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**National Consumer Law Center**
**Comments on**
**Program Integrity: Gainful Employment**
**Proposed Regulations**
**Docket ID ED-2014-OPE-0039**

**Submitted: May 27, 2014**

## I. Introduction

On behalf of our low-income clients, the National Consumer Law Center (NCLC) is responding to the Department of Education's proposed gainful employment regulations, published on March 25, 2014 (79 Fed. Reg. 16426).

NCLC is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. Our Student Loan Borrower Assistance Project focuses on providing information about rights and responsibilities for student borrowers and advocates. We also provide direct legal services to low-income student borrowers. We seek to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.[1]

At NCLC, we see first-hand the harm caused by abusive proprietary school practices. A large percentage of the many clients we have represented attended for-profit schools. Most of these clients defaulted on federal and private student loans. Only a handful reported finding a job in the field related to their program of instruction. We also consult with legal services and other attorneys across the country who represent borrowers and report that many of their clients have been similarly harmed by for-profit schools. In addition, a large percentage of the complaints we receive through our Student Loan Borrower Assistance web site involve for-profit schools.

A large part of the blame clearly lies with schools that aggressively recruit students with false promises of job placement and employment and then fail to deliver. We therefore strongly support the Department's efforts to curb abuses in the for-profit school sector and believe that

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[1] See the Project's web site at www.studentloanborrowerassistance.org. NCLC also publishes and annually supplements practice treatises which describe the law currently applicable to all types of consumer transactions, including *Student Loan Law* (4th ed. 2010 and Supp.). These comments were written by Robyn Smith, Of Counsel with NCLC.

strong gainful employment standards are a critical part of these efforts. Borrowers who take on student debt to enroll in career education programs in all higher education sectors should have a reasonable expectation that they are in fact attending a program that is likely to lead to gainful employment.

The proposed gainful employment rule, particularly if it is strengthened as recommended below, can go a long way toward eliminating the worst programs and giving students a real chance to succeed. While we recommend a few key ways the proposed gainful employment standards should be strengthened, we primarily focus on the critical issue of borrower relief. First, we urge the Department to provide full loan discharges for borrowers who enroll in a program which a school falsely certifies will prepare graduates for employment in an occupation requiring licensure or certification. Second, we recommend that the Department provide borrowers who enroll in zone or failing programs with full loan discharges if those programs lose Title IV eligibility.

These regulations will be most effective if they are part of a comprehensive strategy to challenge fraud and abuse. We therefore urge the Department of Education to work cooperatively with other federal agencies, including the Federal Trade Commission and the Consumer Financial Protection Bureau, to challenge persistent problems and legal violations in this sector. Comprehensive and aggressive enforcement is essential at all times, but we urge particular vigilance during the implementation period for this new gainful employment system. Enforcement is necessary to reduce the rampant fraud and abuse in the proprietary school sector and ensure that federal dollars are spent productively and efficiently.

Our comments on the proposed regulations are not based on a belief that there should be just one particular model of education. As lawyers for low-income clients, we agree that there is a need to offer educational programs that meet the needs of many low-income and "non-traditional" students. The majority of current college students are "non-traditional." Most of our clients are older than "traditional" students, often with their own children. They are looking for flexible schedules and in some cases on-line courses. These regulations are essential to help ensure that these individuals will be given a real opportunity to succeed if they choose to pursue career training.

## II. The Proposed Standards and Consequences for Programs That Fail the Standards Must be Stronger

The proposed rule is long overdue in setting a definition of gainful employment. We generally support the framework in the proposed rule, which requires each of a school's career education programs to meet debt-to-earnings and cohort default rate standards to remain eligible for federal aid. However, as described in greater detail below, we believe that the Department has gone too far in allowing schools to continue to offer programs that are failing the gainful employment standards and harming students. It is shocking that the proposed regulations would allow programs to continue to profit from federal student aid when a third of their students are in default or a majority of their students do not earn enough money to repay their student loans.

