

August 30, 2018

Jean-Didier Gaina
U.S. Department of Education
Office of Postsecondary Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Docket ID ED-2018-OPE-0027

To Whom It May Concern:

The National Student Legal Defense Network (“NSLDN”)¹ submits this comment in response to the notice of proposed rulemaking for the 2018 Borrower Defense Rule (“NPRM”).²

NSLDN is strongly opposed to the proposed rule, which will be devastating to student loan borrowers victimized by unscrupulous and predatory schools. A near-complete reversal of the the 2016 Borrower Defense Rule (“2016 Rule”),³ the Department’s proposal, if adopted, would effectively block relief for the vast majority of student loan borrowers with meritorious borrower defense claims, while simultaneously shielding schools from accountability for their misconduct, even when it is systematic and widespread.

Not only does the NPRM side with predatory institutions over students at nearly every turn, it does so based on unsupported assertions and hypotheticals that ignore, distort and misrepresent data and evidence that the Department previously established and relied upon. The Department’s proposed rule therefore fails, time

¹ NSLDN 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 83 Fed. Reg. 37,242 (July 31, 2018).

³ In 2016, the Department promulgated borrower defense regulations after an extensive negotiated rulemaking process that lasted more than a year. During that time, the Department held two public hearings and considered over 10,000 public comments regarding possible topics for the rulemakings. 80 Fed. Reg. 63,478-79 (Oct. 20, 2015). The Department then convened a negotiated rulemaking committee comprised of sixteen negotiators that represented a wide range of stakeholders—including students, postsecondary institutions, proprietary institutions, state government actors, and consumer advocates—for three multi-day rulemaking sessions in 2016. 81 Fed. Reg. 39,330, 39,333-34 (June 16, 2016). Following the rulemaking sessions, the Department proposed regulations, *id.* at 39,330, considered additional public comments submitted by over 50,000 parties, 81 Fed. Reg. 75,928 (Nov. 1, 2016), and issued the final rule, *id.* at 75,926.

and again, to arrive at reasoned decisions as required under the Administrative Procedures Act (“APA”). We urge the Department to take a step back, consider the harm that its proposals will cause to students and taxpayers, terminate this rulemaking, and fully implement the 2016 Rule.

I. The Department Should Continue to Allow “Affirmative” Claims

The Department is proposing to allow borrower defense claims if—and only if—borrowers first default on their federal student loans. Under this proposal, set forth in “Alternative A” of the NPRM, cheated borrowers who are diligently making loan payments will be shut out of the borrower defense process entirely.

Forcing borrowers to enter default in order to file a claim provides students with an impossible choice: either ignore the wrongs and continue to make payments on debt incurred under false or fraudulent pretenses or expose themselves to the “severe” consequences of default, including wage garnishment, tax refund offsets, adverse credit reporting, loss of eligibility for additional federal student aid, and more.⁴ Borrowers should not have to expose themselves to this list of harms in order to challenge misconduct by schools.⁵

Notably, the Department recognizes that this proposal is arbitrary, explaining that “[a] policy that limits borrower defense eligibility to defensive claims may have the unintended effect of treating borrowers harmed by a misrepresentation who default on their loans better than other defrauded borrowers who stay out of default by responsibly enrolling in income-driven repayment plans and making payments on their loan.”⁶ Indeed, two borrowers who attend the same institution, rely on the same deceptive information, and suffer the same financial harm would be treated differently if one happens to default on her loans and the other does not. There is no justification for connecting a borrower’s repayment status to his or her ability to challenge a school’s predatory practices. And although the Department recognizes this “unintended effect,” the proposed rule avoids any attempt to remedy the harm it will cause.

⁴ See <https://studentaid.ed.gov/sa/repay-loans/default#default>.

⁵ For borrowers who default on their loans, they will have a mere 30-65 day window in which to prepare and file their claim. The NPRM is silent as to how borrowers—especially low-income borrowers that cannot afford representation—might be expected to pull all of the required evidence together in such a short time period. See *infra* Section VI.

⁶ 83 Fed. Reg. at 37,243. See also *id.* (“[L]essons learned from the recent mortgage crisis raise concerns that limiting borrower defense eligibility to defensive claims could lead some relief-seeking borrowers to strategically default. . . . A similar behavioral response from relief-seeking borrowers choosing to enter default could result in a range of troubling unintended consequences, including damage to borrower credit scores, increased default collection costs for taxpayers, and increases to institutional cohort default rates.”).

Moreover, it appears that the Department's sole justification for this proposal is to prevent borrowers from asserting "frivolous claims" for debt relief. This too is arbitrary and lacks evidentiary support, as the Department concedes that it "does not have sufficient information" to know whether the fear of frivolous claims is legitimate and bases its belief on a "random sample [that] is insufficiently representative to support conclusions on the issue."⁷ The NPRM is also contrary to the Department's view in 2016 that frivolous claims were not a concern,⁸ as well as the Department's view when it first established the borrower defense rule under the Direct Loan Program in 1994.⁹ This type of conjecture does not qualify as reasoned decisionmaking under the APA.

Indeed, public comments across the ideological spectrum have asserted that the notion of only permitting a borrower defense claim from students in default is a bridge too far.¹⁰ But even if the Department dispenses with this proposal and allows affirmative claims, it will not remedy the many additional serious problems with the proposed rule.

II. By Adding an Intent or Knowledge Requirement to the Definition of "Misrepresentation," the Department is Deviating from Past Positions Without Adequate Justification or Good Reason

Even if the Department determines that it will accept affirmative claims, borrowers will still face insurmountable hurdles to obtaining borrower defense relief under the NPRM, rendering illusory the entire process and standard. The first such hurdle is the Department's restrictive definition of "misrepresentation."

⁷ *Id.*

⁸ See 81 Fed. Reg. at 75,936 ("We do not agree that the [2016] Federal standard will incent borrowers to assert claims of misrepresentation without sufficient evidence to substantiate their claims.").

⁹ See generally 59 Fed. Reg. 61,690 (Dec. 1, 1994) ("The Secretary believes that the proposed regulations provide an adequate system for adjudicating claims by borrowers that have a defense against repayment of a loan based on the acts or omissions of the school. The Secretary notes that the regulations identify formal proceedings in which borrowers may raise the acts or omissions of the school as a defense against collection of the loan. *The Secretary does not believe that these proceedings will be used by borrowers to raise frivolous appeals.* Moreover, schools are further protected from frivolous claims by the requirement that the Secretary initiate a second proceeding to enforce a liability against the school.") (emphasis added).

