

**Comments of the
National Consumer Law Center
(on behalf of our low-income clients)**

to the

**Department of Education
on Notice of Proposed Rulemaking
79 Fed. Reg. 46640 (August 8, 2014)**

Docket ID ED–2014–OPE–0082

Submitted September 8, 2014

The following comments are submitted on behalf of the National Consumer Law Center’s low-income clients. The National Consumer Law Center (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. NCLC’s Student Loan Borrower Assistance Project provides information about student rights and responsibilities for borrowers and advocates and provides direct legal representation to student loan borrowers. Most of the clients we represent are low-income borrowers living in Massachusetts. We also work with other advocates across the country representing low-income clients. In addition, 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.

The following comments address the Department’s proposed regulations defining “adverse credit history.” We agree with the Department’s stated goal of serving the three public interests: (1) ensuring greater access to higher education for all students and families; (2) ensuring that borrowers do not take out loans that they will be unable to repay without hardship; and (3) protecting the Federal fiscal interest by ensuring that borrowers repay their student loans. Unfortunately, the proposed regulations fail to balance those three goals and, specifically, fail to protect PLUS loan borrowers from taking on excessive amounts of unaffordable debt. It is well within the Department’s power to utilize an ability-to-repay criterion for determining eligibility for PLUS loans and to amend its definition without a change in statute. Therefore, we urge the Department to do so now.

A. The Department of Education Should Ensure Basic Consumer Protections for Parent PLUS Borrowers

The purpose of the Higher Education Act goes beyond giving individuals an opportunity to access secondary education. While access is enormously important, Congress did not intend burdensome lifetime debt to be a condition of educational opportunity. In fact, Congress recognized the harm that students face when they take out loan they will be unable to repay, and determined that economic destruction is not real opportunity. In Committee Report H.R. REP. 102-447, Congress stated:

The Committee is particularly concerned about the impact of increased student loan indebtedness. . . . [I]t is hard to argue that the opportunities of two students have been equalized if the low-income student completes postsecondary education with a substantial loan debt burden....¹

¹ H.R. Rep No. 102-447 *reprinted in* 1992 U.S.C.C.A.N. 334

This concern about debt applies just as strongly to parents. In fact, the problem may be even greater for parents because parents are not investing in their own future earning potential. In 1992, Congress eliminated the annual borrowing limit for parents but, in order to protect parents, it restricted eligibility to parents without an adverse credit history and authorized the Department to impose other eligibility criteria.² An ability to pay standard would further this purpose.

The economic destruction that comes from obtaining loans which are beyond a parent's ability to pay creates more harm than good. Access to uncapped, expensive, and inflexible loans for parents undercuts the very mission of Title IV programs: providing assistance to students so that they can get an education and secure a *net benefit from that education*. Over 75 percent of dependent Pell Grant recipients come from families making less than \$40,000. Since the maximum Pell grants will cover only about \$5730 of their annual educational expenses in the 2014-15 award year, many of their low-income parents are necessarily borrowing PLUS loans to cover the rest of the student's tuition and expenses. Repayment of a PLUS loan will require a significant portion of a low-income parent's income,³ and in some cases, PLUS debt has exceeded a parent's income.⁴ For these parents, the likelihood of default or extreme financial hardship is high.⁵

Unlike all other federal student loans, there are no explicit borrowing limits for PLUS loans. Both parent and graduate/professional PLUS loan borrowers may borrow up to the full cost of attendance, which is determined by the institution, not the government, and includes books, travel and living expenses. Incidentally, Parent PLUS loans are also not counted in institutions' Cohort Default Rates, making them impossible to track and unavailable as a measure of institutional accountability. Parent PLUS loan borrowers are not eligible for income-based repayment (IBR) and therefore have fewer options for avoiding default and its consequences. Additionally, the amount of the Parent PLUS loan is not considered when determining whether the borrower has a partial financial hardship and some borrowers may have a higher IBR payment as a result.

Despite these differences, Parent PLUS loans carry all of the negative consequences of other federal student loans. For example, Parent PLUS loans are nearly impossible to discharge in bankruptcy. Parent PLUS loan borrowers in default face the full range of draconian government collection powers, including wage garnishment, Social Security offsets and tax refund offsets. There is no time limit on government collection. Because of these consequences it is especially important to ensure that Parent PLUS borrowers are able to repay these loans.

Instead of providing true consumer protections, the only measure in the proposed regulations to prevent borrowers from taking on unaffordable debt is "Enhanced Consumer Education." While borrowers should certainly be given information about how much they will be expected to repay each month, this is insufficient to "ensur[e] that borrowers do not take out loans that they will be unable to repay without hardship." As the Federal Reserve of Cleveland stated in its report *Do Financial Education Programs Work?*, "the literature does not succeed in establishing the extent of the benefit provided by financial education programs, nor does it provide conclusive support that any benefit at all exists."⁶

² U.S. House of Representatives, Committee on Education and Labor, Higher Education Amendments of 1992: Conference Report (H.Rpt. 102-630), Washington: Government Printing Office, 1992.

