

August 26, 2016

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

Re: Docket ID ED-2016-ICCD-0075

Dear Secretary King:

On behalf of organizations that represent students, teachers, consumers, veterans, service members, civil rights, and college access, we thank you for the opportunity to comment on the Department of Education's proposed universal borrower defense application form. We appreciate the Department's efforts to improve the accessibility of loan relief for defrauded student loan borrowers. In particular, we thank the Department for proposing a path for groups of borrowers to receive the automatic loan relief they deserve *without an application*. We urge the Department to limit the need for an application to situations where information that the Department lacks must be gathered from the borrower using an application. Where the Department believes applications are necessary, we recommend that the form be easy for borrowers to find, fill out, and follow up about.

Application forms can limit the number and scope of defrauded students who ultimately receive the relief they are entitled to. A process that is not transparent can also deter defrauded borrowers from coming forward. According to the Department, only five borrowers submitted borrower defense claims since the early 1990s.¹ To improve access to relief, the application form for borrower defense should help ensure that every defrauded borrower receives the relief they deserve.

The Department should consider best practices in form design and learn from borrowers' experiences with existing Department forms and user interfaces. Based on some of our collective experience working with low-income student loan borrowers across a variety of existing forms and interfaces, we recommend the following to improve the proposed borrower defense form:

¹ U.S. Dep't of Education, Agency Information Collection Activities; Comment Request; Borrower Defense Against Loan Repayment, 80 Fed. Reg. 32944, 32945 (June 10, 2015) ("In the 20 years prior [to 2015], the Department received 5 claims for borrower defense.").

1. **Promote Awareness of the Form and Make it Easy to Find**

As we have seen, and as the Department itself has repeatedly noted, a lack of awareness of available discharges and the forms that they require can be a barrier between discharge-eligible students and relief. For example, in the wake of the collapse of the Corinthian chain of for-profit schools, which was and continues to be highly publicized, only a tiny percentage of borrowers in the streamlined relief categories have filled out the required attestation forms. As the Special Master's Fourth Report details, the Department has reached out with postal mail and email to more than 335,000 former Corinthian students, but, as of June 24, 2016, had received only 23,185 applications and granted relief to only 3,787 borrowers, or less than two percent of potentially eligible students.² From our experience with other types of student loan discharges, we also know that many borrowers eligible for false certification, closed school, and/or disability discharges have not been able to access relief and were not aware of the availability of applicable discharges.³ In the context of student loan discharges for people with permanent disabilities, the Department of Education recognized that few borrowers had been able to take advantage of recently implemented regulations that were intended to streamline the application process and that "[t]oo many eligible borrowers were falling through the cracks, unaware they were eligible for relief."⁴ To ensure that every defrauded borrower is aware of, can apply for, and receives relief we recommend the following:

- The Department should promote the application form through websites and platforms where borrowers already access information about student loans. For example, borrowers already use the "studentloans.gov" website to access online consolidation and income-driven repayment forms. A separate website at "www.myeddebt.ed.gov" houses pdf versions of Department of Education discharge applications. A third website at "fsaid.ed.gov" is used by students to manage their electronic signature for FSA programs. And a fourth website, "www.nsls.ed.gov," is the "central database" for federal student loan information. To the extent that the Department of Education chooses to maintain these separate hubs for student loan resources, visitors to each site should be notified of the availability of the borrower defense discharge and directed to the application forms..

² <https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-4.pdf>

³ The Department recognizes that "[m]any borrowers eligible for a closed school discharge do not apply," 81 Fed. Reg. 39330, 39369 (June 16, 2016), and others have estimated that only 6% of eligible borrowers ever submit a closed school discharge application, Paul Fain, *Best of a Bad Situation?*, Inside Higher Ed (Dec. 9, 2014). See also, *Salazar v. King*, 822 F.3d 61, 71 (2d Cir. 2016) (legal assistance organization reported speaking with fifty individuals who attended fraudulent beauty school who were eligible for false certification discharge, none of whom were aware of the existence of the discharge).

