



August 12, 2022

Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave. SW
Room 2C172
Washington, DC 20202

Dear Mr. Gaina:

On behalf of the undersigned organizations, we write to offer our comments on the proposed changes to targeted forgiveness programs under Title IV of the Higher Education Act (HEA) offered by the Department of Education (Department), as detailed in Docket ID ED-2021-OPE-0077.

In previous comments on Department rulemakings covering many of the issues in this notice of proposed rulemaking (NPRM), our organizations have expressed our support for enhancing the protections available to borrowers.

This is particularly true for those borrowers who are unable to repay their loans due to unique changes in their personal circumstances or who should not be required to repay loans that resulted from the predatory or deceptive actions of the institutions they attended. Making sure that students and borrowers have access to reliable, effective and targeted safeguards is an important use of the Department's regulatory authority. We appreciate the efforts the Department has undertaken to alleviate the burden on students and borrowers in this NPRM.

For that reason, the undersigned associations are broadly supportive of the goals of the proposals within the NPRM. To ensure that these proposed changes function as intended, it is important that there is clarity as to how they will be operationalized and a clear understanding of the likely consequences of making these changes. We offer the below comments to ensure that the proposals offered in the NPRM work as intended and provide fair treatment for all involved parties.

These comments will not directly address the changes related to interest capitalization or total or permanent disability discharge. There is support for both provisions as drafted.

Additionally, while outside the specific scope of this NPRM, it is worth noting that the changes proposed in the NPRM would significantly expand the availability of, and eligibility for, existing benefits to borrowers. While we support these changes as the best available way to assist borrowers, the continued lack of legislative action to

comprehensively address federal student loan repayment has resulted in a system with little coordination; a lack of understanding of who should, and who does, benefit; and the likelihood of major policy reversals and the accompanying confusion with each change of administration. We understand the Department, in lieu of congressional action, is using the tools at its disposal, but borrowers would benefit most from a revamped student lending and repayment system that looks at all pieces holistically.

Borrower Defense

Any borrower who was induced to enroll and take out loans for their education due to fraud or substantial misrepresentation by an institution deserves to have those debts forgiven and any equivalent eligibility for federal student aid restored. Similarly, if borrowers have been granted a defense to repayment, it is equally reasonable that the Department should seek to recoup those funds from the institution responsible, where possible.

These are significant steps, and the underlying processes should be carefully constructed to produce the best possible outcomes. The Department in this NPRM has made clear that, where there are conflicting interests, protecting the borrower takes precedence. This is both appropriate and understandable. In drafting the NPRM in this way, though, the text creates areas of ambiguity that may have negative unintended consequences for institutions acting in good faith and in compliance with the spirit of the proposed regulations. The following comments are intended to raise these areas of concern in an effort to strengthen the rules:

Omission of Fact: The NPRM proposes a new category under misrepresentation, omission of fact, which would serve as the basis to assert a borrower defense claim. The new category would require that any omission of fact be substantial and aligned with similar circumstances that are currently used to determine misrepresentation. The intent of the Department here is clear and unobjectionable, but the practical implications for institutions are more challenging. While an intentional misrepresentation is easily understood, it is less clear when information is omitted specifically for the purpose of misleading a prospective student. We would ask that the final rules provide additional clarifying language and examples more strictly defining the circumstances under which an omission of fact would violate the new standard.

Aggressive and Deceptive Recruiting: The language in the NPRM is broadly written, with a goal of ensuring any type of aggressive or deceptive recruiting is captured by the regulations. As a result, this language would be subject to a great deal of interpretation by the parties involved. Standard administrative actions by institutions, such as notifying students of impending deadlines for enrollment or financial aid, counseling students regarding the necessity of borrowing to enroll, or failing to respond regarding the availability of financial aid where a prospective student's financial circumstances may be unknown to the institution, would seemingly fall afoul of the new regulations. In

publishing a final rule, the Department should make clear where the lines are drawn between necessary operations related to enrollment and financial aid and the aggressive and deceptive recruiting measures the Department is attempting to address in this NPRM. Similarly, the NPRM reasonably prohibits institutions and their agents from using threatening or abusive language as part of the recruitment process. While we support this prohibition, it is important to note that what may constitute threatening or abusive language can be highly subjective and open to individual interpretation. The Department should make clear in the final rule that, where the use of such language is asserted as part of a borrower defense claim, that objective documentation of the language, to the extent practicable, is relied upon in making a determination.