It is not only possible, but essential to set a high bar. Otherwise, the regulations will allow the current race to the bottom to continue. Thus, although we generally support the gainful employment framework that the Department proposes, we recommend that the regulations should be strengthened in a number of ways. Although our comments focus on the need for borrower relief provisions, we also recommend (1) lowering the debt-to-earnings thresholds, (2) shortening the amount of time before a program becomes ineligible for Title IV funds, (3) capping the number of students a school may enroll in a zone or failing program; and (4) revising the certification requirement to cover all states where gainful employment programs are offered, including through distance education. Rather than providing detailed comments about each of these areas, we support the comments of The Institute for College Access and Success (TICAS) which address most of these recommendations.

### A. The Debt-to-Earnings Thresholds are Too High (34 C.F.R. § 668.403(c)(1)(i)-(iii))

The Department has defined a "passing" annual debt-to-earnings rate (D/E rate) as 8% or less, while it has defined a "failing" annual D/E rate as higher than 12%.[2] Annual D/E rates that are greater than 8% but less than or equal to 12% are in "the zone."[3] The Department justifies the 8% annual D/E passing standard by pointing to its use by mortgage lenders and other creditors.[4] However, this standard is usually intended to cover all non-mortgage debt, including car payments, credit cards and other debts. The threshold for passing annual D/E rates should be lower since most borrowers with student loans are also struggling to pay other essential debts and expenses. This is certainly true of most of our clients. Furthermore, based on this reasoning, the 12% rate is far too high for a failing standard. We recommend that the Department eliminate the zone and adopt a single threshold -- an annual D/E rate of 5% -- as a more realistic standard.

The D/E rates based on discretionary income are also too high. The Department has defined a passing discretionary D/E rate as 20% or less, while it has defined a failing discretionary D/E rate as higher than 30%.[5] The Department has defined the discretionary D/E zone as rates between 20% and 31%.[6] The Department justifies the passing discretionary D/E rate of 20% or lower based on the research of Sandy Baum and Saul Schwartz.[7] However, it does not accurately reflect the research. Baum and Schwartz concluded that the percentage of income borrowers can reasonably be expected to devote to student loan repayment increases with earnings. They noted that borrowers with earnings near the median should not devote more than about 10% to education debt repayment and that the payment-to-earnings ratio should *never* exceed 18 to 20%. Thus, once again, the Department has far exceeded these rates with its proposed passing discretionary D/E rate of 20% and its failing D/E rate of 30%. We therefore propose that the Department eliminate the zone and adopt only a single threshold -- a discretionary D/E rate over 18% -- as the standard defining a failing program.

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[2] Proposed 34 C.F.R. § 668.403(c).
[3] Id.
[4] 79 Fed. Reg. 16425, 16443 (citing Sandy Baum and Saul Schwartz, "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt" (2006)).
[5] Proposed 34 C.F.R. § 668.403(c).
[6] Id.
[7] 79 Fed. Reg. 16425, 16443 (citing Sandy Baum and Saul Schwartz, "How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt" (2006).).

We are not submitting further detailed comments regarding the thresholds or calculations of the D/E rates or other proposed gainful employment measures, but instead support the detailed comments on these issues submitted by TICAS.

### B. Schools Are Allowed Too Much Time to Improve Zone and Failing Programs Before They Lose Title IV Eligibility (34 C.F.R. § 668.403(c)(1)(iv))

Under the proposed regulations, career education programs can continue to receive federal aid for many years after the Department knows that the program is not succeeding, *i.e*. is not achieving a passing D/E rate or program cohort default rate (pCDR). A program will lose eligibility only if it fails both D/E rate measures for two out of three consecutive years[8] or fails the pCDR measure for three consecutive years.[9] A school could therefore enroll up to three years of students, without any enrollment cap, after the Department knows the program is failing. A program will also lose eligibility if its D/E rate measures are failing or in the zone for four consecutive years, thus enrolling four years of students without any cap after the Department knows that the program is in the zone or failing.[10] It is also possible under the Department's proposal for a school to remain eligible indefinitely by passing a D/E measure one out of every four years, even if outcomes for three out of four cohorts of completing students fall into the zone or fail. These examples do not even include the four-year period after the regulations first go into effect during which schools with zone or failing D/E rate measures could use an alternative D/E rate calculation based on the median loan debt of more recent graduates.[11]