³ "Trends in Higher Education: Distribution of Pell Grant Recipients by Family Income and Dependency Status, 2011-12," College Board, accessed December 13, 2013, <https://trends.collegeboard.org/student-aid/figures-tables/distribution-pell-grant-recipients-family-income-dependency-status-2011-12>.

⁴ Marian Wang, et al., The Parent Loan Trap, Chronicle of Higher Education (Oct. 4, 2012), available at <https://chronicle.com/article/The-Parent-Loan-Trap/134844/>

⁵ In addition to the data the Department provided at the negotiations, more data needs to be available including default and delinquency rates by borrower demographics and income.

⁶ Available at: <http://www.clevelandfed.org/research/workpaper/2008/wp0803.pdf>.

B. The Department has the Statutory Authority to Implement an Ability to Repay Standard

The statute governing the eligibility criteria for PLUS loans is broad enough to permit the Department of Education to implement an ability to repay standard. In its Notice of Proposed Rulemaking, the Department states that the Higher Education Act would need to be amended to allow consideration of the applicant's ability to repay. We disagree.

1. *The Higher Education Act Gives Department Authority to Establish Eligibility Criteria Beyond Adverse Credit History*

The statute provides the Department with the authority to establish whatever criteria it deems necessary for eligibility, so long as it is done in consultation with the relevant stakeholders. It provides that a graduate or professional student or the parents of a dependent student are eligible if, among other things:

The graduate or professional student or the parents meet such other eligibility criteria *as the Secretary may establish by regulation*, after consultation with guaranty agencies, eligible lenders, and other organizations involved in student financial assistance.⁷

This subsection clearly allows the Department to establish eligibility criteria in addition to a borrower's "adverse credit history." This provision provides the Department with the most straightforward authority to implement an ability-to-repay standard.

2. *Adverse Credit History Can Be Reasonably Interpreted to Include Ability-to-Repay*

In addition, an ability-to-repay standard is permissible under the Department's authority to define "adverse credit history"—one of the eligibility criteria specified by the statute.⁸ We disagree with the Department's unsupported definition of "adverse credit history" as:

[A]dverse credit history is a measure of an individual's history of repaying existing debt. It does not measure whether the individual has the financial ability to repay a specific level of debt, but whether that individual has repaid debt in the past.

The Department's definition of "credit history" is overly narrow and rigid.⁹ There is no single legal definition of "credit history," but the term "credit history" is often associated with an ability to repay. Investopedia defines "Credit History" as "[a] record of a consumer's ability to repay debts and demonstrated responsibility in repaying debts." The Department's own website states that "[a] credit history is a summary of your financial strength, including your history of paying bills and your ability to repay future loans."¹⁰

Moreover, the Department should look to the evolution of credit determinations more broadly. In *Chevron*, the Supreme Court encouraged agencies to be flexible and it revisit the "wisdom of its policy" as necessary for the agency to carry out its congressionally mandated duties.¹¹ Since the financial crisis

⁷ 20 U.S.C. §1078-2(a)(1)(C).

⁸ 20 U.S.C. §1078-2(a)(1)(A).

⁹ See generally, *Bob Jones Univ. V. U.S.*, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.").

¹⁰ See <https://studentaid.ed.gov/glossary> (defining adverse credit history).

¹¹ See *Chevron v. Nat. Resc. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (stating Congress may delegate rulemaking authority to administrative agencies).

of 2008, the harm to both consumers and the broader economy of lending credit without an ability to repay has become more evident. In fact, in January 2014, the Consumer Financial Protection Bureau established an Ability-to-Repay rule to “protect[] consumers from debt traps by requiring mortgage lenders to evaluate whether borrowers can afford to pay back the mortgage before signing them up.”¹²

Due to the ambiguity of the definition and the greater context of the current financial landscape, including an ability-to-repay standard would further the statutory intent of the law and be consistent within the meaning of “adverse credit history.” The details of the standard can be worked out in consultation with borrowers and their advocates.

C. Conclusion

As demonstrated above, it is well within the Department’s statutory authority to implement an ability-to-repay standard for Parent PLUS borrowers. An ability-to-repay standard is vital to ensuring the Department’s second stated goal: ensuring that borrowers do not take out loans that they will be unable to repay without hardship. Therefore, we urge the Department to do so now.

Thank you for your consideration of these comments. Please feel free to contact Persis Yu if you have any questions or comments. (Ph: 617-542-8010; E-mail: pyu@nclc.org).

¹² Consumer Financial Protection Bureau, Ability-to-Repay Rule: Protecting Homebuyers from Debt Traps (Jan. 10, 2014) *available at* http://files.consumerfinance.gov/f/201312_cfpb_mortgage-rules_fact-vs-fiction.pdf.