¹⁰ See, e.g., Andrew Kreighbaum, "Winners and Losers from DeVos Approach," *Inside Higher Ed* (Aug. 7, 2018) (noting the objection by Career Education Colleges and Universities, an association of for-profit institutions, to the proposed standard), available at: <https://www.insidehighered.com/news/2018/08/07/devos-regulatory-framework-means-less-pressure-colleges-tougher-standard-student>.

The 2016 Rule established a new federal standard that allowed borrowers to assert a borrower defense “on the basis of a substantial misrepresentation, a breach of contract, or a favorable, nondefault contested judgment against the school, for its act or omission relating to the making of the borrower’s Direct Loan or the provision of educational services for which the loan was provided.”¹¹ Consistent with 34 C.F.R. Part 668, subpart F, the Department defined a “misrepresentation” as including false, erroneous, or misleading statements that have the likelihood or tendency to mislead under the circumstances.¹²

By contrast, the NPRM proposes to omit breaches of contract and nondefault contested judgments from the federal standard¹³ and redefine “misrepresentation” as “a statement, act, or omission by the eligible institution to the borrower that is (i) false, misleading, or deceptive, (ii) *made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth*, and (iii) directly and clearly related to the making of a Direct Loan for enrollment at the school or to the provision of educational services for which the loan was made.”¹⁴

As explained further below, this new intent standard is contrary to the Department’s “longstanding position that a misrepresentation does not require knowledge or intent on the part of the institution.”¹⁵

A. The Department’s Express Decision to Decline to Include “Intent” in the 2016 Rule’s Definition of “Misrepresentation” was Reasoned Agency Decision-Making

¹¹ 81 Fed. Reg. at 75,926.

¹² *See id.* at 79,545, 76,083.

¹³ While not the focus of this section, NSLDN strongly opposes the Department’s removal of the breach of contract and judgement-based standards for borrower defense relief. The Department’s approach in 2016 was based on reasoned analysis and decisionmaking that the NPRM does not directly address or refute. *See* 81 Fed. Reg. 75,942 (“State law may provide important protections for borrowers and students. We believe that a standard recognizing nondefault, favorable, contested judgments strikes a balance between recognizing causes of action under State or other Federal law and minimizing the Department’s administrative burden in accurately evaluating the merits of such claims.”); *id.* at 75,943 (“[B]reach of contract is a common allegation against schools, and the underlying facts for a breach of contract claim may very well not fit into the Department’s substantial misrepresentation standard. Furthermore, breach of contract is a cause of action established in common law recognized across all States, and its basic elements are likewise uniform across the States. Developing a Federal standard in the particularized area of student-institution contracts will ultimately lead to better consistency and greater predictability in this area.”). The Department should retain these standards.

¹⁴ 83 Fed. Reg. at 37,253 (emphasis added).

¹⁵ 81 Fed. Reg. at 75,937.

In 2016, the Department considered and rejected including an intent or knowledge element in the definition of “misrepresentation.” The Department explained:

[W]e do not believe it is necessary to incorporate an element of intent or knowledge into the substantial misrepresentation standard. This reflects ***the Department’s longstanding position that a misrepresentation does not require knowledge or intent on the part of the institution.*** . . . [A]n institution will generally be responsible for harm to borrowers caused by its misrepresentations, ***even if they are not intentional.*** We continue to believe that this is more reasonable and fair than having the borrower (or taxpayers) bear the cost of such injuries. It also reflects the consumer protection laws of many States.¹⁶

The Department concluded that “misrepresentation” as defined in the 2016 Rule “appropriately addresses the Department’s interests in accurately identifying and providing relief for borrowers and in providing clear standards for borrowers, schools, and the Department in resolving claims.”¹⁷

B. The Department has not Provided Adequate Justification for Changing Its Position and Including Intent in the Definition of “Misrepresentation”

The Department cites no evidence, plausible explanation, or “good reason” that justifies creating a new standard that borrowers will be unable to satisfy and that is far above state and federal consumer protection laws and the Department’s prior definitions of “misrepresentation.” Moreover, the proposed rule fails to properly explain why this heightened standard would be appropriate in 2018 when it was “nearly impossible” to satisfy in 2016.¹⁸

Indeed, the Department’s discussion of the proposed change contains conclusory and contradicting statements that are impossible to parse. In an attempt to explain the change, the Department states that it “agrees with negotiators that it is *unlikely*

¹⁶ *Id.* (emphasis added). *See also id.* at 75,947 (“There appears to be some confusion as to whether the definition for misrepresentation in part 668, subpart F, requires a demonstration of intent, as would be required in common law fraud. In proposing to replace the word “deceive” with “mislead under the circumstances” in § 668.71(c), the Department is not seeking to remove any intent element, but rather to clarify the definition to more accurately reflect the position it expressed in 2010 as to part 668, subpart F. As noted in the NPRM, 81 FR 39342, the word “deceive” may be viewed as implying knowledge or intent. However, in the Department’s 2010 rulemaking on part 668, subpart F, *we explicitly declined to require that a substantial misrepresentation under the regulation require knowledge or intent by the school.*”) (emphasis added).

¹⁷ *Id.* at 75,945.

¹⁸ *Id.* at 75,937.

*that a borrower would have evidence to demonstrate that an institution had acted with intent to deceive.*¹⁹ Yet, a few sentences later, the Department states, without explanation or citation, that it “believes that this standard strikes a balance between protecting borrowers by establishing a standard of evidence that *is reasonable for a borrower to meet* and protecting the Federal taxpayer by requiring a level of evidence that ensures misrepresentation actually took place and the student relied upon that misrepresentation and suffered harm.”²⁰ This type of unsupported, muddled explanation constitutes arbitrary and capricious decision-making.

Moreover, the Department’s rationale is illogical. From a student’s perspective, an institution’s intent has nothing to do with whether or not a “misrepresentation actually took place and the student relied upon that misrepresentation and suffered harm.”²¹ The Department surely must recognize that an institution’s motives are wholly divorced from the harms suffered by injured students.

The new standard is also contrary to existing federal and state laws. For example, the Federal Trade Commission definition of deception does not require intent.²² Similarly, intent is generally not necessary under state UDAP statutes.²³ Indeed, as one court explained in interpreting a state UDAP law, to require proof of intent “would effectively emasculate the act and contradict its fundamental purpose.”²⁴

The Department has not, and cannot, justify the inclusion of intent in the definition of “misrepresentation.”

