STUDENT DEFENSE
NATIONAL STUDENT LEGAL DEFENSE NETWORK

1701 Rhode Island Ave NW
Washington, DC 20036
www.defendstudents.org

Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue Southwest
Washington, D.C. 20202-6110

August 12, 2022

Re: NPRM - Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

Docket ID ED–2021–OPE–0077

Dear Mr. Gaina,

The National Student Legal Defense Network ("Student Defense") submits this comment in response to the proposed 2022 Borrower Defense Rule ("NPRM"), published in the *Federal Register* on July 13, 2022.[1] This comment (one of five submitted by Student Defense) focuses on the Department's proposed changes to (1) the grounds upon which borrowers and third parties can apply for relief under the proposed borrower defense regulations; and (2) who is permitted to submit group borrower defense applications.

With respect to the first topic, the Department proposes a single "Federal Standard," which includes five grounds upon which a borrower can bring a claim.[2] We note with concern the absence of the long-standing state law standard in 34 C.F.R. Part 685 Subpart D, as an initial grounds for discharge. The exclusion of a state law standard undermines one of the cornerstones of the Department's proposed regulation which is to "expand the current basis for a borrower to receive a discharge." 87 Fed. Reg. at 41,879 (July 13, 2022). We urge the Department to reinstate the state law standard as an initial basis for relief. We also urge the Department to adopt an "unfair or abusive" conduct grounds in the Federal Standard importing the framework developed by other agencies.

With respect to the second topic, the Department proposes a group application process that, despite its many improvements to the current regulation, still fails to allow non-state entities, including representatives of certified classes, to submit group claims. This is wrong on its face and inconsistent with the Department's many statements in the NPRM on the value of class actions. Allowing group

---

1 87 Fed. Reg. at 41,878 (July 13, 2022). Student Defense is a non-partisan, 501(c)(3) non-profit organization that works, through litigation and advocacy, to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility.

2 The Department's proposed § 685.401(b) includes the following bases for discharge: (1) substantial misrepresentation; (2) substantial omission of fact; (3) breach of contract; (4) aggressive and deceptive recruitment; and (5) a federal or state judgment or Departmental adverse action against an institution that could give rise to a borrower defense claim. 87 Fed. Reg. at 41,888 and 42005 (July 13, 2022).

claims to be filed only by state-actors is also unfair to students who live in states that do not prioritize combatting higher education fraud and abuse.

We thank the Department for the opportunity to comment on these important issues.

A Defined Standard is Key to Streamlining the Borrower Defense Process

We appreciate the Department's proposal to apply a single standard to borrower defense applications, regardless of when a borrowers' loans were disbursed. This is appropriate to avoid unfair treatment of borrowers. As the Department points out, the differing standards under the 1994, 2016, and 2019 borrower defense regulations could (and likely did) yield "different outcomes [for two similarly situated borrowers] solely based upon the loan's disbursement date." 87 Fed. Reg. at 41,889 (July 13, 2022). For this reason, we support the Department's creation of a single standard that will apply to all claims, regardless of when the loan was disbursed.

The Proposed Regulations Should Include a State Law Standard as an Initial Ground for Discharge

By incorporating a state law standard into the reconsideration process, the Department has tacitly recognized the value of using such a standard. This is consistent with the Department's multiple statements that the proposed regulation would permit "borrowers to bring claims under a series of acts or omissions that … encompasses what would have been available to them under any of the three prior applicable regulations." 87 Fed. Reg. at 41,888 (July 13, 2022); see also *id.* at 41,484.

A more robust state law standard is important for at least two reasons. First, although the Department has proposed a standard that strives to incorporate attributes of state consumer protection laws (87 Fed. Reg. at 41,892 (July 13, 2022)), it fails to consider that states routinely expand laws and regulations to police consumer misconduct.[3] As schools modify their structure, partnering with Online Program Managers (OPMs) and offering new institutional financing products, for example, it's possible that states will prohibit certain abusive or deceptive conduct tied to these emerging trends. Any federal standard for borrower defense should therefore remain a floor instead of a ceiling.