The proposed rule would thus allow schools to continue to profit from federal student aid when over 30% of its students are in default or when its graduates' D/E rates are too high. Allowing schools so much time to continue to offer zone or failing programs is a recipe for disaster and could impact a large number of borrowers. These borrowers are already being harmed by a school that has failed a gainful employment measure. Most of these borrowers will end up with enormous debt and little likelihood of ever being able to pay it off. The Department's proposal goes too far and allows the schools too much time to improve. It should be first and foremost concerned about the needs of borrowers and taxpayers and the regulations should reflect these priorities.

Our clients' experiences illustrate the harm done by prolonging an unproductive, debt-ridden school experience. We have countless stories of clients staying in a program, despite very early warnings that the program would not prepare them for employment. Often these clients complained to the school while they are enrolled. Among other things, they have complained about unqualified instructors, a school's failure to provide books or other materials, the lack of up-to-date, operational or sufficient instructional equipment, and internships that do not involve any of the skills the students have learned. When they raise concerns, school staff tell many of our clients that they might as well try to finish because they have to pay back their loans anyway. Although they might in fact qualify for partial refunds, our clients often believe these

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[8] Proposed 34 C.F.R. 668.403(c)(1)(iv).
[9] Proposed 34 C.F.R. 668.403(c)(2).
[10] Proposed 34 C.F.R. 668.403(c)(1)(iv).
[11] Proposed 34 C.F.R. 668.404(g).

misrepresentations and stay in school. When they try to find work after completing, they cannot find or keep jobs because they lack the necessary skills to do so. Many of our clients are told by employers that they never hire graduates from the for-profit schools they attend.

These clients are devastated by the time and resources they waste at these schools. Even worse, they are saddled with student loan debts they cannot repay. We strongly recommend that the Department stop these programs as soon as possible. To they extent the Department allows borrowers to enroll after a program is in the zone or failing, the Department should provide full loan discharges for all such borrowers if that program loses Title IV eligibility. We discuss this recommendation in more detail in Section III(B) below.

### C. Schools Are Allowed to Enroll Increasing Numbers of Students in Poorly Performing Programs

The proposed gainful employment regulations afford few protections to students. The regulations will allow programs which the Department has determined will *not* lead to gainful employment to enroll unlimited numbers of students for up to four years (and possibly longer) before they finally lose Title IV eligibility. The regulations should be amended to require that when a program is either in the zone or failing any gainful employment measure, the school's future enrollment numbers be capped, at a minimum, at the number of enrollees the prior year.

The Department decided not to cap enrollments because it believes that the proposed mandatory warnings provide "meaningful" student protection.[12] The proposed regulations require schools to provide a written warning to enrollees and prospective students when programs are in danger of losing eligibility for the following award year.[13] The Department believes that this warning "will sufficiently enable students and their families to make informed decisions about their education investment."[14]

Although we do not object to the provision of warnings, we believe that they are unlikely to have much impact for a number of reasons. First, disclosures and warnings are generally ineffective. As we have stated repeatedly in the context of consumer credit products and other contexts, no amount of disclosure can adequately protect the public from the failure to underwrite for the basic affordability of loans and in this case for the failure to properly educate students.