⁴ In an initial review, the Department of Education found nearly 400,000 borrowers who conclusively met eligibility criteria for a discharge but who still carried student loan debts; nearly half these borrowers were in default. See, Danielle Douglas-Gabriel, "Obama to forgive the debts of permanently disabled people," The Washington Post, April 12, 2016. <https://www.washingtonpost.com/news/grade-point/wp/2016/04/12/obama-to-forgive-the-student-debt-of-permanently-disabled-people/>.

- To make this discharge application accessible, the Department should make sure that it sends consistent messages in its communications about the scope of borrower defense relief. The Department’s written materials and the materials used by federal student loan servicers, collectors, and guarantee agencies should promote the form, note the availability of borrower defense and other discharges and avoid inadvertently suggesting that defrauded borrowers are without relief options. One Legal Services client recently received a notice of proposed garnishment from a guaranty agency that included potentially misleading information about her borrower defense rights. The notice contained a statement that the borrower “cannot request an administrative review” if she was “unable to find employment in the field for which the school prepared you” or was “dissatisfied with the school you attended.” Additionally, the Department of Education’s master promissory note currently includes language that “you must repay your loan even if you . . . are unable to obtain employment in the field of study for which the school provided training, or are dissatisfied with, or do not receive, the education you paid for with the loan.” These statements are likely to discourage some eligible borrowers from seeking and submitting borrower defense discharge applications.
- The Department should make the form available in paper, online, and optimized for mobile use. The text of the form should identify where borrowers can go to access the form through their preferred platform.
- The Department should also provide clear guidance to and ensure that servicers: (1) inform all borrowers who allege they were harmed by their school, either orally or in writing, with the applicable loan relief forms, including discharge applications and borrower defense forms; and (2) send the borrower defense form as an attachment to monthly student loan statements for all borrowers who attended schools that the Department believes engaged in state or federal law violations.
- The Department should ensure that all federal student loan servicers and debt collectors proactively direct all potentially eligible borrowers to the application form in the borrower’s preferred platform. This should include proactive outreach to borrowers about available relief and routine, periodic distribution of the form. The Department and its agents should also inform borrowers about options for how they can fill out the form. Two examples from our experience working with clients illustrate the importance of communicating application submission options to borrowers. One Legal Services client, “Anne,” attended the Art Institute of Philadelphia and contacted her servicer to ask about loan repayment options shortly after her school settled fraud claims brought by the Department of Justice.⁵ At the time, she was temporarily housed in a secure domestic

⁵ Department of Justice, Office of Public Affairs. “For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud, and Other Violations. <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and>

violence shelter and informed the servicer that she could not provide a mailing address but could communicate electronically or by phone. The servicer instead sent all communications by mail to the address of the borrower's abuser and the borrower's loans entered default. Another Legal Services client, "Bob," saw his monthly payment jump from \$80 up to \$800 when he was unable to re-certify for income-driven repayment. His servicer directed him to the online application and did not send a paper form. Bob is older and is not comfortable using computers; he became so frustrated in his attempts to navigate the online process that he broke his laptop in a moment of despair. Each of these borrowers was directed to the wrong application platform for their circumstances. In addition to providing options for completing the application form, the Department of Education should ensure that its contractors help borrowers access the appropriate option.

2. Make the Form Easy to Fill

From prior experience, we know that a poorly designed form will discourage eligible applicants from seeking and accessing relief. A well-designed form can reduce the administrative burden on the Department and provide clarity to impacted parties. To that end, we recommend:

- The text of the form itself should be clear and encourage borrowers to share the details of their experiences to the extent necessary for successful borrower defense claims.
- Following best practices for form design, and The Plain Writing Act of 2010, the Department should use plain language on all versions of the form. Plain language should be tailored to the intended audience – here students who were defrauded by unscrupulous colleges and training programs.
- The Department should also test the form for consumer comprehension and usability, to ensure all students who attend various institutional levels and types are able to comprehend and complete the form. While government forms are often written at an 8th grade reading level to ensure accessibility, according to one readability index, the prompts in this form require up to 24 years of education to understand.
- All versions of the form should also be available in languages other than English, particularly in Spanish and other languages commonly used by borrowers.
- The Department should avoid language that requires applicants to interpret complex legal concepts. For example, in Section III, one category of misrepresentation is "program cost and nature of the loan." The "nature of the loan" prompt is vague and does not include plain language examples such as the common misrepresentation that a school program was "free" to the borrower, the partial truth that "financial aid" was available to cover a borrower's costs, and the omission of the fact that "financial aid" includes loans that the

