

Comments on Topics for Negotiated Rulemaking

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The Institute for College Access & Success (TICAS) is an independent, nonprofit policy research organization that works to make higher education more available and affordable for people of all backgrounds. Through nonpartisan research, analysis, and advocacy, we aim to improve the processes and public policies that can pave the way to successful educational outcomes for students and for society.

These comments are in response to the August 20, 2015 Federal Register notice soliciting input on topics to be included in the U.S. Department of Education's upcoming negotiated rulemaking.¹ The Federal Register notice requests comments on the Department's plans to convene a committee to develop proposed regulations for determining which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a federal student loan and the consequences of such borrower defenses for borrowers, institutions, and taxpayers.

These comments suggest ways that current regulations can be improved to ensure defrauded students get the relief they deserve and are entitled to under law, and to better deter illegal, abusive school practices and protect taxpayers. However, the Department should *not* wait for new regulations to be implemented to discharge the loans of harmed students or hold schools accountable under current regulations.

In addition to addressing issues pertaining to borrower defense to repayment, we strongly urge the Department to include three related issues in the rulemaking:

- update antiquated and overly narrow false certification regulations to provide relief for harmed students, discourage illegal, abusive school practices, and protect taxpayers;
- prevent cohort default rate (CDR) and 90/10 rule manipulation; and
- prohibit mandatory pre-dispute arbitration clauses and class action waivers as a condition of Title IV funding.

¹ U.S. Department of Education. August 20, 2015. Federal Register Notice, Docket ID: ED-2015-OPE-0103. "Negotiated Rulemaking Committee; Public Hearings." <http://www.regulations.gov/#!documentDetail;D=ED-2015-OPE-0103-0001>.

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Borrower Defense/Defense to Repayment

All federal loans are eligible for borrower defense discharges, regardless of the type of loan or when they were issued

All federal loans are eligible for borrower defense discharges, and the rulemaking should address all types of federal loans, including Federal Family Education Loan (FFEL), Perkins, and consolidation loans as well as all Direct Loans, regardless of when they were issued. To ensure equitable and meaningful access to debt relief, it is imperative that the Department immediately make clear that *all borrowers* are eligible to assert defenses to repayment (DTR) and establish a consistent process for asserting defenses for all federal loans, including for FFEL, consolidation and Parent PLUS loans, regardless of whether the Department holds the loans.

There is clear authority for borrowers to raise school-based claims as a defense to repayment of any type of federal loan. Indeed, the Department has previously made clear that all types of federal loans are eligible for DTR discharges. In 1995, the Department announced its intent “to

establish the Borrower Defenses Regulations Negotiated Rulemaking Advisory Committee to create draft proposed rules for borrower defenses in the Direct Loan, FFEL, and Perkins Programs.”² The subsequent notice cancelling those negotiations made clear that the Department could already discharge FFEL loans, stating that FFEL borrowers could assert “that he or she has a defense against repayment of his or her loan because of some action or failure of the borrower’s school”³ Likewise, a 1995 “Dear Colleague” letter from the Department states that “the Department has already committed during negotiated rulemaking to apply the same borrower defense provisions to BOTH the Direct Loan and FFEL programs”⁴ [emphasis in the original].

The Department appears to have based its recent actions primarily on the borrower defense regulations under the Direct Loan program, but the Department also has a *mandatory obligation* to cancel the loans of FFEL borrowers who establish that they have been subjected to the unlawful, unfair or deceptive practices of their school. Since Jan. 1, 1994, the FFEL Master Promissory Note (MPN) has included language making loan holders subject to “all claims and defenses” that a borrower could assert against his or her school, as long as the school “refer[red] [borrowers] to the lender” or was “affiliated with the lender by common control, contract, or business arrangement.” These provisions were codified in the federal regulations in 2007.⁵ The MPN for both FFEL and Direct consolidation loans also explicitly provide that borrowers may raise school-based claims as a defense to repayment.