Definition of a Prospective Student: The definition of a “prospective student” in the NPRM includes “any individual...who has been contacted...indirectly through advertising about enrolling at the institution.” While the intent appears to limit the use of deceptive advertising, drawing the definition of a prospective student so broadly as to include anyone who has viewed or received an institution’s advertising is impractical. Given that the individual would have had to enroll in an institution in order to have the basis for a borrower defense claim, and that the NPRM language around misrepresentation and recruiting are strong enough to encompass misleading advertising, this portion of the definition of a prospective student is unnecessary and should be removed.

Records Retention: The NPRM proposes to allow the Secretary to seek to recover losses related to borrower defense claims from institutions within six years of a student’s last date of attendance at an institution. Notification to an institution of an assertion of a borrower defense claim would pause this six-year period, which is an improvement on previous proposals to restart the period. However, despite the assertions in the NPRM that this imposes no requirement on institutions to maintain records past the three years currently identified in the General Education Provisions Act, as a practical matter, institutions will now need to maintain relevant records for six years in case they need to defend themselves against efforts to recoup funds.

Of greater concern is the new language contained in the NPRM that effectively lifts the six-year limitation on the recovery of funds in cases where there has been a judgment by a court or an administrative tribunal. While a judgment may serve as a sufficient basis on which to grant defense to repayment to borrowers, in seeking to recover funds from institutions, the NPRM otherwise provides institutions the opportunity to rebut the claims made against it. Institutions will not be able to do so effectively with no limitation on the duration for which records must be maintained. The final NPRM should establish a single, consistent period in which the Department can seek to recoup funds from institutions. Doing so will allow institutions to implement appropriate policies in response.

Institutional Reconsideration Process: The NPRM proposes to allow individual or group borrowers to request reconsideration of borrower defense claims that were fully or

partially denied “if there were administrative or technical errors, new evidence became available, or the borrower or State requestor wishes the claim to be reconsidered under a State law standard.” This is a sensible measure to allow borrowers every opportunity to make their claims. The NPRM does not include a similar provision for institutions from which the Department would recover money. Given the reasonable nature of the criteria for which reconsideration would be granted to borrowers, and the fact that reconsideration of the decision to recover funds from an institution would not impact determinations of borrower defense claims for borrowers, the final NPRM should provide an equivalent reconsideration process for institutions. This reconsideration process should use the same grounds for seeking reconsideration as the NPRM makes available to borrowers.

Public Service Loan Forgiveness

The difficulty borrowers have had in accessing the benefits of the Public Service Loan Forgiveness (PSLF) program has been the source of enormous public attention, and has highlighted the flaws in the underlying statute. The Department should be commended for using its authority under the temporary PSLF waiver to make the program work for borrowers in the public sector. Similarly, the proposals in the NPRM to make permanent many elements of the current waiver will do much to restore public confidence in the program and ensure that it meets its intended purpose. For that reason, we hope that the Department will seriously consider either implementing the PSLF provisions in the NPRM early, or extending the current waiver through June 2023 so that there is a seamless transition into the new regulations.

Beyond this request, there is much that we support in this section. In particular, we appreciate the proposals to: expand what are considered eligible payments, including Direct loan payments made prior to consolidation; remove the requirement that borrowers be employed at a qualified employer at the time a determination is made in order to receive forgiveness; provide for a reconsideration process for denied claims; increase transparency throughout the process for borrowers; more clearly define what organizations are qualified employers; expand the types of forbearances that would apply to the 120 payment threshold; and allow the Department to make automatic determinations of eligibility without an application.