---

[3] See Matthew Munro, *Where the Federal Government Fails State Legislatures Can Succeed: Eliminating Student Debt by Regulating For-Profit Colleges and Universities*, 41 J.C. & U.L. 627, 644 (2015). Until recently, Colorado was one of a handful of states that did not have an unfairness provision in its consumer protection law. *See Consumer Protection in the States: A 50 State Evaluation of Unfair and Deceptive Practices Laws, Executive Summary*, Nat'l Consumer Law Ctr. (Mar. 2018), https://www.nclc.org/issues/how-well-do-states-protect-consumers.html. In 2019, the state passed legislation that expanded the definition of a "deceptive trade practice" to include "either knowingly or recklessly engages in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice." *See* Consumer Protection Act, HB19-1289, Colo. Gen. Assemb., 2019 Regular Sess. (Colo. 2019), https://leg.colorado.gov/bills/hb19-1289; *see also* Colo. Rev. Stat. § 6-1-105(1)(kkk). Similarly, Massachusetts added a regulation that specifically addresses misconduct by for-profit and occupational schools. 940 Mass. Code Regs. 31.01 et seq. (2014), https://www.mass.gov/doc/940-cmr-31-for-profit-and-occupational-schools/download?_ga=2.143309622.2055963991.1659552659-395266174.1659552659.

Second, a state law standard is consistent with the Holder Rule, which preserves all of a consumer's claims and defenses that could be raised against the original seller of a private loan against subsequent holders of the loan.[4] If a student borrower is permitted to rely on state law to dispute repayment of a private student loan, the same claims should be available to dispute repayment of their Direct Loan.

For these reasons and others, we strongly recommend the Department include a state law standard not only on reconsideration, as is the case under the current proposal, but also as part of the Department's initial review of borrower defense claims.

It appears that the Department's primary reason for not including a state law standard in the initial review process is the burden on the Department to apply various state laws and the attending delays in providing relief to borrowers. 87 Fed. Reg. at 41,907 (July 13, 2022). While this may be true, the Department overlooks other, equally important considerations of efficiency and fairness. Under the Department's proposal, borrowers, who typically are not represented by counsel, would have to (i) wait up to 3 years for their claim to be denied in part or in full under the federal standard; (ii) subsequently file for reconsideration under a state law standard; and (iii) wait an indefinite amount of time for the Department to review their claim under this new standard. At the end of this process, the borrower would either receive a discharge based on a standard the Department could have applied at the beginning *or* receive a denial based on a new standard, without a process for reconsideration. Because the Department "expects that borrowers or State requestors would include their best available evidence at the time that they file their original claims," it is nonsensical to ignore evidence of a state law violation in the first instance, if the borrower's claim fails to satisfy the Federal Standard. 87 Fed. Reg. at 41,906 (July 13, 2022). Of course, the Department can choose, as a matter of internal processes, to prioritize claim assessment under the federal standard ahead of the assessment under a state law standard.

Recommendation: The Department should incorporate the state law standard into its initial review of borrower defense applications. If the Department chooses to include the state law standard only as a basis for reconsideration, it should provide examples in other regulations where a different substantive standard is applied only on reconsideration and whether such a provision has harmed the ability of claimants to obtain relief.

The Department Should Adopt "Unfair or Abusive Conduct" as Grounds for Discharge Under the Proposed Federal Standard

By acknowledging "aggressive and deceptive recruitment," separate and apart from misrepresentations and omissions, the Department has taken a necessary step towards authorizing borrower defenses based on unfair or abusive practices. We encourage the Department to state expressly that unfair or abusive conduct can give rise to a valid borrower defense claim and adopt an

4 16 C.F.R. § 433.2 ("Holder Rule").