No time limits: As the statute does not limit a borrowers’ ability to assert school-related defenses to repayment and there is no statute of limitations on federal student loan collection, the Department should not attempt to impose a time limit for loan relief. Indeed, there is no time limit for false certification discharges, and we are aware of multiple instances in which the Department has discharged falsely certified loans nearly 10 years after the loans were made.⁶ It is also important for borrower defenses to be able to be reconsidered should new information about the loans or school actions become available.

Examples: As an example of why all loans should be eligible regardless of their type or when they were issued, more than 90% of the federal loans disbursed to Heald students in 2009-10 were FFEL loans. In addition, in 2014 the Department made three Everest Institute campuses ineligible for Title IV funds because they used false job placement rates to recruit students over

² U.S. Department of Education, Federal Register, Tuesday, February 28, 1995, pp. 11004-05.
<http://www.gpo.gov/fdsys/pkg/FR-1995-02-28/pdf/95-4875.pdf>.

³ U.S. Department of Education, “Notice of Interpretation,” Federal Register, July 21, 1995, pp. 37769-70.
<http://www.gpo.gov/fdsys/pkg/FR-1995-07-21/html/95-17988.htm>.

⁴ U.S. Department of Education. January 1995. Dear Colleague Letter GEN-95-8.
http://www.ifap.ed.gov/dpcletters/doc0162_bodyoftext.htm.

⁵ 34 C.F.R. § 682.209(g) (published in 72 Fed. Reg. 32,410 (June 2, 2007)).

⁶ For example, in 1996 the Department approved the discharge of loans to all students enrolled without a high school diploma based on their ability to benefit in six branches of Pacific Coast College/UES between February 1, 1987 and May 31, 1989. Similarly, in 1996 the Department approved the discharge of loans of any ability-to-benefit student who was enrolled at Draughon College between July 1, 1987 and June 30, 1991.

multiple years.⁷ The Department's letter denying these campuses eligibility for federal funds indicates that Corinthian *admitted* using false placement rates for its 2009 and 2010 cohorts, including claiming that its medical administrative assistant program had a 73% placement rate when in fact it had a 36% placement rate. These campuses disbursed FFEL program loans until 2010, and originated more than \$20 million in FFEL loans in 2009-10 alone. The Department's letter documents job placement rate misrepresentation similar to what the Department found at Corinthian's Heald campuses, and the former students at these Everest campuses should also be eligible for discharges of their loans. Indeed, as discussed below, we believe their loans should be automatically discharged based on the Department's findings.

In assessing borrower relief applications, the Department should consult all available sources of information within its possession, including prior borrower defense claims and student complaints, accreditors' audits of schools, state law enforcement or oversight agency records, other federal agency records, and any records held by guarantors. If new information comes to light that would have caused the Department to grant any previously denied application, the Department should search its records and grant any such previously denied applications.

Loans cancelled under DTR should not be treated as taxable income. As legal aid organizations recently stated in comments to the Department on borrower defense provisions, students should not be required to include cancellation of their student loan debt in their taxable income when it is granted on the basis of a valid defense against repayment.⁸ A defense against repayment claim should be treated as an assertion that the liability for the debt is contested based on the misconduct of the school.

The relief process should be fair, clear, and efficient

No borrower seeking federal discharges entitled to them under federal law should require legal representation. The process for all borrowers should be straightforward, as simple as possible, and accessible to those who are unfamiliar with legal terms. Expecting borrowers who may not know what school actions are appropriate or permissible to submit testimonials that will be subjected to strict legal scrutiny and standards is unreasonable and unfair. When the Department already has knowledge of school wrongdoing through federal or state complaints, evidence or findings, it is *unnecessary* to require borrowers to describe their experience and borrower narratives should not be required. State Attorneys General, the majority of whom are engaged in

⁷ August 22, 2014 letter from the Department to Corinthian Colleges denying recertification of the Everest Institute campuses in Cross Lanes WV, Eagan MN, and Decatur GA. Available at <http://www.republicreport.org/2014/dept-of-education-letter-corinthian-misled-students-and-overseers-about-job-placement/>.

