

October 27, 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**
Comments to Application for Borrower Defense to Loan Repayment Form (as revised per 81 Fed. Reg. 66642 (Sept. 28, 2016))

Dear Secretary King:

As organizations that represent low-income student loan borrowers, we thank you for the opportunity to comment on the Department of Education's revised proposed universal borrower defense application form. We incorporate the comments we previously submitted on August 26, 2016, and request that the Department address those comments in detail when it publishes the final form. We also have several new comments regarding the revised form.

1. Revised Form is Not Sufficiently Accessible to Low-Income Unsophisticated Student Loan Borrowers

While we appreciate the Department's efforts to improve the accessibility of loan relief for defrauded student loan borrowers, we reiterate our recommendation that the Department limit the need for an application to situations where information that the Department (or guaranty agencies) 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 understand and complete without the assistance of an attorney.

We are concerned that the Department did not accept our previous comments to consider best practices in form design and learn from borrowers' experiences with existing Department forms and user interfaces. From prior experience, we know that a poorly designed form will discourage eligible applicants from seeking and accessing relief. In particular, the revised form does not address the following:

- The revised form does not appear to incorporate plain language tailored to the intended audience – students who were defrauded primarily by unscrupulous for-profit colleges. 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.

In addition, the Department should avoid language that requires applicants to interpret complex legal concepts. For the borrower defense application form, the Department should use plain language and clear illustrative examples so that borrowers can complete the application without needing legal advice. The following are just a few examples of legalistic language that will be difficult for many borrowers to understand:

- “Please also describe any harm to you as a result of the school’s conduct.” Most borrowers will not understand what the Department means by the word “harm” or what it wants to know with this question. (See Section III).
 - “Did the school mislead you . . . about the terms of loan repayment . . .?”
 - “Do you have any other reasons relating to your school that you believe qualify you for borrower defense, such as your school failing to perform its obligations under its contract with you . . . ?”
 - “If your school misled you or engaged in other misconduct.”
 - Words such as “likelihood,” “availability,” “education services,” and “consequences of failure to enroll.”
- As far as we are aware, the Department has not tested 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.

We understand that this may take time, and suggest that the Department publish an interim form that borrowers may currently use, but also start a process to test the form for consumer comprehension and usability. We encourage the Department to seek input on the form and on this process from other federal agencies which have extensive testing experience, including the Federal Trade Commission and the Consumer Financial Protection Bureau.

- 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. Contractors and staff providing assistance should be trained on how to advise and assist borrowers and evaluated by consumer feedback.
- 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.

We are particularly concerned with the placement and marking of the following question: “*Did any of the issues you describe above affect your decision to enroll in this school?” While it appears that the Department has attempted to respond to our comments by placing this immediately below each subject matter area of substantive questions, we are concerned it will get lost and remain unanswered by borrowers due to:

- Its placement immediately below the text box for each question without any spacing, as if it is an unimportant footnote.
- Lack of special marking or highlighting of the question or Yes/No checkboxes after the question indicating that the student must answer the question and that his/her application will remain incomplete with no answer.

2. Form Should Be Translated Into Other Languages

All versions of the form should also be available in languages other than English, particularly in Spanish and other languages commonly used by borrowers. At a minimum, the Department should provide this form in Spanish, as many for-profit colleges have specifically targeted their deceptive conduct towards Spanish speakers who are not proficient in English.

Executive Order 13166 obligates federal agencies to provide Limited English Proficiency (LEP) individuals with meaningful access to services in line with Title VI of the Civil Rights Act. Pursuant to this order, in 2002 the Department of Justice (DOJ) published a “four-factor analysis” to determine appropriate language assistance services to ensure an LEP individual has meaningful access to the government’s services, programs, and activities.¹ The DOJ reaffirmed these obligations in 2011 when it directed all federal agencies to take action to ensure compliance with their “legal and public service obligations” to provide equal access to services regardless of language skills.²

The Department of Education has issued its own Policy Directive to implement Executive Order 13166 and the Attorney General’s four-factor analysis and related guidance.³ The Directive states the following:

With respect to documents intended for public outreach or a broad audience, [the Department] should ensure that the documents it considers “vital” are translated

¹ U.S. Dep’t of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002).

² Eric Holder, Memorandum for Heads of Federal Agencies, General Counsels, and Civil Rights Heads, Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166 (Feb. 17, 2011), available at http://www.lep.gov/13166/AG_021711_EO_13166_Memo_to_Agencies_with_Supplement.pdf.

³ U.S. Dep’t of Educ., U.S. Department of Education Policy Directive to Ensure Meaningful Access to Federally Conducted Services, Programs and Activities for Individuals with Limited English Proficiency,” No. OCR/OCO: 1-102 (Sept. 4, 2012), available at <http://www2.ed.gov/policy/gen/leg/foia/acsocroco1102.pdf>.

where a significant number or proportion of the population eligible to be served, or likely to be directly affected, by the [Department's] services, programs, or activities needs access to the information in a language other than English in order to be effectively informed of or to participate in the program or activity. [The Department] should consider the nationally prominent languages spoken by LEP individuals as a guide for prioritizing languages for translation of vital documents. [The Department] may want to consider translation into other languages, as necessary, based on regional demographics or subject matter targeted to specific audiences.