borrower must repay. We know from experience that when application forms require borrowers to apply vague or complex legal terms, students struggle to complete the forms and servicers struggle to administer the programs. For example, one Legal Services client qualified for \$0 payments under any income-driven repayment plan because she was a retiree whose sole source of income was a non-taxable pension. For years, the client made partial payments using whatever she could save from her exempt income. She could not even cover the interest and soon defaulted. Through an AARP tax advice program, she learned that she did not have any taxable income, and with assistance, she submitted an income-driven repayment application. Still, when servicers asked her to list all of her “taxable income” in an addendum to her income-driven repayment application, she panicked and felt unqualified to answer. The servicer could not help her determine whether her income was taxable or what the client should include in her addendum. For the borrower defense application form, the Department should use plain language and clear illustrative examples so that borrowers can complete the application and servicers can administer relief without needing legal advice.

- One common barrier to the completion of forms is length. Lengthier forms may require a “roadmap” so that borrowers can know what to expect and allow for the time to complete the application process.
- Any “yes” or “no” options on the form should be clearly marked as distinct and placed side-by-side. The Department should also place consequences of each option directly below the choice, rather than in the preceding text.
- Electronic versions of the form should use skip-logic to expedite sections of the form that are not necessary for every borrower. For paper versions of the form, however, the Department should take care that skip-logic does not render the form confusing.
- The Department should invite borrowers who use an electronic application platform to automatically pre-populate “Borrower Information” and “Program Information” by using an FSA ID to link to a NSLDS account. However, this option should not be required as some users struggle to use the FSA ID interface. Pre-filling functionality currently exists on the Department’s online consolidation and income-driven repayment application forms and the Department’s repayment estimator tool, all of which are available at <https://studentloans.gov/>. Pre-filling functionality also exists for FSA ID users who want to file complaints through the Department’s new feedback system.
- The Department should ensure that all fields are flexible enough to capture unique circumstances. For example, the draft form does not allow a borrower to indicate that she attended multiple programs. It also does not allow the borrower to indicate that she attended school for years with gaps in attendance.

- The Department should use the form to help inform borrowers about the effects of filling out the form. For example, it should clarify the effect of submitting a form on a borrower's statute of limitation for borrower defense.
- The Department should create and use a database, similar to the closed school database, for judgments, administrative decisions, and other state and federal enforcement activity. This database should be used to identify when a judgment exists against the applicant's school, rather than relying on the borrower to identify such judgments. The proposed form asks borrowers to identify if there "is a judgment against your school in a Federal court, a State court, or in front of an administrative board." Legal databases are expensive and eligible students may not have the legal research skills to access the information required to answer this question. The Department is already required to review these types of decisions and, in some circumstances, to suspend collection and notify students. We have seen few successful instances of borrowers receiving notice and, in practice, many borrowers continue to pay or go into default on discharge-eligible loans because they are unaware of available relief. For the borrower defense application form, borrowers using an electronic platform should be able to use their program information to find and pre-fill information about relevant proceedings at the state and federal levels.
- The form should capture the breadth of available bases for relief. Eligible borrowers may be discouraged if they do not see their circumstances described on the form. Currently, Section III of the form lists a few types of misrepresentations and repeatedly asks if a borrower chose to enroll in a school based in part on that particular type of misrepresentation. The limited list excludes important categories of misrepresentations such as accreditation issues. The reliance formulation also focuses on the enrollment decision and excludes students who were persuaded to enroll for additional courses or dissuaded from dropping out because of misrepresentations, for example if a school misrepresented a student's refund rights. For example, one Legal Services client, "Diane," enrolled into an ultrasound technology program at a local for-profit college. As an older student returning to school, Diane hoped to start a new career right away and the school assured her that she would be able to sit for the ultrasound certification exam and work in her field of study upon graduation. Little did she know that her program was not properly accredited, which meant that she would need two years of extra experience after graduating in order to even sit for the certification exam that most employers require before hiring. Had she attended a program that was properly accredited, she could have been work-ready upon graduation. Determining whether the school or program is properly accredited is not a burden that a student should have to bear. Students will likely defer to the school's representations about accreditation issues and relying on false information can seriously disadvantage students.