⁸ Comments submitted by Megumi Trutruoi on behalf of multiple legal aid organizations on August 17, 2015 in response to ED-2015-ICCD-0076-0027, available at: <http://www.regulations.gov/#!documentDetail;D=ED-2015-ICCD-0076-0027>.

efforts to investigate the for-profit college industry, have frequently conducted extensive investigations of specific colleges. The Department should use Attorney General, other federal agency, and its own complaints, evidence and findings in its consideration of borrower defenses. When illegal school acts have not yet been documented, borrowers should be able to communicate their experience in a way that does not require an attorney or knowledge of state or federal law.

Provide automatic discharges in cases of documented school misconduct

The Department's step of providing a streamlined attestation form in cases where it is aware of wrongdoing is unprecedented and important, yet also insufficient. New rules and guidance on borrower defenses should allow for the provision of automatic group discharges. Requiring defrauded students to submit applications adds insult to their injury. When possible, the Department can and should discharge wronged students' loans without requiring students to apply.

Because federal loans flow through institutions deemed eligible by the Department, the Department knows which loans were borrowed to attend a particular school. Further, since at least 2013, all colleges have been required to report program-level enrollment because loan subsidies are limited to 150% of the length of each program.⁹ Colleges have had to report program-level enrollment for their Title IV students in career education programs for even longer, so that the debt levels and default rates of these programs can be assessed as required under the federal gainful employment regulation. Indeed, because of gainful employment reporting, the Department should have program-level enrollment for many of the students who borrowed to attend the many Heald programs for which the Department has created a simplified attestation process.

Existing program-level reporting is currently being used to cut off students' subsidized loan benefits, and it is being used to assess program-level debt outcomes for career education students. If this information is sufficient to restrict eligibility, it should absolutely be sufficient to provide benefits that the law provides for harmed students. If such enrollment reporting is not yet comprehensive for all schools and programs, it will become comprehensive over time because existing law already requires it to be comprehensive and the rules must account for it.

Ample precedents for automatic discharges: It is important to recognize that Department rules already provide for automatic discharges to certain borrowers. Since 1999, federal rules have

⁹ The Department's Frequently Asked Questions on implementation of the statutory limitation of loan subsidies states: "All schools that participate in the Title IV programs, both domestic and foreign, undergraduate and graduate, are required to report, in addition to campus-level enrollment information, program-level enrollment to NSLDS." <http://ifap.ed.gov/150PercentDirectSubsidizedLoanLimitInfo/FAQ.html#INT-Q5>

allowed for closed school discharges without a borrower needing to apply for them,¹⁰ and false certification rules have allowed for discharges without an application since 2000.¹¹ In explaining the extension of this provision to false certification discharges, the Department's Notice of Proposed Rulemaking states:¹²

We (or a guaranty agency) occasionally learn of information that strongly suggests that all borrowers in a certain category would likely qualify for a false certification discharge. For example, we might determine that all students at a specific school during a certain time period had incorrect ATB determinations. In the interest of assisting those borrowers, (many of whom may be unaware of the possibility of receiving a loan discharge), the committee decided that it would be appropriate to discharge those loans without an individual discharge request from each borrower. On October 29, 1999 (64 FR 58622), we issued regulations that authorized the granting of closed school loan discharges in certain cases without individual requests from each borrower. These proposed regulations would extend that approach to false certification discharges.

The rationale provided by the Department for changing the false certification rules, and the closed-school rules before that, is the same one we provide for borrower defenses: when the Department has documentation that a group of students has been affected by unlawful school practices, those affected students – many of whom, as the Department states, may be unaware of the possibility of receiving a loan discharge – should receive relief without needing to apply for it. Importantly, discharge eligibility under both false certification and closed school rules can be and is established for groups of students at a time.

We also note that Corinthian's Heald campuses are not the only ones for which the Department has found misrepresentation of job placement rates. For the reasons explained above, the simplified application process should immediately be extended to former students of the Everest campuses in Cross Lanes WV, Eagan MN, and Decatur GA. Further, given the plethora of evidence already uncovered for Corinthian College programs,¹³ we strongly urge the Department to finish its company-wide investigation of job placement rates, and make an expedited borrower defense process available to all borrowers who attended applicable programs.