The Department identified categories of “vital documents” for which translations must be made available to LEP individuals as including:

forms pertaining to an individual's eligibility for Department services or the reduction, denial, or termination of services or programs notices, letters, or forms related to individual rights, requirements, or responsibilities; ... other documents critical to understanding and exercising federally protected rights....

It further defines vital documents as material “that is critical for access to the Department's services [or] programs, . . . or contains information about procedures and processes required by law. Classification of a document as ‘vital’ depends upon the importance of the program, information, encounter, or service involved, and the consequence to the LEP individual if the information in question is not provided accurately or in a timely manner.”

Based upon this Directive, the Department must, at a minimum provide the final borrower defense form in Spanish. Many for-profit colleges have specifically targeted their deceptive conduct towards Spanish speakers who are not proficient in English. Just a few examples from California alone include Meadows College of Business, CIT College, Northern California Institute of Cosmetology, Webster Career College, Wyotech and Heald. In addition, whenever it has information that indicates that a school targeted non-English proficient individuals who are proficient in any *other* language, the Department must also provide a translated form in that language. For example, in Southern California many schools target and harm Korean-speaking students, so a translation of the form into Korean should also be provided. Additionally, in New York, ASA College targets LEP immigrants by advertising ESL classes and conducting admissions and financial aid counseling in other languages.⁴

The borrower defense form is a vital document. It will be critical to ensuring that LEP borrowers harmed by unscrupulous for-profit colleges are able to understand and exercise their federal right to assert a defense-to-repayment based on school misconduct. If this form is not translated into

⁴ See Class Action Complaint and Plaintiff Affidavits in Sanchez v. ASA College, SDNY, 14-cv-5006.

Spanish and other languages, LEP borrowers will be denied the loan relief to which they are entitled by law, which will likely result in large numbers of them defaulting on their loans, suffering from the Department's harsh involuntary debt collection tactics, and being barred from access to quality higher education. This result is contrary to the purpose of the Higher Education Act, as well as the requirements of Title VI of the Civil Rights Act, the federal government's directives, and the Department's own commitment to equal access to education.

3. Specific Issues Concerning Substantive Content of Form

The Department did not alleviate the following concerns in the revised version of the form:

- The Department should ensure that all fields are flexible enough to capture unique circumstances, including:
 - The revised form does not allow a borrower to indicate that she attended multiple programs and to answer questions about representations made regarding each different program.
 - The form does not allow the borrower to indicate that she attended school for years with gaps in attendance.
 - While Section I of the form refers to Parent PLUS borrowers, the remaining sections do not clarify that only the person who experienced the illegal conduct should answer the questions in Section III and attest to those facts. If not clear, the form essentially asks parents to attest to facts of which they have no personal knowledge. This has been an issue for Parent PLUS borrowers using the Corinthian attestation form. Several of our client parent borrowers report being told by Department of Education that they should sign the attestation form, rather than the student.
- 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 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 the misrepresentations affected the borrower's decision to enroll. The limited list excludes important categories of misrepresentations such as institutional and programmatic accreditation misrepresentations, misrepresentations regarding borrowers' refunds or cancellation rights under federal or state law, and a number of other common and serious misrepresentations which we described in our August 26, 2016 comments and in Appendices A and B to those comments.

- The reliance formulation 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. At a minimum, the question should be revised to ask whether the illegal conduct affected his/her decision to enroll or to stay enrolled or take out additional loans. If this change is not made, borrowers may believe that they cannot use such misrepresentations as a basis for relief. This change would also bring the form into conformity with the borrower-defense substantial misrepresentation standard proposed by the Department, which recognizes a defense when “the borrower reasonably relied on [a substantial misrepresentation] when the borrower decided to attend, *or continue attending*, the school.” (See Proposed 685.222(d) (emph. added).)
- 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.

While in Section III under “Other” the Department asks “Or is there some other reason you feel your school misled you,” it is buried in the middle of a long paragraph. This section should include only this one very important question, especially if the Department refuses to add additional substantive sections and questions as we recommend above. To make it clearer, it should include other types of examples (such as about accreditation, refund rights, etc.). The two other questions regarding breach of contract and judgments should each be included in different questions and be revised into less legalistic language.

- 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. This type of organization is likely to be more user friendly and understandable for many borrowers, who may not realize that they should providing information about different misrepresentations or other experiences during recruitment, while they attended, and upon graduation.
- The form should not offer forbearance as the only option. Instead, it should do all of the following:
 - Offer income-driven repayment as an alternative to forbearance for borrowers who are not in default;

- Allow borrowers who are in the midst of a rehabilitation plan to choose to continue on that plan;
- Provide prominent information about who the borrower can call for guidance about the form itself and which options (forbearance, IDR, rehabilitation, etc.) are available to him;
- Provide information about all of the above, or a link to where each of the above are simply explained in a way accessible to borrowers.
- 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.

Thank you again for your work to help defrauded borrowers and protect taxpayers. We appreciate your careful consideration of these comments.

Sincerely,

Bay Area Legal Aid
Empire Justice Center
Housing and Economic Rights Advocates
Legal Aid Foundation of Los Angeles
Legal Services – NYC
MFY Legal Services, Inc.
National Consumer Law Center, on behalf of its low-income clients
Public Counsel