The fiction that disclosures are sufficient to regulate markets and impact consumer decision making is especially apparent for less sophisticated consumers. For example, we assisted a client who was pressured into signing up for a proprietary school medical assistant program even though she dropped out of school in ninth grade and had only a sixth grade reading level. She did not complete the course, has never found work in the medical assistant field, has been in and out of homelessness and went into default on the student loans. Individuals with limited English skills are often exploited as well, including one of our clients who signed up for a

[12] 79 Fed. Reg. 16426, 16470.
[13] Proposed 34 C.F.R. § 668.410(a).
[14] 79 Fed. Reg. 16426, 16470.

cosmetology course after the Spanish-speaking school representative misrepresented that the instructors were bilingual.

Second, many consumer behavior researchers find that there is an optimism bias that affects most decision making. Consumers may hear the warnings, but assume that they do not apply to them. This is especially true when consumers are also facing hard sell tactics that contradict the message in the disclosures. The Department itself has cited its concern about aggressive, high-pressure sales techniques used by for-profit recruiters based on an investigation by the Government Accountability Office, the 2012 Senate Health, Education, Labor and Pensions Committee report regarding an investigation of 30 for-profit education companies, and numerous state attorneys general actions.[15] Many of our clients tell us that although they have been provided with disclosures, they believed the school employees' assurances that they should disregard those warnings for any number of reasons. There is no assurance that the same will not happen with the proposed warnings for failing programs

Warnings will not provide sufficient protection for students from poorly performing programs. The regulations should be amended to require that when a program is either in the zone or failing any gainful employment measure, the school's future enrollment numbers be capped, at a minimum, at the number of enrollees the prior year. In addition, as described in Section III(B) below, both the warnings and the caps must be supplemented with complete loan discharges for all borrowers who enroll in zone or failing programs that eventually lose Title IV eligibility.

### D. Clarify That Schools Must Certify that Gainful Employment Programs Meet Licensure and Certification Requirements in Each State Where They Are Offered (34 C.F.R. § 668.414)

We support the Department's proposal to require schools to certify, in their program participation agreements, that each of their gainful employment programs meets state accreditation, certification and licensure requirements necessary for a student to obtain employment in the occupation for which the program provides training.[16] This is an outcome-oriented requirement that directly connects to gainful employment. The proposed regulation does not in any way dictate the content or curriculum of a program, but appropriately requires that graduates meet the legal requirements necessary to be gainfully employed in the occupations for which they train.

We recommend, however, that this regulation be strengthened by requiring schools to make this certification for: (1) all states and metropolitan statistical regions (MSRs) in which campuses under an Office of Postsecondary Education Identification code (OPEID) are located; and (2) distance education programs in all states and MSRs where a minimum number of distance education students enroll. The Department should also require schools to certify that their gainful employment programs prepare graduates for the certifications required by a majority of employers in the applicable state and MSR. For further details, we support the comments submitted by TICAS.

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[15] 79 Fed. Reg. 16426, 16435.
[16] Proposed 34 C.F.R. § 668.414.

## III. The Regulations Must Provide for Borrower Relief

Regulations aimed at shutting off the federal financial aid stream to career education programs that do not adequately prepare graduates for gainful employment will prevent future students from obtaining insurmountable debt to attend those programs. The gainful employment regulations, however, should also provide relief for borrowers who enroll at or near the time such programs lose their eligibility to receive Title IV funds. We appreciate the Department's request for comment on borrower relief issues and hope that it will incorporate the following recommendations into the final regulations.

### A. Supplement Program Certification Requirements with a False Certification Loan Discharge Provision (34 C.F.R. § 668.414)

As discussed in Section II(D) above, we support the proposed regulation requiring schools to certify that each gainful employment program meets all accreditation, certification and licensure requirements necessary for a graduate to obtain employment, especially if it is clarified as we recommend.[17] It is critical, however, that the Department also supplement this regulation with a loan discharge regulation. Borrowers who enroll in falsely certified programs should be eligible for the cancellation of their student loans.