¹⁰ U.S. Department of Education, Federal Register, Friday, October 29, 1999, pp. 58622-58641. <http://www.gpo.gov/fdsys/pkg/FR-1999-10-29/pdf/99-28172.pdf>.

¹¹ U.S. Department of Education, Federal Register, Wednesday, November 1, 2000, pp. 65616-65622. <http://www.gpo.gov/fdsys/pkg/FR-2000-11-01/pdf/00-27738.pdf>.

¹² U.S. Department of Education, Federal Register, Tuesday, August 3, 1999, pp. 42176-42203. <http://www.gpo.gov/fdsys/pkg/FR-1999-08-03/pdf/99-19308.pdf>.

¹³ See, for example, the evidence cited in the CFPB's lawsuit against Corinthian Colleges at http://files.consumerfinance.gov/f/201409_cfpb_complaint_corinthian.pdf; the California Attorney General's lawsuit against Corinthian Colleges at <http://bit.ly/1sWvg10>; and the Department's own findings for Heald campuses at <http://www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf>.

Establish federal standards for borrower defenses that do not preempt stronger state laws

Current rules allow for borrower defenses in cases where a school’s act or omission “would give rise to a cause of action against the school under applicable State law.” The Department should establish *federal* standards for evaluating borrower defense claims that are available to borrowers nationwide *in addition* to the standards available under borrowers’ individual state laws. The federal standards will ensure that students nationwide have access to relief without limiting borrowers’ access to relief based on state laws when state standards are stronger, and thus more protective, than the federal standard.

We agree with the National Consumer Law Center that the federal standard should be based on existing law. A claim should be granted under the federal standard if the borrower can show that her school engaged in conduct that:

- A) Met the standard for a federal UDAAP violation (unfair, deceptive or abusive act or practice, see 12 U.S.C. § 5531(a));
- B) Violated the Higher Education Act or regulations thereunder; or
- C) Constituted a violation of the Federal Trade Commission Guides for Vocational Schools.

Colleges and their leaders must be held accountable, but student relief should not be dependent on college sanctions

We wholeheartedly agree with the Department’s goal of strengthening college and college executive accountability both to deter wrongdoing and to protect taxpayers. Publicly traded companies are accountable to shareholders, and the executives of those companies may face penalties if they mislead investors. Yet school executives and directors are rarely held accountable if they mislead the Department, and even more rarely accountable if they mislead students. As the Department seeks to strengthen rules for school accountability, it is imperative that it also ensures that school executives and directors – under whose direction the malfeasance occurs – are also on the hook.

The recent Securities and Exchange Commission suit against ITT Educational Services provides a useful contrast.¹⁴ The suit cites the “abysmally” high default rates on the loans, along with the “numerous misstatements and omissions” by company executives designed to mislead investors about the financial health of the company. Among other things, the suit seeks to ensure that the executives are permanently barred from serving as an officer or director of any publicly traded

¹⁴ U.S. Securities and Exchange Commission lawsuit against ITT Educational Services, May 12, 2015, available at: <http://www.sec.gov/litigation/complaints/2015/comp-pr2015-86.pdf>.

company in the future, require the return of all “ill-gotten gains” derived from the alleged improper conduct, and impose civil money penalties on both the company *and* its executives.

As critical as it is to improve accountability and strengthen personal liability for executives and directors, *student relief should not be dependent on the imposition of sanctions or the receipt of reclaimed funds*. Linking students’ eligibility for relief with a requirement that schools pay for that relief, or face repercussions as a direct response to the provision of that relief, pits students and schools against each other in ways that will lead schools to fight borrower defenses tooth and nail. Further, in cases of school fraud, it should not be the provision of relief that triggers sanctions for schools and executives but rather the finding of fraud itself, even if no borrowers assert defenses based on that fraud. Financial guarantees that might be required of schools, such as letters of credit, should be required at an earlier point in time than when relief is being provided to students, to both delink relief from sanctions as well as to help deter and address problems before they lead to student harm.