C. As the Department has Previously Stated, it is “Nearly Impossible” for Borrowers to Gather Evidence of Intent

The Department recognized in 2016 that requiring proof of intent would, as a practical matter, be a herculean task for borrowers, who have little way of accessing

¹⁹ 83 Fed. Reg. at 37,257 (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ *Id.*

²² See, e.g., *Fed. Trade Comm’n v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) (noting that the key question is not intent to deceive, but “the likely effect of the claim on the mind of an ordinary consumer”); *Fed. Trade Comm’n v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) (explaining that intent is unnecessary, even for an action seeking monetary redress). See generally Nat’l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* § 4.2.4.1 (8th ed. 2012).

²³ See generally Nat’l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* § 4.2.4.1 (8th ed. 2012) (citing cases from a majority of states); see also Nat’l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Feb. 2009), available at: <http://www.nclc.org> (providing a state-by-state survey of UDAP statutes’ features, including intent requirements).

²⁴ *Thomas v. Sun Furniture & Appliance Co.*, 399 N.E.2d 567, 570 (Ohio Ct. App. 1978).

and presenting evidence of what recruiters or other school officials knew or intended when telling them falsehoods. The Department explained, in no uncertain terms, that “[g]athering evidence of intent would likely be *nearly impossible* for borrowers. Information asymmetry between borrowers and institutions, which are likely in control of the best evidence of intentionality of misrepresentations, would render borrower defense claims implausible for most borrowers.”²⁵

Because injured borrowers will have no access to internal documents or emails of college executives or recruiters, they will be unable to show that a school’s statement was made with knowledge of its falsity or reckless disregard for its truth. This is especially so given that many borrower claims are based on oral statements (or omissions) made by school representatives, for which no documentary evidence exists.

In addition, even in those rare circumstances where documentary evidence of intent might exist, students will have no way of obtaining it. The vast majority of students will be unable to afford representation and, even if they could, the Department proposes to once again allow pre-dispute arbitration clauses that will bar students from seeking discovery.²⁶ The Department cannot arbitrarily deny relief to all borrowers who make claims based on oral misrepresentations, or who are unable to access evidence due to lack of representation and/or the existence of an arbitration clause.²⁷

In sum, the Department’s proposed definition of “misrepresentation” will create an insurmountable barrier for borrowers with meritorious claims. The Department’s explanations in the NPRM are wholly insufficient to rise to the level of reasoned decision-making to justify such a drastic policy change that will effectively close the

²⁵ *Id.* at 75,937 (emphasis added).

²⁶ *See infra* Section V.

²⁷ The NPRM further provides that evidence of a misrepresentation might include, for example: “[a]ctual licensure passage rates materially different from those included in the institution’s marketing materials, website, or other communications made to the student;” “[a]ctual employment rates materially different from those included in the institution’s marketing materials, website, or other communications made to the student;” “[a]ctual institutional selectivity rates or rankings, student admission profiles, or institutional rankings that are materially different from those included in the institution’s marketing materials, website, or other communications made to the student;” or “[a] representation regarding the employability or specific earnings of graduates without an agreement between the institution and another entity for such employment or sufficient evidence of past employment or earnings to justify such a representation or without citing appropriate national data for earnings in the same field as provided by an appropriate Federal agency that provides such data.” 83 Fed. Reg. at 37,326. It is hard to fathom how any borrower, let alone an unrepresented borrower, would be able to produce this kind of information.

door on relief for borrowers. The federal standard established in the 2016 Rule should remain.²⁸

III. The Requirement to Prove Financial Harm Beyond the Debt Incurred is Arbitrary, Unsupported, and Not Feasible for Borrowers

Not only will borrowers be required to prove institutional knowledge or intent, but they will also have to establish that they were financially harmed by the misrepresentation *beyond* the debt incurred by taking out the loan. This requirement too renders relief for borrowers illusory.

A. When Borrowers Take out Direct Loans Based on School Misconduct, They are Financially Harmed

The first problem with the Department's financial harm requirement is the absurd declaration that "it does not consider the act of taking out a Direct Loan as evidence of financial harm to the borrower."²⁹ This statement fails to recognize or explain the Department's previous recognition in the 2016 Rule of the deep and substantial harms to student loan borrowers associated with debt incurred from illegal conduct:

Borrowers who ultimately have their loans discharged will be relieved of debts they may not have been able to repay, and that debt relief can ultimately allow them to become bigger participants in the economy, possibly buying a home, saving for retirement, or paying for other expenses. Recent literature related to student loans suggests that high levels of student debt may decrease the long-term probability of marriage, increase the probability of bankruptcy, reduce home ownership rates, and increase credit constraints, especially for students who drop out. Further, when borrowers default on their loans, everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge. Borrowers who default might also be denied a job due to poor credit, struggle to pay fees necessary to maintain professional licenses, or be unable open a new checking account. While difficult to quantify because of the multitude of different potential borrowing profiles and nature of the claims of those who will seek relief through borrower defense and the possibility of partial relief, the discharge of loans for which borrowers have valid borrower defenses could have significant

²⁸ Although insufficient on its own, we recommend that the Department clarify that it will afford a presumption of intent to allegations that are consistent with the list of "misrepresentation examples," as described at 83 Fed. Reg. at 37,326-27.

²⁹ 83 Fed. Reg. at 37,327.

positive consequences for affected borrowers and associated spillover economic benefits. Affected borrowers also will be able to return into the higher education marketplace and pursue credentials they need for career advancement.³⁰

The Department's 2016 analysis recognized that student debt incurred from institutional misconduct substantially harmed numerous aspects of borrowers' lives, directly impeding their ability to start a family, get a job, rent or buy a home, and pay bills. This analysis was supported by numerous sources.³¹ Yet, the NPRM ignores this evidence and declares, without support, that "it does not consider the act of taking out a Direct Loan as evidence of financial harm to the borrower."³² The Department must take notice of and address its prior evidence and findings.³³

B. The Financial Harm Elements are not Feasible, Will Penalize Borrowers Who Obtain Employment, and Will Shame, Embarrass, and Dissuade Them From Filing Claims

The financial harm requirements are unduly burdensome to borrowers and will be impossible to prove. Under the Department's proposal, borrowers must "[s]tate the amount of harm that [they] allege[] to have been caused by the school's action and supply any information relevant to assessing this allegation of harm."³⁴ This includes:

- "[I]nformation about whether the borrower failed to actively pursue employment in the field if the borrower is a recent graduate;"
- "[W]hether the borrower was terminated or removed for performance reasons from a position in the field for which the borrower's education prepared the borrower, or a related field;" or
- "[W]hether the borrower failed to meet other requirements of or qualifications for a job in such field for reasons unrelated to the

³⁰ 81 Fed. Reg. at 76,051 (internal citations omitted).

