and timely considered.
- The Department should include a specific time-limit by which it must decide any individual and group borrower defense claim (we recommend 180 days for individual claims). Further, the Department should automatically grant relief if it fails to comply with the time limit. This change should be retroactive to provide relief to the borrowers who have waited multiple years to get a decision on their application. Finally, if the Department transfers an individual application into the group process, it should provide notice to the borrower.
- The Department should eliminate the concept of “partial relief.” The Department has not identified any concrete instances in which partial relief is appropriate. And, it has abused the availability of “partial relief” in the past. This change is particularly appropriate since the concept of “full relief” is a misnomer; a borrower who lost has significant time and out-of-

pocket money, and who potentially incurred private debt, is never actually made whole even if their federal loan is fully discharged.¹

- The Department should provide a remedy for borrowers whose loans are unlawfully collected during their borrower defense forbearance to account for the cascading consequences that often follow from involuntary collection (like being unable to pay rent or other bills).
- The Department should halt interest accumulation as soon as a borrower applies for a borrower defense.
- We agree with the Department's decision to eliminate a statute of limitations for borrowers to assert a claim. However, a borrower should be able to assert a borrower defense at any time even if they have no outstanding Direct Loan.

Additional Proposal 1: The Department should identify requirements for its notices of decision.

Background: The Department's proposal does not currently include requirements for its notices of decision. However, as its 2016 regulations recognized, basic due process requires that a borrower understand how the Department renders its decision. *See* 34 C.F.R. § 685.222 (e)(4) (requiring a written notice of the "reasons for the denial" and "the evidence that was relied upon.")

The Department's practice over the past few years is concerning. As a federal Judge explained, after the Spring of 2020, the Department "began sending out blanket denials of borrowers' claims – going so far as to send many students the exact same form denial letter. Many of the form letters denied relief due to a "lack of evidence," despite the extensive evidence submitted, even in cases where other government enforcement agencies had found fraud."² In other words, the Department provided "perfunctory, alarmingly-curt denial notices."

The Department's proposal to re-instate a reconsideration process only enhances the need for a fulsome notice of decision. That is, a borrower cannot effectively seek reconsideration of a decision – or otherwise appeal a decision – if they do not understand why the Department denied a claim in the first place.

Proposal: The Department should bolster its requirements for its notices of decision. Other agencies provide examples on how to do so.

For example, it could include a requirement that the Department include "a statement of the findings of fact and conclusions of law, with reasons and bases therefor upon each material issue of fact, law, or discretion presented on the record." 29 C.F.R. §1955.41. Or it could draw from the SSA and require "a written decision that gives the findings of fact and the reasons for the decision." 20 C.F.R. § 404.953. At a minimum, the Department should explain to the borrower what evidence it considered, any evidence it had in its possession but excluded from review, what law it applied, and all findings of fact and conclusions of law.

The Department's notice should also clearly inform borrowers of their right to request reconsideration of a denial and outline all possible grounds for reconsideration. The notice should inform borrowers that, if the denial is upheld on reconsideration, they have a right to challenge the

¹ At a minimum, the Department should impose a clear and convincing evidentiary standard to overcome a presumption of full relief.

² *See Sweet v. Cardona*, No. 19-cv-03674, ECF No. 146 (N.D. Cal. Oct. 19, 2020)

decision in federal court. Finally, the Department's notice should clearly explain what will happen with the borrower's loans following a denial including when the loan will re-enter repayment and what the monthly repayment amount will be.

Additional Proposal 2: The Department should explicitly state that it can re-open a denied claim at any time.

Background: In its 2016 regulations, the Department included a provision that "The Secretary may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision." 34 C.F.R. § 685.222(e)(5)(ii). However, in 2019, it eliminated this language, and narrowed the circumstances under which the Secretary could reopen a claim to instances in which there was a final judicial or arbitral decision. 34 C.F.R. § 685.206(e)(7).

The narrowing in 2019 is problematic given the possibility that new evidence may warrant the granting of a previously-denied borrower defense. Indeed, as the Department explained in enacting the 2016 Rule, "We believe that if the Department becomes aware of new evidence that would entitle a borrower to relief under the regulations, then the borrower is entitled to relief regardless of the passage of time." 81 Fed. Reg. 75926, 75969 (Nov. 1, 2016). In many cases, this new evidence will be in the Department's exclusive possession (and thus a borrower would not even know that they should re-apply based on that new evidence).

We also think that the 2016 language was too narrow. Specifically, it does not explicitly permit the Department to reopen a claim if the Department failed to properly consider the allegations in the first instance. This is particularly problematic in light of the Department's past perfunctory denial notices, as described above.

Proposal: We propose that the Department adopt language that it retains broad discretion to reopen any denied borrower defense claim. The Department should make clear that this applies to all borrower defense claims regardless of when the loans were first disbursed. To preserve a borrower's right to federal court review, the Department should also note that a decision following reconsideration constitutes a final agency action notwithstanding the Department's ability to re-open a claim in the future. Finally, the Department should clarify that a reaffirmed denial following a re-opening constitutes a separate final agency action.

Additional Proposal 3: The Department should require routine disclosure of borrower defense data.

Background: The borrower defense regulations do not require the Department to disclose claims-related data. However, as past requirements for data disclosure have shown, these data are essential for borrowers and advocates to ensure that the Department is fulfilling its obligations under the HEA. They are also critical for Attorneys General who can use the information to protect their citizens.

For example, the FY 2018 Senate Labor, HHS, Education, Appropriations Subcommittee required the Department to temporarily provide quarterly reports detailing its progress in deciding borrower defense claims. This data showed that the Department was failing in its responsibility to timely decide claims. Similarly, litigation has required the Department to release information related to its borrower defense process. In one case, the data confirmed that the Department had been

unlawfully collecting on borrowers (both in contravention of its own policy and in violation of a federal court's injunction).³

Proposal: The Department should include a requirement that it release borrower defense data every quarter. At a minimum, the Department should report out the number of claims that have been granted and the number of discharges that have been effectuated; the number of pending applications; the average length of time an application has been pending; the amount of money discharged and the amount of money implicated by the pending applications; the volume of granted and pending claims by state; the states where claims are pending; and the number of granted and pending claims for schools subject to over 50 borrower defense applications.⁴

³ See generally *Calvillo Manriquez v. Cardona*, No. 17-cv-07210 (N.D. Cal.).

⁴ The Department could also consider adding a provision that would require disclosure of borrower defense allegations and evidence (with identifying information redacted) to its own enforcement office, the Consumer Financial Protection Bureau, and other government agencies authorized to enforce student and consumer protections.