The Department has the authority to grant false certification discharges in these circumstances. The Higher Education Act (HEA) requires the Secretary to discharge a borrower's liability on a loan "if such student's eligibility to borrow…was falsely certified by the eligible institution."[18] When a school falsely certifies a program's eligibility, it also falsely certifies a borrower's eligibility. The Department has defined an eligible student as "a regular student enrolled or accepted for enrollment in an eligible institution . . . ."[19] The HEA therefore authorizes the Department to add this type of false certification discharge regulation.[20]

The Department's compromise authority also provides it with authority to discharge these borrowers' loans. The HEA grants the Secretary broad authority to "compromise, waive or release any right, title, claim, lien, or demand, however acquired . . . ."[21] This broad authority is reflected in the regulations, which state that "the Secretary may compromise a debt, or suspend or terminate collection of a debt, in any amount if the debt arises under the Guaranteed Student Loan Program authorized under Title IV, Part B of the Higher Education Act of 1965, as amended . . . ."[22]

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[17] Proposed 34 C.F.R. § 668.414.
[18] 20 U.S.C. § 1087(c)(1).
[19] 34 C.F.R. § 668.32(a)(1)(i).
[20] 20 U.S.C. § 1087(c)(1).
[21] 20 U.S.C. § 1082(a)(6).
[22] 34 C.F.R. § 30.70(h).

## B. Provide Full Loan Discharges and Restore Pell Grant Eligibility to All Borrowers Who Enroll in Zone or Failing Programs that Lose Title IV Eligibility

During negotiated rulemaking, the Department proposed providing partial relief to borrowers who are unable to complete their programs before they lose Title IV eligibility. It proposed paying down the loans of each eligible student by an amount that would reduce his/her individual D/E rate to a passing gainful employment D/E rate.[23] Because it felt that the borrower relief issues are complex, the Department dropped this provision from the proposed regulations. The Department instead decided that these issues warranted "further exploration" and invited comment.[24]

### 1. The Regulations Should Provide for Full, Rather than Partial, Student Loan Discharges and Reinstatement of Pell Grant Eligibility

The Department's partial discharge proposal would not adequately compensate students who enroll in a program that is failing or in the zone and loses Title IV eligibility. The harm that for-profit school borrowers will experience is *not* the difference between a passing and a failing D/E rate, which is likely to be a tiny fraction of the debts they incur. The harm goes far beyond that. Borrowers who complete their credential while the program is failing or in the zone will most likely have earned a worthless degree that will not lead to employment. Borrowers who are unable to complete because a program loses eligibility will not even earn a credential. In both cases, it is likely that the credits earned will also be worthless and non-transferable. This means that borrowers who want to continue their education will have to start over as freshmen.

Many borrowers will not re-enroll in better programs because they are reluctant to take on more debt or because they have defaulted and are ineligible for financial aid. Moreover, as the Department itself points out, federal law sets lifetime limits on the amount of grant and loan assistance students may receive. For low-income students who cannot afford to attend college without this aid, the grants and loans that were used to pay for their worthless education will constrain their options to move to higher-quality education programs. These limitations make it even more critical that students who are not able to transfer their credits obtain a full discharge of all student loans and have their Pell grant eligibility reinstated.

These borrowers will also be stuck with debts they cannot afford to repay. If they default, they will be subject to a lifetime of the government's harsh debt collection methods. In addition, as the Department notes, student loan defaults damage credit ratings and therefore affect borrowers' ability to rent or buy homes, purchase cars, and obtain credit.[25] To the extent defaulted borrowers qualify for credit, they will be required to pay higher interest rates. In addition, because employers are increasingly considering credit records in making hiring decisions, they will face an additional barrier to finding employment.

Borrowers who enroll in a poorly performing programs that loses Title IV eligibility need a fresh start. They should have the opportunity to follow their dreams and go back to school on a

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[24] 79 Fed. Reg. 16426, 16471.

clean slate. Otherwise, their decision to enroll in a low-quality career education program, often based on a lack of information or on school misrepresentations, will haunt them for the rest of their lives and make it almost impossible to improve the economic circumstances of their families.