³¹ *Id.*

³² 83 Fed. Reg. at 37,327.

³³ The Department's discussion of financial harm is also out of step with its interpretations of harm on borrower defense claims approved to date, which have considered student loan debt incurred on the basis of a misrepresentation to be financial harm. *See, e.g.*, U.S. Dep't of Educ., Fed. Student Aid, "Information About Debt Relief for Corinthian Colleges Students," *available at*: <https://studentaid.ed.gov/sa/about/announcements/corinthian#debt-relief> (describing process for relief and linking to Heald and Everest/WyoTech Attestation Forms, which do not require evidence of financial harm in order to qualify for relief).

³⁴ *Id.* at 37,326.

school's action underlying the borrower defense, such as the borrower's ability to pass a drug test, satisfy criminal history or driving record requirements, and meet any health qualifications.”³⁵

To suggest that borrowers who have successfully established that they were intentionally deceived are themselves to blame for a lack of employment is completely out of touch with the well-documented nature of abuses by predatory colleges. The Department has not justified why these proposals are necessary, nor has it indicated how these factors relate to the harm that was caused in the first place—*i.e.*, the conduct by an institution that led a student to incur debt under false or fraudulent pretenses.

In addition, the Department summarily declares, among other things, that financial harm cannot:

- “[Be] predominantly due to intervening local, regional, or national economic or labor market conditions” and any extended period of unemployment after graduation must be “unrelated to national or local economic downturns or recessions;” or
- “[A]rise from the borrower’s voluntary decision to pursue less than full-time work or not to work, or result from a voluntary change in occupation.”³⁶

Evidence borrowers would need to satisfy these financial harm requirements would require sophisticated analysis, including the possibly of expert testimony from labor economists. It would also be difficult for a fact finder to resolve.

Indeed, as attorneys who specialize in consumer protection and higher education issues, it is hard to fathom how individual unrepresented student loan borrowers could possibly satisfy these requirements. The Department does not appear to have conducted any analysis as to whether it is feasible for a low-income student loan borrower to obtain the expert services that would be necessary to satisfy the standard. Nor does it appear to have conducted any analysis of how its proposals will work in practice. For example:

- Consider a student who is somehow able to prove that she enrolled in her school based on a misrepresentation and suffered financial harm, but who subsequently is diagnosed with a serious illness that causes her to

³⁵ *Id.*

³⁶ *Id.* The Department does not discuss how it plans to determine if a change in occupations or a decision to pursue less than full-time work is “voluntary.” Beyond an attestation, this would be extremely difficult for borrowers to affirmatively prove.

temporarily leave her job (or to work less than full-time in her field). Will the Department require the student to provide her sensitive medical records? If so, how will the Department evaluate such medical records? Will the borrower be allowed the opportunity to refute the Department's conclusions? Will schools be granted access to the borrower's medical records? Will the Department deny or limit relief for this borrower?

- Consider a borrower who graduates during an economic downturn. How will borrowers—especially borrowers without legal representation—prove that their struggles to find work are not related to economic forces? Will the Department's proposal create a presumption against relief for borrowers that happen to be scammed by predatory institutions during local, regional, or national economic downturns?
- Consider a single mother who chooses to work part-time so that she can spend time with her children. Does the Department plan to penalize her for this decision? Will single parents be forced to choose between full-time work and borrower defense relief? What bearing does that decision have on the borrower's claim about a misrepresentation in the first place?
- Consider a borrower who, one year after enrolling, drops out of school because she realizes that it is not providing the academic services promised and graduates are not finding jobs. Because of her decision to drop out, she is unable to obtain work in her field. How will the Department approach this all-too-common situation? Will the borrower be penalized for the arguably wise decision to cut her losses? How will the Department determine the reasons for a student dropping out? If a school provides evidence that the student had bad grades prior to dropping out, how will that evidence be analyzed? What about students who drop out due to unforeseen circumstances, such as a pregnancy or death in the family?

These are but some of the questions that the Department's proposal raises.

In addition to being unduly burdensome and impossible to prove, the proposed financial harm requirements would, perversely, penalize borrowers who are able to get jobs through their own hard work and dedication, despite the misconduct of their school. The Department should not be creating financial incentives for borrowers to delay efforts to obtain employment.

The financial harm requirements may also dissuade borrowers from applying in the first place. As discussed above, students will be forced to turn over highly sensitive personal materials, including documents sufficient to show whether they have lost a

job due to the “[in]ability to pass a drug test, satisfy criminal history or driving record requirements, and meet any health qualifications.”³⁷ In addition, students will be forced to “sign a waiver allowing the institution to share relevant portions” of the student’s “education record” with the Department. Again, these requirements are unrelated to the underlying claim and designed only to shame, embarrass, and dissuade students from filing in the first place.

The financial harm requirements will also add an entirely new layer to the Department’s review process. Each claim will require significant attention from Department staff, who will somehow have to determine the role of labor market conditions, health qualifications, drug tests, student intent, and other factors as applied to each borrower’s employment status. Yet the Department claims that the proposed rule will “streamline” the review process. The process posited here will do precisely the opposite.

In sum, the Department has not articulated any need for these financial harm requirements grounded in evidence or reason. The Department does not—and indeed cannot—establish how such post-graduation factors are even remotely tied to misconduct by an institution. Indeed, the Department itself concedes that these factors are “unrelated to the school’s action underlying the borrower defense.”³⁸

Consistent with the 2016 Rule and consumer protection laws throughout the country, NSLDN recommends that the Department omit these new “financial harm” requirements in their entirety and recognize, as it has previously, that the act of taking out a Direct Loan on the basis of a misrepresentation constitutes sufficient harm itself.

IV. The Proposed Process is Unfair to Borrowers and Will Hamper Investigations Into Predatory Institutions

A. The Proposed Process Raises Significant Fairness Issues

Under proposed 34 C.F.R § 685.206(d)(7), “the school against which the borrower alleges misrepresentation in a defense to repayment will be notified of the pending application and allowed to submit a response and evidence within the specified timeframe included in the notice.”³⁹

As the Department is well aware, students targeted by predatory colleges are often the least prepared to navigate the Department’s forms and systems because they

³⁷ 83 Fed. Reg. at 37,326.