"unfair or abusive conduct" standard as grounds for relief *instead* of an "aggressive and deceptive recruitment" standard.[5]

In 2016, non-federal commenters asked the Department to include unfair or abusive acts/practices that may occur absent a misrepresentation, but the Department declined "because of a lack of clear precedent and guidance" about how such practices would apply in a borrower defense context.[6] The Department, at the time, felt that most borrower defense claims were based on misrepresentations by the school.[7] As the Department now acknowledges, after receiving well over 100,000 applications in which borrowers made allegations related to admission and urgency to enroll, conduct beyond misrepresentations and omissions harms consumers and can give rise to a borrower defense claim. 87 Fed. Reg. at 41,894 (July 13, 2022).

Using an "unfair or abusive" standard is important because there are well-established precedents defining and applying these terms. The FTC Policy Statement on Unfairness,[8] which presents specific factors used to assess whether conduct is unfair, was codified in 1994[9] and has been utilized by other agencies, such as the Federal Deposit Insurance Corporation (FDIC), to inform their own policies.[10] The Department can use a similar approach and import established FTC caselaw regarding this standard.[11] Similarly, the Department can import the abusive practices standard within the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) as well as the CFPB's application of the law to protect student loan borrowers. Under the Dodd-Frank Act, conduct is abusive if it:

> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
> (2) takes unreasonable advantage of--
>> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

---

5 We also have concerns about the structure of the proposed aggressive and deceptive recruitment standard, which includes a long list of known conduct that could be misinterpreted to exclude from its ambit other harmful conduct. The list may appear to be comprehensive now, but risks becoming outdated as predatory schools innovate and change their behavior, marketing schemes, and financial products to increase profits. The final rule should therefore make clear that the list is illustrative, and not exhaustive.

6 81 Fed. Reg. at 75,952 (Nov. 1, 2016).

7 *Id.* at 75,939–40.

8 Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, et al. to Hon. Wendell Ford, Comm. on Com., Sci., and Transp., U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), reprinted in *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984) ("Unfairness Policy").

9 Federal Trade Commission Act Amendments of 1994, Pub. L. 103-312, 108 Stat. 1691; 15 U.S.C. § 45(n).

10 *See* Federal Deposit Insurance Corporation, *FDIC Consumer Compliance Examination Manual* at VII-1.1 – 1.10 (June 2022), https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf.

11 *See* Nat'l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* § 4.3.1 (9th ed. 2016), www.nclc.org/library (last visited Aug. 12, 2022).

> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.[12]

Recommendation: The Department should add an unfair or abusive conduct grounds for a borrower defense claim, which could include aggressive and deceptive recruitment and other harmful conduct not yet known to the Department. The addition of an unfairness or abusive conduct grounds is particularly important if the Department excludes a state law standard in the initial review of an application, as many state laws include a broad definition of deceptive trade practices that incorporates unfair or abusive conduct.

The Department Should Allow Representatives of Certified Classes of Borrowers to Submit Group Borrower Defense Applications

The Department's proposal that only "State requestors"[13] be permitted to submit group borrower defense applications is shortsighted and inconsistent with other aspects of the proposed regulations that underscore the importance of class actions. Additionally, although the Department asserts that the proposed changes expand the regulation and are "designed to further protect student loan borrowers from the financial effects of certain predatory practices," the Department has unnecessarily limited the ability of groups of borrowers to seek relief, especially groups that have been certified as a class by a judge.

Rather than allowing representatives of certified classes to submit a group claim, the Department permits only two types of group claims: a Department-initiated group process and one initiated by a State requestor. 87 Fed. Reg. at 41,898 (July 13, 2022).[14]

We urge the Department to adopt a more expansive group submission process for two reasons.

First, the NPRM repeatedly acknowledges the value of borrower lawsuits and class actions to promote the purposes of the Direct Loan Program:

- The Department proposes to revive its 2016 regulation accepting nondefault, contested judgments as a basis for borrower defense liability. *See* 87 Fed. Reg. at 41,895–41,896 (July 13, 2022) ("We believe the Department did not fully consider the importance of the lawsuits

---

12 12 U.S.C. § 5531(d).