We therefore strongly recommend that, in the event the Department decides to maintain the zone/failing D/E rate program measures, the Department provide full loan discharges to all borrowers:

(1) whose programs lose eligibility; and
(2) who are enrolled at any time after a school receives a notice from the Department that the applicable programs are passing or in the zone, pursuant to 34 C.F.R. § 668.409.

If the Department changes the measures and stops funding programs as soon as they fail a strict gainful employment standard, the Department should provide full loan discharges to all borrowers unable to complete their programs due to loss of eligibility. Under either scenario, the Department should also reinstate the borrowers' Pell grant eligibility.

Moreover, schools should be required to refund to the Department all Title IV funds paid on behalf of all borrowers who are eligible for loan discharges and grant reinstatement. It is important, however, that borrower relief be independent of any such refund provision. The Department should grant loan discharges and restore Pell grant eligibility regardless of whether a school is able to pay the required refunds. In addition, if a school fails to compensate the Department for its losses, the Department should ensure there are consequences to a school's continued Title IV eligibility.

Even full federal loan cancellations will not be enough to fully compensate many borrowers. The recommendations above are critical, but in our experience, such relief will be far from complete because so many borrowers also have private loans and institutional debts. We urge the Department to work with other federal agencies to seek solutions for these debt burdens as well, including by supporting full bankruptcy relief for private student loan borrowers.

**2. Full Loan Discharges Funded by Schools will More Equitably Allocate the Financial Risk of Failing Programs to Schools**

Our loan discharge proposal has the advantage of reallocating the risks of failing career education programs in a more equitable manner that aligns school incentives with the proposed regulation's goals. The Department's stated policy objectives are to (1) increase the likelihood that career education programs funded by the federal government will lead to gainful employment;[26] (2) reduce the likelihood that career education program borrowers will take on unsustainable student loan debt and end up in default;[27] and (3) prevent the use of misleading

[26] 79 Fed. Reg. 16426.
[27] Id. (Dep't is concerned that low-quality career education programs are "leaving students with unaffordable levels of loan debt in relation to their earnings or leading to default.").

recruitment tactics.[28] Without a complete loan discharge provision and school liability for all Title IV funds paid on behalf of borrowers who are enrolled after a program is in the zone or failing, the proposed regulations will not achieve these goals with respect to these borrowers.

As drafted, the regulations essentially place the entire burden of understanding and avoiding the risk of failing programs on borrowers. The Department proposes to allow schools to continue to enroll students in failing or zone programs for up to four years.[29] Yet, as detailed in Section II(C) above, the only "protections" the Department has proposed for these borrowers are written warnings which it unrealistically expects students to heed by withdrawing or refraining from enrolling.[30] Otherwise, the student must face the harsh consequences. Because the debt obligations will constitute a far greater share of a low-earning or unemployed borrower's income than it will of the government's or school's incomes, borrowers are least able to afford the financial risk for failing programs.

Schools, on the other hand, are in the best position to assess and avoid the risk of failing programs. They are also in a better position than individual students to absorb the financial risk. Yet, under the Department's proposal they will not incur any risk for borrowers who enroll before a program loses Title IV eligibility. While the risk of losing Title IV eligibility provides some incentive to improve a program, there is little incentive for a school to voluntarily cease operating a program even when it knows it will not be able to meet the standards. The regulations may actually encourage for-profit schools to bring in as much federal financial aid as possible by increasing enrollments (and possibly using misleading high pressure sales techniques to do so) just before the program loses eligibility.

While the government is also in a better position to absorb the financial risk, a regulation providing for full loan discharges and school liability for Title IV funds is also more equitable to taxpayers. Ultimately, taxpayers are on the hook for defaulted loans of borrowers who enroll in poorly performing programs. They benefit when those programs are shut down quickly and borrowers are provided full loan discharges which enable them to complete legitimate programs, obtain employment, repay their student loans and contribute to the economy.