³⁸ *Id.*

³⁹ *Id.* at 37,261.

are unfamiliar with higher education, do not always know their rights, and are almost always unable to afford a lawyer or obtain representation from legal aid organizations with limited resources. Recognizing this reality, the Department “specifically set out [in 2016] to design a process that would not be onerous for borrowers and that would not require third-party assistance, such as but not limited to an attorney.”⁴⁰ The Department’s intent was to “work[] toward evening the playing field for students” by creating a process that “does not require students to directly oppose schools.”⁴¹

Without analysis or explanation, the NPRM proposes to abandon this prior approach. Under the NPRM, borrowers would be required to “face off” against sophisticated, corporate institutions. Although this would present challenges under any set of circumstances, it is particularly difficult given the labyrinth of hurdles (discussed throughout this comment) that borrowers would face to bring their defense to repayment claims.

The proposed process will also likely increase the already problematic delay in the borrower defense review process. As the Department stated in 2016:

[T]he parallel identification of records to schools, which under the proposed regulations was permissive, would . . . cause unnecessary administrative delay, given that the fact-finding process described in § 685.222(e) will not decide any amounts schools must pay the Secretary for losses due to the borrower defense at issue. The school will have the right and opportunity to obtain such evidence, and present evidence and arguments, in the separate proceeding initiated by the Secretary under § 685.222(e)(7) to collect the amount of relief resulting from the individually filed borrower defense claim.⁴²

Finally, the proposed process does not provide borrowers with the opportunity to respond to any evidence submitted by the school. While we strongly oppose any process that pits students directly against institutions, the Department must, at a minimum, allow students the opportunity to respond.

The Department provides no basis for its complete reversal in the NPRM and does not address the “unnecessary administrative delay” that it found, less than two years ago, would result from sharing records with schools prior to initiating a proceeding to collect from the school.

⁴⁰ 81 Fed. Reg. at 75,962.

⁴¹ *Id.*

⁴² *Id.* at 75,964 (emphasis added).

B. The Proposed Process Will Hinder Investigations Into Improper Institutional Conduct

Proposed § 685.206(d)(7) provides that the school against which the borrower alleges a misrepresentation in a defense to repayment will be notified of the pending application and allowed to submit a response and evidence within a specified timeframe.⁴³

Automatically and immediately forwarding every borrower defense claim, along with all of the attached evidence, to the school will be detrimental to ongoing investigations. In the 2016 Rule, the Department noted that the “consideration of individual borrower defense claims will lead to information gathering as part of enforcement investigations.”⁴⁴ The Department retained discretion to defer the release of borrower defense records to “protect the integrity of the investigation.”⁴⁵ If requested, records were to be made available “after the investigation is complete and prior to the borrower defense decision.”⁴⁶ The Department concluded that, “[w]e may defer consideration of individual claims where we determine that releasing potentially relevant records prior to the completion of the investigation would be undesirable.”⁴⁷

Unlike in 2016, the NPRM ignores how the timing of sharing records might interfere with ongoing investigations against schools. There are plenty of reasons why a government investigator would not want to turn over records to the target of its investigation. But the proposal does not even recognize the impact that this rule will have on investigations, suggesting that the Department does not plan to undertake serious investigations of schools, or, at a minimum, is not thinking strategically with respect to investigative strategy and its duty to protect federal taxpayer dollars from waste, fraud, and abuse. The Department must retain discretion to withhold evidence from institutions while investigations remain ongoing.

V. The Department Should not Eliminate the Ban on Pre-Dispute Arbitration Clauses and Class Action Waivers

⁴³ 83 Fed. Reg. at 37,261 (emphasis added); *see also id.* at 37,262 (“The Department preliminarily believes that such a process must include an opportunity for the institution to receive a copy of the borrower’s claim and a signed waiver allowing the institution to share relevant portions of the borrower’s education record with the Department, and provide sufficient time for the institution to provide a response and any supporting evidence of its own to the Secretary.”).

⁴⁴ 81 Fed. Reg. at 75,964.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Although rare with respect to non-profit and public institutions, for-profit colleges frequently include provisions in enrollment contracts that eliminate students' rights to access federal and state courts for claims against the institution, forcing students instead into often secret arbitration proceedings. These provisions also frequently prohibit students from joining together to bring class claims. By contractually barring students' access to courts and by preventing students from joining together, these clauses help shield institutions from accountability for harm caused to students.

A. The Department Provided a Reasoned Rationale When it Banned Pre-Dispute Arbitration Clauses and Class Action Waivers in 2016

In 2016, the Department prohibited schools participating in the Direct Loan program from using mandatory pre-dispute arbitration clauses and class action waivers. In making this decision, the Department relied upon extensive empirical research and peer-reviewed studies regarding the harm that these provisions caused.

In concluding that pre-dispute arbitration clauses and class actions waivers “jeopardize the taxpayer investment in Direct Loans,” for example, the Department explained:

[W]e considered the effect of predispute arbitration agreements on the achievement of Direct Loan Program objectives and the Federal interest, as evidenced during the same period. A major objective of the program is protecting the taxpayer investment in Direct Loans. That objective includes preventing the institutions empowered to arrange Direct Loans for their students from insulating themselves from direct and effective accountability for their misconduct, from deterring publicity that would prompt government oversight agencies to react, and from shifting the risk of loss for that misconduct to the taxpayer. Predispute arbitration agreements, like class action waivers, do each of these, and thus jeopardize the taxpayer investment in Direct Loans.⁴⁸

In further support of the ban, the Department “gathered substantial evidence” showing that:

[T]he widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan

⁴⁸ 81 Fed. Reg. at 76,022.

Program. It is undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.⁴⁹

Among other things, the Department's evidence included sources confirming that forced arbitration prevents relief for consumers who have been harmed by illegal practices. For example, after three years of study, the Consumer Financial Protection Bureau ("CFPB") reported that consumers brought fewer than 1,500 arbitration claims across six consumer financial markets from 2010 to 2012, and claims filed with the largest arbitration firm resulted in decisions providing combined relief of less than \$400,000.⁵⁰ By contrast, about 32 million consumers obtained about \$220 million from class action settlements in each of those years.⁵¹ Furthermore, ninety percent of the arbitration clauses examined for the CFPB study waived class action proceedings—precluding consumers from obtaining relief through class actions, or from holding companies responsible for the full extent of their illegal conduct against consumers as a whole.⁵² This data, which the Department relied on previously, show that forced arbitration clauses frequently pose insurmountable barriers to consumers seeking relief.⁵³

The Department's findings are also consistent with stories reported in the media. For example, in the fall of 2015, the *New York Times* told the story of Matthew

⁴⁹ *Id.* at 76,025.