13 The Department proposes to define "State requestors" to include States, State attorneys general, or State oversight or regulatory agencies with authority from the State (such as a State consumer financial protection agency with civil investigative demand authority from that State). See 87 Fed. Reg. at 41,886 (July 13, 2022).

14 Excluding non-state entities from the group borrower defense process has the effect of insulating the Department from groups of borrowers seeking to compel unlawfully withheld action or unreasonably delayed conduct because there is no statutory or regulatory language requiring the Department to act on their group discharge application. Notably, this is one of the reasons why the Department proposed *adding* a group false certification process. See 87 Fed. Reg. at 41931 (July 13, 2022).

students brought against institutions when it removed this provision in the 2019 regulation.").

- In the "Department-initiated group process," the Department would have the discretion to create a group based on "class action lawsuits related to educational programs at one institution" and "State or Federal judgments against institutions awarded to several borrowers…" 87 Fed. Reg. at 41,898 (July 13, 2022).
- The Department also proposes to reinstate the condition (from the 2016 rule) prohibiting schools that receive Title IV funding from using arbitration clauses and class action waivers. 87 Fed. Reg. 41,913–41,918 (July 13, 2022).

If the proposed rule regarding arbitration and class action waivers becomes final, students will once again have the ability to join together to hold schools accountable in court and will have more opportunities to develop evidence in support of group borrower defense applications. Their counsel should be allowed to submit group claims on their behalf.

Second, permitting only State requestors to submit group applications will likely result in differential treatment of student borrowers based solely on where they live. Not all states have the resources or the inclination to investigate schools and assemble group borrower defense applications.[15] These investigations, and the attending litigation, are costly to the states, largely because the schools can afford to engage in protracted litigation. Under the proposed group process, students living in a state that prioritizes assisting students and has the resources to investigate and assemble borrower defense applications will fare better than students living in states that don't.

Further, the Department offers no basis for the counterfactual of its position that information from State requesters is highest in quality. 87 Fed. Reg. at 41,887 (July 13, 2022). When given the ability to investigate and litigate, counsel representing classes of harmed borrowers can assemble a wealth of relevant evidence. For example, the Project on Predatory Student Lending recently released a lengthy report about ITT, which was based on a class action against ITT's estate in the company's bankruptcy proceedings.[16] The report includes internal company documents, sworn statements from students and ITT employees, and public documents.[17] These are the same types of documents collected by state attorneys general in the course of their consumer protection investigations—and the same types of evidence that the Department has relied on when granting discharges. *Id.* at 41,887

---

15 Since 2015, a minority of state attorneys general have submitted group borrower defense applications. *See* List of Attorney General Submissions, Exhibit 1. Even multistate borrower defense group applications (of which there are few) include no more than a dozen sign-on states. *See* Application for Borrower Defense on Behalf of ITT Students (April 1, 2021), https://www.doj.state.or.us/wp-content/uploads/2021/04/2021_States_Group_BD_Application_ITT.pdf, submitted by 25 states, many of which are the same states that submitted earlier applications regarding students who attended other schools. To our knowledge, no state regulators have submitted group borrower defense applications on behalf of student borrowers.

16 *Dreams Destroyed: How ITT Technical Institute Defrauded a Generation of Students*, Project on Predatory Student Lending (Feb. 2022), https://predatorystudentlending.org/wp-content/uploads/2022/02/ITT-Report.pdf.

17 *Id.* at 6.

and 41,899.[18] In any event, concern that a group requestor would submit subpar information is addressed by the process itself, which requires the requestor to complete a Department-approved form and provide extensive information and supporting documentation in § 685.402. 87 Fed. Reg. at 42,006 (July 13, 2022).

Recommendation: In addition to the Department-initiated and state-initiated processes for group claims, the Department should provide representatives of certified classes of borrowers the right to submit group applications.