We remain concerned that many borrowers who should be eligible for PSLF by the nature of their work, such as early childhood educators or medical professionals working under contract or at for-profit hospitals, would remain ineligible under this NPRM. The Department requests comment on better ways to determine whether those borrowers would be eligible. Individual certifications by employers attesting to the fact that borrowers worked on behalf of qualifying government and nonprofit organizations, even if not directly for those entities, may address this in part. In cases where obtaining such certifications may be difficult, individual attestations could be allowed, with Departmental review of employment included as part of the overall review of whether a

borrower is qualified for forgiveness. In combination with the possibility of reconsideration, such a process could capture significantly more of those borrowers who would otherwise not be eligible.

Closed School Discharge

As with the PSLF provisions, there are numerous elements of the closed school discharge provisions in the NPRM that we support. These include: extending the period under which borrowers can file for a discharge; allowing for discharge in some cases where a teach-out plan was available; and removing the bar on borrowers re-enrolling or transferring credits to another institution.

In drafting these regulations, the Department has sought to address previous abuses, but in doing so has included language that is overly broad, with the possibility of creating unintended consequences. This is particularly true in cases where, for example, an entire community college system of a state would be administratively reorganized under a single institutional identifier. While none of the programs, faculty, missions or course offerings may change as a result of a shift in operations, such a transition could technically fall afoul of the revised closed school discharge criteria identified in this NPRM. The Department should make note of this issue and provide flexibility in the final rule, whether through a clear exemption or an individual review by the Secretary, for situations such as those described above where the closed school discharge would not appropriately apply.

Similarly, the relatively arbitrary nature of the process used to determine the precise date of an institution's closure may prevent some efforts at abuse, but will also cause confusion for students and borrowers trying to determine their eligibility for a closed school discharge, as well as hindering the ability of institutions acting in good faith to make decisions that will comply with the rules in the event of a closure.

In particular, we are concerned with the proposal to define a closed school as an institution that has closed "most" of its programs instead of an institution that has closed "all" of its programs as defined in current regulations. This new definition, coupled with the new language included under the expanded list of exceptional circumstances allowing for a closed school discharge in cases where the "school discontinued a significant share of its academic programs" proves to be concerning. This language represents a significant shift from current regulations that define closure as the closure of all programs at the institution, and not simply a reorganization of its academic offerings. In addition, the NPRM leaves the term "significant share" undefined and subject to interpretation as to what constitutes a significant share of programs.

Without standards stipulating what exactly constitutes an institution closing most of its programs, this ambiguity could give rise to numerous claims for a closed school discharge in situations where students or borrowers were not negatively impacted by the

institution's changes. Similarly, setting a threshold for the number or percentage of programs offered will have a disproportionate impact on smaller institutions that may offer a limited number of programs. Likewise, it may result in a chilling effect in which institutions do not create new programs, even where there may be need or interest, for fear that, if they are unsuccessful, ending those programs may have significant consequences under this provision. If the Department intends to allow discharges in cases where the institution continues to operate, then the criteria must set a very high threshold that is clear and transparent, with well-understood standards for determining the timing of triggering events under the rule.

We wish to reiterate the broad support for the goals of the provisions contained in the NPRM and the efforts the Department has undertaken through the rulemaking process to include all stakeholders in a comprehensive way. We offer these comments in the hopes of improving the final rule, and we appreciate your attention to them.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Mitchell", with a stylized flourish at the end.

Ted Mitchell
President

On behalf of:

ACPA-College Student Educators International
American Association of Colleges for Teacher Education
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
American Indian Higher Education Consortium
Association of American Universities
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
CCCU - Council for Christian Colleges & Universities
College and University Professional Association for Human Resources
Consortium of Universities of the Washington Metropolitan Area
Council for Higher Education Accreditation
Council of Graduate Schools
Hispanic Association of Colleges and Universities

Targeted Forgiveness Regulations Comment Letter
August 12, 2022

National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
State Higher Education Executive Officers Association