⁵⁰ *See* Consumer Fin. Prot. Bureau, Arbitration Study; § 1:11-13 (2015).

⁵¹ *Id.*

⁵² *Id.* § 1:13.

⁵³ 81 Fed. Reg. at 76,026 ("Contrary to the assertion that class actions provide only modest returns, we note that the CFPB found, in its study, that the 419 consumer finance class actions during the five-year period it studied produced some \$2.2 billion in net cash or in kind relief to consumers in those markets. Whether or not consumer class actions have produced minimal or no actual benefit to the consumers who comprise the class, there is little evidence that this has happened in the postsecondary education industry. Rather, precisely because of schools' widespread and aggressive use of class action waivers, and even opposition to class arbitration, as described in the NPRM, there appears to be no history of such minimal benefits in this market.") (citing *Jamieson v. Vatterott Educ. Centers, Inc.*, 259 F.R.D. 520 (D. Kan. 2009) (granting a class of students two million dollars in relief from a for-profit school, in one of the only post-secondary class actions to proceed to trial)). *See also* Nick DeSantis, "Missouri Court Upholds Ex-Student's Win in Suit Against Vatterott College," *The Ticker* (Aug. 27, 2014), available at: www.chronicle.com/blogs/ticker/mo-appeals-court-upholds-ex-students-win-in-suit-against-vatterott-college/84777.

Kilgore, a bread truck driver who dreamed of becoming a helicopter pilot ever since he was a child.

At 28, after his first daughter was born, [Mr. Kilgore] enrolled at Silver State Helicopters, a for-profit school in Oakland, taking out a \$55,950 loan from Key Bank to pay for the program.

Less than halfway into training, Mr. Kilgore got a call from his flight instructor, who said Silver State was bankrupt. In disbelief, he drove to Oakland the next day to find the school's doors padlocked.

Key Bank and Student Loan Xpress, the school's preferred lenders, demanded that students pay back their loans for degrees they never received. About 2,700 students, including Mr. Kilgore, joined in class actions against the two lenders, accusing them of ignoring financial signs that the school was in trouble.

Student Loan Xpress, whose contracts did not have an arbitration clause, agreed to settle and forgave more than \$100 million in student loans. Key Bank, whose contracts did, used the clause to get Mr. Kilgore's lawsuit dismissed in 2013.

Key Bank declined to comment on Mr. Kilgore's case, but said the bank had forgiven a portion of many students' loans.

Mr. Kilgore has not been able to pay back his loan, which with interest has swelled to \$110,000. With his credit ruined, he and his wife cannot buy a house and he has abandoned his dream of becoming a pilot.

"It's the worst decision I ever made," he said.⁵⁴

The Department has also determined that mandatory arbitration clauses and class action waivers substantially harm the financial interests of the United States:

⁵⁴ Jessica Silver-Greenberg & Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *New York Times* (Oct. 31, 2015), available at: <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>. This article was the first in a three-part series called "Behind the Fine Print," which examined how arbitration clauses "buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court." *Id.*

[R]ecent experience with class action waivers demonstrates that some institutions, notably Corinthian, aggressively used class action waivers to thwart actions by students for the very same abusive conduct that government agencies, including this Department, eventually pursued. Corinthian used these waivers to avoid the publicity that might have triggered more timely enforcement agency action, which came too late for Corinthian to provide relief to affected students. 81 FR 39383. Corinthian's widespread use of these waivers and mandatory arbitration agreements resulted in grievances against Corinthian being asserted not against the now-defunct Corinthian, but as defenses to repayment of taxpayer-financed Direct Loans, with no other party from which the Federal government may recover any losses. As noted, Corinthian was not alone in this practice. The absence of class action risk coincided with the use of deceptive practices in the industry during this same period, as recounted in the NPRM and in the earlier NPRM for Program Integrity: Gainful Employment. 79 FR 16,426 (Mar. 24, 2014). We infer that from the continued misconduct and from the extensive use of class action waivers that the waivers effectively removed any deterrent effect that the risk of such lawsuits would have provided. These claims, thus, ended up as defenses to repayment of Direct Loans. This experience demonstrates that class action waivers for these claims substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program.⁵⁵

In making these findings, the Department thoroughly analyzed comments both for and against arbitration and class action waivers, finding that:

Nothing in the comments opposing the regulation demonstrates that these effects are exaggerated or mischaracterized, that the substantial problems created by the use of class action waivers can be reduced or eliminated by more modest measures, that the disadvantages and burdens the regulation would place on schools outweigh the costs and harm that use of class action waivers has already caused, or that there is any reason to expect that this pattern will change so that such waivers will not cause these same problems in the future. It is possible that banning class action waivers may increase legal expenses and could divert funds from educational services, or lead to tuition increases. We expect that the potential exposure to class actions will motivate institutions to provide value and treat their student

consumers fairly in order to reduce the likelihood of suits in the first place.⁵⁶

This thorough analysis makes clear that the Department provided a reasoned rationale when it prohibited schools participating in the Direct Loan program from using mandatory pre-dispute arbitration clauses and class action waivers in 2016.

B. The Department has not Provided Adequate Justification for Eliminating Pre-Dispute Arbitration Clauses and Class Action Bans in the NPRM

In the NPRM, the Department ignores all of this evidence and summarily declares that it will once again allow mandatory pre-dispute arbitration clauses and class action waivers. In the Department's words:

We believe that arbitration offers a number of potential advantages in this context. Arbitration may, for example, be more accessible to borrowers since it does not require legal counsel and can be carried out more quickly than a legal process that may drag on for years. It may also allow an institution to more quickly identify and stop bad practices to ensure that other students are not harmed. It may also allow borrowers to obtain greater relief than they would in a consumer class action case where attorneys often benefit most. And it may reduce the expense of litigation that a university would otherwise pass on to students in the form of higher tuition and fees. Arbitration also eases burdens on the overtaxed U.S. court system.⁵⁷

The Department does not adequately address the case law, research studies, or empirical analyses from the 2016 Rule. With respect to the CFPB study, the Department attempts to cast it aside by citing to a joint resolution of Congress disapproving of a final CFPB rule that would have regulated pre-dispute arbitration agreements based on the study.⁵⁸ But Congress's disapproval does not mean that the underlying evidence is somehow flawed or inaccurate. The NPRM does not address or even describe the extensive evidence that formed the basis of the CFPB's findings. It also fails to cite to

⁵⁶ *Id.* at 76,026 (citing Blake Shinoda, *Enabling Class Litigation as an Approach to Regulating For-Profit Colleges*, 87 S. Cal. L. Rev. 1085 (2014) (“[C]lass actions increase negative publicity of for-profits and draw attention to deceptive recruiting in a much more public fashion than bilateral arbitration.”)).