* * *

Thank you for your attention to these important issues facing student loan borrowers. For more information, please contact Student Defense Senior Counsel Libby Webster at libby@defendstudents.org.

Sincerely,

The National Student Legal Defense Network

[18] The Department relied on information from a non-governmental organization – Veterans Education Success – in its approval of 18,000 borrower defense claims for students who attended ITT. *See* Press Release, U.S. Dep't of Educ., Dep't of Educ. Announces Approval of New Categories of Borrower Defense Claims Totaling $500 Million in Loan Relief to 18,000 Borrowers (June 16, 2021), https://www.ed.gov/news/press-releases/department-education-announces-approval-new-categories-borrower-defense-claims-totaling-500-million-loan-relief-18000-borrowers?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

EXHIBIT 1

United States Senate
WASHINGTON, DC 20510

June 18, 2019

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Dear Secretary DeVos:

We write today to seek the status of each borrower defense group discharge application submitted by State attorneys general and urge you to provide full borrower defense discharges to qualified borrowers covered by these group applications.

According to data recently provided by the Department of Education (Department), attorneys general of 20 states have submitted group discharge applications on behalf of defrauded borrowers in their states.[1] These applications cover students who attended American Career Institute, Anthem University, Corinthian Colleges, Inc., Globe University and Minnesota School of Business, Kaplan University, Lincoln Technical Institute, and Westwood College.[2] Earlier this month, Attorney General Kwame Raoul of Illinois and Attorney General Phil Weiser of Colorado submitted group discharge applications on behalf of Illinois Institute of Art and Art Institute of Colorado students who were misled about their institutions' accreditation status.[3]

The applications rely on findings made by the Department itself or supporting evidence, collected and provided by State attorneys general as part of the application, establishing the group's eligibility for federal loan discharge under the borrower defense provision of the Higher Education Act. In addition, State attorneys general have often already done the exacting work of assembling enrollment and contact information of borrowers within the groups—streamlining administrative processes for the Department and making these loans particularly easy to discharge.

---

[1] California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, Oregon, Pennsylvania, Virginia, Washington, Wisconsin

[2] See attached. U.S. Department of Education. Agency Response to Questions for the Record submitted by Senator Durbin to the Senate Committee on Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies. Hearing on the Fiscal Year 2020 Budget Request for the U.S. Department of Education. May 08, 2019.

[3] Letter from Illinois Attorney General Kwame Raoul and Colorado Attorney General Phil Weiser to U.S. Department of Education. (June 3, 2019). *Loan Discharge for Illinois Institute of Art and Art Institute of Colorado Students.* http://www.illinoisattorneygeneral.gov/pressroom/2019_06/Letter_to_ED_Re_Group_Discharge_for_Illinois_Institute_of_Art_and_Art_Institute_Coloradostudents.pdf

Despite this, you have inexcusably failed to review and respond to these group applications.[4] In a recent decision in *Williams v. DeVos*, a federal district court found that you must review group discharge applications submitted by State attorneys general and that you must cease all involuntary collection activities against borrowers covered by State attorney general group discharge applications.[5] Please provide an update on the status of each of the group discharge applications submitted by State attorneys general.

In addition to your failure to respond to group discharge applications from State attorneys general, you are forcing at least 158,110 borrowers with pending borrower defense claims to languish without decision.[6] These borrowers have been waiting an average of 882 days each.[7] In fact, it has been nearly one year since the Department publicly reported any borrower defense approvals.[8]

It is time for your cruel delays to end and for you to provide federal student loan discharges to which defrauded borrowers are entitled under the law; the courts have ordered it, students are begging for it, Congress expects it, and justice demands it.