- There are a number of other common areas of school misconduct that the form does not ask applicants about, including all the areas that we indicated in prior proposed forms we provided to the Department, which we are attaching at Attachments A and B. These areas include:
 - Whether the school misled a borrower about likelihood of promotion in a current job based on the training provided;
 - Whether the school misled a borrower about the earnings, job placement rates, and graduation rates of prior graduates.
 - Whether a school misled the student about providing externships that would utilize skills applicable to employment in the relevant occupation. For example, one legal services organization had multiple clients from a school that provided externships for medical assistant trainees, but the trainees only mopped and cleaned and did not use any of the medical assisting skills necessary for employment.
 - Whether a school misled a student about whether a past criminal record would affect the student's job prospects.
 - Whether language skills or limited English-proficiency would affect job prospects.
 - Issues regarding whether the program will qualify the student in occupations that require licensure.
 - Whether a school misled a student about his or her rights under federal or state law, such as cancellation rights, refund rights, right to complaint to a state agency, etc.
- The form currently presents an unnecessarily restrictive view of the reliance standard: it lists six discrete types misrepresentations, presents a problematic "other" category, and asks borrowers if they chose to enroll in a school based in part on misrepresentations regarding each of these subsections. The form should include an instruction that borrowers can provide information about multiple types of misrepresentations, including misrepresentations about issues not expressly itemized in the form.
- The form should capture the breadth of eligible applicants. The student-focused language may be read to exclude relief for Parent Plus borrowers.
- The form should use an intuitive ordering system that prompts borrowers to relate information in the order that it occurred, beginning with their recruitment into the school

and proceeding through their experience obtaining job placement assistance and/or attempting to transfer credits. The form also places the option to choose forbearance at the bottom of the form, making it more likely that a borrower may overlook this option or accidentally choose it to complete the form rather than make an informed choice.

- The Department should provide support structures for borrowers who need assistance filling out the form, including a help line, a chat function, a search function, and a frequently asked questions section. Assistance providers should be evaluated by consumer feedback.
- The Department should encourage students to submit additional pages as necessary in writing or ensure that a fillable pdf has sufficient space for students to provide thorough and detailed information.

3. Provide Simple Method for Borrowers to Follow-up About Submitted Forms

- The Department should be transparent about what borrowers can expect. Borrowers should be well informed about what will happen after they submit an application. Either on the form or in related materials that accompany the form, the Department should provide the relevant timelines and information about how borrowers can track the status of their application form and who they should call for updates and follow up.
- The Department should provide information about forbearance alongside a menu of other options and make clear that borrowers can seek additional assistance after submitting this form to obtain more information about forbearance. For low-income borrowers with sufficiently low earnings, income-driven repayment plans can lead to \$0 monthly payments and accrue toward eventual loan forgiveness. Low-income borrowers may be disadvantaged by selecting forbearance over income-driven repayment. In addition, the Department should ensure that borrowers who are currently making payments pursuant to a rehabilitation agreement can continue to do so, and explain this option. The decision of whether to request forbearance may be more complex for the borrower than the form suggests. The Department should make clear the implications of forbearance and include consumer information about income-driven repayment.

To help the Department meet these objectives, we are including alongside these comments two model forms that were developed for student loan borrowers who were defrauded by unscrupulous schools.

Thank you again for your work to help defrauded borrowers and protect taxpayers. We believe these improvements would help students and could prevent future fraud. We look forward to continue working with the Department on this important issue.

Sincerely,

American Federation of Teachers AFL-CIO

Americans for Financial Reform

Empire Justice Center

Higher Ed, Not Debt

Housing and Economic Rights Advocates

Legal Aid Foundation of Los Angeles

Legal Services - NYC

National Consumer Law Center, on behalf of its low-income clients

Project on Predatory Student Lending, Legal Services Center of Harvard Law School

The Institute for College Access and Success

U.S. Public Interest Research Group

Veterans Education Success