⁵⁷ 83 Fed. Reg. at 37,265.

⁵⁸ *See id.*

other studies or examples in support of the purported “potential advantages” of arbitration.

In addition, the Department’s reasoning relies upon its so-called “reexamination of the legal landscape,” which is based exclusively on one case, *Epic Systems Corp. v. Lewis*.⁵⁹ The Department posits that *Epic*’s “recent reaffirmation of the Federal policy in favor of arbitration may warrant a different approach to these regulations.”⁶⁰ *Epic*, however, is not relevant to the Department’s regulation of mandatory arbitration clauses and class action waivers. *Epic* addressed the entirely separate question of whether the National Labor Relations Act renders individual arbitration clauses in private employer-employee agreements unenforceable. The Court concluded that the Federal Arbitration Act requires courts to enforce arbitration agreements between employers and employees according to their terms, even when the agreements provide only for arbitration through “individualized proceedings” rather than as a class.

Because *Epic* addresses the separate issue of when a court must enforce a private arbitration agreement, it: (1) is unrelated to the issue of class action waivers and (2) has no bearing on the Department’s 2016 analysis of its authority to include contractual conditions relating to arbitration within its own program participation agreements with institutions participating in Title IV. In 2016, the Department explained that the Higher Education Act:

[G]ives [it] the authority to impose conditions on schools that wish to participate in a Federal benefit program. In this regulation, the Department is exercising its broad authority, as provided under the HEA, to impose conditions on schools that wish to participate in the Federal Direct Loan Program. Section 452(b) of the HEA states, “No institution of higher education shall have a right to participate in the [Direct Loan] programs authorized under this part [part D of title IV of the HEA].” 20 U.S.C. 1087b(b). If a school chooses to participate in the Direct Loan Program, it must enter into a Direct Loan Program participation agreement (PPA). 20 U.S.C. 1087d. Section 454(a)(6) of the HEA authorizes the Department to include in that PPA “provisions that the Secretary determines are necessary to protect the interests of the United States and to promote the purposes of” the Direct Loan Program. 20 U.S.C. 1087d(a)(6); 81 FR 39385.⁶¹

⁵⁹ 138 S. Ct. 1612, 1632 (2018).

⁶⁰ 83 Fed. Reg. at 37,265.

⁶¹ 81 Fed. Reg. at 76,022.

After describing numerous studies and evidence in support of its arbitration and class action provisions in 2016, the Department concluded that “section 454(a)(6) of the HEA authorizes [it] to ban Direct Loan participant institutions from securing class action waivers of borrower-defense type claims” and to “regulate the use of predispute arbitration agreements.”⁶² More specifically, the Department explained:

The arguments that, by these regulations, the Department attempts to override, displace, or disregard the FAA mischaracterize the regulations. The regulations do not control the conduct of purely private transactions between private parties, transactions unrelated to the Direct Loan Program. Direct Loans are not purely private transactions; but for the Direct Loan, the student may very likely not have enrolled at all in a chosen school. The terms of enrollment agreements between the institution and the student loan recipient, and the school’s performance with respect to the education financed by that loan, directly affect the Direct Loan program. These regulations impose a condition on the participation by a school in this specific Federal program, a Federal program in which Congress explicitly stated that “no institution shall have a right to participate . . .” 20 U.S.C. 1087b(b). The final regulations do not bar schools from using any kind of predispute arbitration agreements, or class action waivers, so long as they pertain only to grievances unrelated to the Direct Loan Program. The regulations merely require that a school that participates in the Direct Loan program cannot enter into a predispute arbitration agreement regarding borrower defense-type claims with a student who benefits from aid under that program.⁶³

In making this determination the Department directly acknowledged that:

[T]he FAA assures that agreements to arbitrate shall be valid, and may not be invalidated “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. [§] 2. Contrary to the commenters’ assertion, none of the case authority to which the commenters cite addresses Federal regulations that may affect arbitration, and the disputes addressed in that case authority appear to involve litigation between private parties regarding rights arising under Federal, State, or local law or contracts between those parties.⁶⁴

⁶² *Id.* at 76,022-23.

⁶³ *Id.*

⁶⁴ *Id.* at 76,023.

Similarly, *Epic* involves litigation between private parties regarding rights under private employment contracts; it does not address federal regulations that may affect arbitration. *Epic* therefore falls squarely within the Department's 2016 analysis of this issue; it does not stand for the propositions that the Department suggests in the NPRM.

In sum, by permitting schools to force students into non-public arbitration proceedings, Secretary DeVos is providing institutions with a mechanism to help schools hide allegations made against them and suppress evidence of fraud and other misconduct. This will cause further harm to both students and taxpayers.

The Department's explanations in the NPRM are wholly insufficient to rise to the level of reasoned decision-making.⁶⁵ The ban on pre-dispute arbitration clauses and class action bans in the 2016 Rule should remain.

VI. Other Concerns

NSLDN has numerous other concerns with the NPRM, including but not limited to:

- *Evidentiary Standard*. The Department is “interested in comments as to whether it should require clear and convincing evidence of misrepresentation and financial harm (as opposed to a preponderance of the evidence of misrepresentation and financial harm) in the event it continues to consider affirmative claims.”⁶⁶ The Department justifies the higher standard because it “could deter some frivolous affirmative claims.”⁶⁷

First, as discussed above, the Department is well aware that evidence of intent will be extremely hard, if not impossible, to find. The Department has not justified its proposal to place a heightened evidentiary burden on top of an already impossible intent standard. Second, the Department provides no

⁶⁵ The Department's justification in the NPRM for proposing to eliminate the 2016 prohibition on mandatory pre-dispute arbitration provisions and class action waivers is based entirely on anecdotal comments from negotiators and a discussion of the legality of bans on mandatory arbitration (but not class action waivers). Although NSLDN strongly opposes allowing institutions to force students into arbitration, if the Department follows through with its proposal and allows institutions to do so, NSLDN recommends that the Department nevertheless bar institutions, as part of the Direct Loan participation agreements, from forcing students to waive rights to file class claims. Indeed, numerous providers of arbitration services permit class arbitrations. See, e.g., <https://www.adr.org/ClassArbitration> (noting that the American Arbitration Association (AAA) “administers class arbitrations for cases where the underlying agreement specifies that disputes arising out of the parties’ agreement should be resolved by arbitration and the agreement is silent with respect to class claims, consolidation, or joinder of claims”).