### 3. The Department Has the Authority to Provide for Loan Discharges

The Department has the authority to provide for loan discharges through two alternative processes. First, the Department could move zone or failing programs into provisional eligibility status while those programs continue to receive Title IV funds. Provisional eligibility is not a new concept; the regulations provide for provisional eligibility in other circumstances. The Department, for example, may provisionally certify and later revoke institutional eligibility.[31]

[28] Id. (Dep't is concerned that "many gainful employment programs are engaging in aggressive and deceptive marketing and recruiting practices. As a result of these practices, prospective students and their families are potentially being pressured and misled into critical decisions regarding their educational investments that are against their interests.").
[29] See Section III(B), supra.
[30] Proposed 34 C.F.R. § 668.410(a).
[31] See 34 C.F.R. § 668.13(c) and (d).

If a program eventually loses eligibility under the gainful employment regulations, the Department could then revoke the program's provisional eligibility and provide false certification loan discharges to all borrowers who enrolled during the provisional eligibility period. The Department has the authority necessary to provide for such false certification discharges. As described in Section III(A) above, the HEA requires the Secretary to discharge a borrower's liability on a loan if his/her eligibility was falsely certified.[32] If the provisional eligibility of a program is revoked, then all borrowers who enrolled during the provisional eligibility period would have enrolled in an ineligible program and been falsely certified. The Department's compromise authority also provides it with authority to discharge these borrowers' loans, as described in Section III(A) above.

As a second proposal, the Department has discretion to decide which school acts or omissions constitute a defense to loan repayment and how borrowers may assert that defense.[33] The Department could define such acts or omissions to include (1) enrolling students after a school has received notification, pursuant to 34 C.F.R. § 668.409, that a program is either failing a gainful employment measure or in the zone and (2) failing to bring the program into compliance with the gainful employment measures causing it to lose Title IV eligibility.

The Department could allow borrowers to affirmatively raise this defense through an expanded discharge process. For this process, it could send simple applications to all potentially eligible borrowers. The Department should not impose high evidentiary burdens on borrowers, but instead should recognize a borrower's defense unless it has credible evidence to contradict his or her application. If the borrower meets the loan discharge eligibility requirements, the Department should fully discharge the borrower's loans.

Whatever method is used to provide borrower relief, the school should be required to fully refund to the federal government all Title IV funds for all borrowers who successfully seek discharges of their student loans. It is the school that has failed both the students and the taxpayers. It is the school that decided to continue offering a poorly performing program to students, knowing the risks of doing so. And it is the school that is in the best position to predict whether its program will become ineligible.  But borrower relief must not depend in any way upon a school's refund of Title IV funds to the Department.

In other areas, the Department requires a school to assume the financial risk that a future event will retroactively affect its Title IV eligibility. For example, schools are required to repay all Title IV funds received by or on behalf of borrowers enrolled in a gainful employment program that the school incorrectly concluded did not need to be approved by the Department as a "new program."[34] In order to ensure these schools have sufficient funds to pay the required refunds, the Department could impose financial guarantees. The HEA provides that "to the extent necessary to protect the financial interests of the United States," the Secretary may require financial guarantees in an amount "sufficient to satisfy the institution's potential liability to the

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[32] 20 U.S.C. § 1087(c)(1).
[33] 20 U.S.C. § 1087e(h).
[34] 34 C.F.R. § 600.10(c)(3).

Federal Government [and] student assistance recipients."[35]

To mire borrowers in insurmountable debt for programs that the Department knows are poorly performing is the exact opposite of the primary purpose of the proposed regulations. Borrower relief is therefore critical to the proposed gainful employment system. We urge the Department to establish some method for providing full relief to borrowers who end up in programs that do not meet the Department's gainful employment standards.

We thank the Department for its courage and persistence on the gainful employment issues and for its consideration of our comments. Please feel free to contact Robyn Smith with any questions or comments. (Phone: 617-542-8010; E-mail: rsmith@nclc.org).

[35] 20 U.S.C. § 1099c(e).