Sincerely,

Richard J. Durbin
United States Senator

Patty Murray
United States Senator

Elizabeth Warren
United States Senator

Richard Blumenthal
United States Senator

---

[4]Letter from Illinois Attorney General Kwame Raoul to U.S. Department of Education. (June 3, 2019). http://www.illinoisattorneygeneral.gov/pressroom/2019_06/Letter_to_ED_Re_Group_Discharge_for_Westwood_and_Corinthian.pd

[5]Williams v. DeVos, 2019 U.S. Dist. Lexis 78231. Decided May 9, 2019.

[6] U.S. Department of Education. (2018). *Borrower Defense to Repayment Report.* Retrieved from: https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/borrower-defense-data

[7] U.S. Department of Education. Agency Response to Questions for the Record submitted by Senator Durbin to the Senate Committee on Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies. Hearing on the Fiscal Year 2020 Budget Request for the U.S. Department of Education. May 08, 2019.

[8] U.S. Department of Education. (2018). *Borrower Defense to Repayment Report.* Retrieved from: https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/borrower-defense-data

Sherrod Brown
United States Senator

Edward J. Markey
United States Senator

Tammy Duckworth
United States Senator

Robert P. Casey, Jr.
United States Senator

Christopher S. Murphy
United States Senator

Kamala D. Harris
United States Senator

Ron Wyden
United States Senator

Dianne Feinstein
United States Senator

Chris Van Hollen
United States Senator

Tammy Baldwin
United States Senator

Tim Kaine
United States Senator

Tina Smith
United States Senator

Mazie K. Hirono
United States Senator

Michael F. Bennet
United States Senator

Amy Klobuchar
United States Senator

Benjamin L. Cardin
United States Senator

Brian Schatz
United States Senator

Kirsten Gillibrand
United States Senator

Durbin Question 6.4

Submissions by Attorneys General Seeking Relief for Constituents

SCHOOL/SCHOOL GROUP	DIPLOMA PROGRAM(S) IF APPLICABLE	ATTORNEY GENERAL	STATE	SUBMISSION DATE
American Career Institute		Maura Healy	Massachusetts	• 7/20/2016 • 7/26/2016 • 8/3/2016 • 8/12/2016 • 11/16/2016 • 11/23/2016 • 1/3/2017
Anthem University		Lori Swanson	Minnesota	• 5/3/2016 • 7/22/2016 • 10/19/2016 • 2/13/2017 • 3/9/2017 • 4/4/2017
Corinthian Colleges, Inc.		Maura Healy	Massachusetts	• 11/30/2015
Corinthian Colleges, Inc.		Brad Schimel	Wisconsin	• 2/4/2016
Corinthian Colleges, Inc.	• Dental Assistant • Electrician • Massage Therapy • Medical Administrative Assistant • Medical Assistant • Medical Insurance Billing and Coding • Pharmacy Technician	Lisa Madigan	Illinois	• 12/16/2016
Corinthian Colleges, Inc.		Bob Ferguson	Washington	• 12/20/2016

Corinthian Colleges, Inc.	Submission for discharge for students enrolled at programs covered by the Department's job placement rate misrepresentation findings.	Lisa Madigan Bob Ferguson Maura Healy Xavier Becerra George Jepsen Matthew Dean Douglas Chin Tom Miller Andy Beshear Brian E. Frosh Janet T. Mills Lori Swanson Jim Hodd Hector Balderas Eric T. Schneiderman Ellen F. Rosenblum Josh Shapiro Mark R. Herring Karl A. Racine	Illinois Washington Massachusetts California Connecticut Delaware Hawaii Iowa Kentucky Maryland Maine Minnesota Mississippi New Mexico New York Oregon Pennsylvania Virginia District of Columbia	• 6/5/2017
Globe University & Minnesota School of Business		Lori Swanson	Minnesota	• 6/7/2016
Kaplan University	• Medical Assistant • Medical Billing and Coding	Maura Healy	Massachusetts	• 5/6/2016 • 5/31/2016
Lincoln Technical Institute	• Criminal Justice	Maura Healy	Massachusetts	• 1/14/2016
Westwood College	• Criminal Justice	Lisa Madigan	Illinois	• 12/13/2016