⁶⁶ *Id.* at 37,253.

⁶⁷ *Id.* at 37,252.

evidence that a heightened evidentiary standard—a concept understood by few outside of the legal community—would somehow deter borrowers from filing frivolous claims. Indeed, as discussed above, the Department concedes that there is no evidence that frivolous claims are even a problem.⁶⁸ Third, a clear and convincing standard is out of step with consumer protection law, with the Department’s other administrative proceedings, and with the Department’s specific findings in the 2016 Rule.⁶⁹ The Department has provided no basis for charting this new course.

- *Statute of Limitations.* The Department’s proposal imposes strict time limitations, leaving borrowers only a narrow window during which their applications will be considered. Its proposal to consider only those claims brought by borrowers in default would allow a mere 30 to 65 days to submit a defense to repayment application.⁷⁰ This is entirely insufficient for any borrower, let alone unrepresented borrowers who will need to request or obtain evidence of institutional intent and financial harm, among other things.

The Department’s alternative contemplates allowing affirmative borrower defense claims for only three years after the date they leave school. In 2016, the Department determined that no statute of limitations should apply to borrowers’ ability to obtain relief from outstanding student loan debts. The Department recognized that, because there are no time limits on its ability to demand payment or collect debt, borrowers should be allowed—under general state law principles and the doctrine of recoupment—to defend against such actions at any time.⁷¹ The Department’s proposal to apply a three-year statute of limitations in all cases ignores these findings, and is not based on any evidence or analysis. The Department should, therefore, amend its

⁶⁸ See *supra*, notes 7-9 and accompanying text.

⁶⁹ See 81 Fed. Reg. at 75,936 (“We do not agree that the ‘preponderance of the evidence’ standard will result in greater risk to institutions. We believe this evidentiary standard is appropriate as it is the typical standard in most civil proceedings. Additionally, the Department uses a preponderance of the evidence standard in other proceedings regarding borrower debt issues. See 34 CFR [§] 34.14(b), (c) (administrative wage garnishment); 34 CFR [§] 31.7(e) (Federal salary offset). We believe that this evidentiary standard strikes a balance between ensuring that borrowers who have been harmed are not subject to an overly burdensome evidentiary standard and protecting the Federal government, taxpayers, and institutions from unsubstantiated claims.”).

⁷⁰ See 83 Fed. Reg. at 37,260 (explaining that borrowers “must comply with the existing filing deadlines for raising defenses in [] collections proceedings”).

⁷¹ 81 Fed. Reg. at 75,959 (“As noted in the NPRM, the six-year statute of limitations is only applicable to students’ claims for amounts already paid on student loans. A borrower may assert a defense to repayment at any time. This rule comports with the FTC Holder Rule and general State law principles, as well as general principles relating to the defense of recoupment.”).

proposal to make clear that borrowers may apply for a borrower defense discharge of their outstanding debt at any time.

With respect to payments already made, the 2016 Rule created a six-year time limit. Recognizing “that students may not always be in a position to bring borrower defense claims immediately,” the Department determined that six years would “strike a balance between allowing borrowers sufficient time to bring their claims and ensuring that the claims are brought while there is still evidence available to assess the claims.”⁷² The Department’s proposal to cut the amount of time in half is not based on any evidence or analysis. Instead, the Department simply states that the three-year time limit “corresponds to the three-year record retention policy imposed by the Department,”⁷³ a fact that has nothing to do with when a borrower is likely to discover her claim. The Department continues by declaring, again without any support, that “[i]t is unlikely that it would take a borrower more than three years to realize that he or she was harmed by misrepresentations upon which the borrower relied to make an enrollment decision.”⁷⁴ This unsupported assertion is belied by the experiences of numerous experts who have repeatedly explained that deceived borrowers may not understand the extent of the deceit or have the evidence to prove it until long after they have separated from their school.⁷⁵

- *Group claims.* The Department proposes to eliminate group applications, even in cases of clear, widespread misconduct. Requiring harmed borrowers to apply individually, even when there is convincing evidence that they were harmed as a group, is both unfair to borrowers and unnecessarily onerous to the Department. Indeed, the Department states that the current, individualized process “has proven to be burdensome to borrowers, given the

⁷² 81 Fed. Reg. at 75,959.

⁷³ 83 Fed. Reg. at 37,257.

⁷⁴ *Id.*

⁷⁵ See, e.g., Comments from the Legal Aid Community to the U.S. Dep’t of Educ., Docket ID ED-2015-OPE-0103, Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations, at 31-32 (Aug. 1, 2016), available at: http://www.nclc.org/images/pdf/special_projects/sl/comments_legal_aid_docketid-ED-2015-OPE-0103.pdf (“There is no strategic reason for borrowers to delay in prosecuting their claims, while suffering the stress, financial obligations, and often negative credit consequences of being in debt on student loans in the meantime. Rather, borrowers who submit discharge claims after six or more years of enrolling in a predatory school do so because they were not previously aware of the scope of their school’s misconduct, or of their rights and how to pursue them. This fact is regularly borne out in our experience working directly with student loan borrowers who have suffered for years after being taken advantage of by their schools without realizing they had a right to have their loans discharged.”).

time it takes to adjudicate each claim, and costly to taxpayers.”⁷⁶ This rationale would call for *expanding* access to group applications as a means of reducing borrower burden and the time needed to adjudicate, not eliminating it.

VII. Conclusion

The Department’s explanations in the NPRM do not rise to the level of reasoned agency decision-making required by the APA. Time and again, the Department ignores, distorts and misrepresents data and evidence that it previously established and relied upon.

There have been, and will likely continue to be, tens of thousands of students duped into enrolling in failing programs, who will have lifelong negative consequences as a result of the debt incurred to attend these programs.⁷⁷ For the students harmed by predatory institutions, and for those who will be harmed in the future, we strongly urge the Department to consider the damage that its proposals will cause, terminate this rulemaking, and fully implement the 2016 Rule.

Sincerely,

National Student Legal Defense Network

⁷⁶ 83 Fed. Reg. at 37,251.

⁷⁷ If there was any doubt, the Department’s proposed repeal of the Gainful Employment regulation will ensure that predatory programs will evade accountability and continue to receive billions in federal financial aid. *See* 83 Fed. Reg. 40,167 (Aug. 14, 2018).