While regulations can and should be strengthened, we believe the Department already has authority to act earlier and publicly as soon as signs of trouble emerge to protect both students and taxpayers. In June, TICAS and 45 organizations representing students, consumers, veterans, faculty and staff, civil rights, and college access, submitted specific recommendations for developing a proactive, risk-based, student-centered strategy for dealing with schools that may be breaking the law and putting students and taxpayers in jeopardy.¹⁵

Update outdated and overly narrow false certification regulations to complement borrower defense regulations

To achieve the Department's goal of making the process of forgiving loans fair, clear and efficient, we urge the Department to use this rulemaking to establish a cohesive set of loan relief regulations, rather than focusing solely on borrower defenses. In particular, many of the harmed borrowers whom the Department seeks to assist may be better served by a false certification discharge. Borrowers who qualify for a statutory false certification discharge should not be forced to use a potentially more complex DTR process just because the current false certification regulations are outdated and excessively narrow.

The false certification discharge provisions in the Higher Education Act (20 USC 1087(c)) are intended to provide relief for harmed students and discourage illegal, abusive school practices by providing for the discharge of loans falsely certified by institutions and for the Secretary to recover the discharged amounts from schools and their affiliates. However, the Department’s current regulations are much more narrow than the statute. The current false certification regulations are also outdated. For example, they address forged handwritten signatures but not

¹⁵ Letter to Secretary Duncan from 46 organizations on June 3, 2015, available at: <http://bit.ly/1Kn1BUj>.

the more common electronic signatures, and they are based on a prior version of the ability-to-benefit provisions in the statute.¹⁶

It is critical that the false certification rules be modified to ensure that they more explicitly address various forms of false certification that harm both students and taxpayers. The statute is not limited to specific types of false certification, and it provides for relief for a range of illegal and abusive acts. Borrowers should be eligible for relief in any case in which a school falsely certifies eligibility. For example, relief should be available if the school improperly or falsely certifies a student's satisfactory academic progress, which is a necessary requirement for student eligibility.¹⁷ Another way schools falsely certify student eligibility is by enrolling students in career education programs that lack the programmatic accreditation necessary for employment in the occupation. Other false certifications of eligibility for programs from which students cannot benefit include enrolling students who do not speak English in programs taught only in English, or enrolling students with criminal records in programs that prepare them for employment in professions from which they are barred because of their criminal record. These false certifications need to be stopped and borrowers provided relief from the resulting debts. The regulations should be revised to more explicitly provide relief in these and other circumstances that constitute false certification.

Updating these rules now is particularly timely because of the potential to provide relief to the same students the Department intends to help with new borrower defense rules. Many of the borrowers for whom the Department has created an expedited process for borrower defense may also be eligible for relief under false certification. For example, the Department found Heald Stockton's medical assisting program had a job placement rate of 32.7%, far short of either the 78.27% placement rate put forward by Heald or the 60% required of programs by the programmatic accrediting agency.¹⁸ Given that the program's actual placement rate fell short of what was required for the program to be eligible for federal aid, the students who borrowed to attend this program were falsely certified as being eligible for loans because they were attending a program that was not truly eligible for loans.

¹⁶ As the National Consumer Law Center (NCLC) explains in its comments, the current false certification regulations provide for discharges for borrowers who have not earned a high school diploma or GED *only* when the school did not properly administer an ability-to-benefit (ATB) test. However, the ATB provisions in the HEA have changed significantly since the regulation was drafted. As of July 1, 2012, new students without a high school diploma or GED were no longer eligible for financial aid by passing an ATB test. As of July 1, 2014, students without a high school diploma or GED can become eligible for financial aid if they pass an ATB test *and* enroll in an eligible career pathway program. Nevertheless, NCLC has clients who enrolled after July 1, 2012, who did not enroll in a career pathway program, and whose schools falsely certified that they had earned a high school diploma. Although these borrowers were falsely certified, they are not eligible for a false certification discharge under current regulations.

¹⁷ For examples of teachers being pressured to manipulate grades to retain students, see Field, Kelly. May 8, 2011. "Faculty at For-Profit Colleges Allege Constant Pressure to Keep Students Enrolled." *The Chronicle of Higher Education*. <http://chronicle.com/article/Pawns-in-the-For-Profit/127424/>.

¹⁸ U.S. Department of Education. April 14, 2015. "Notice of Intent to Fine Heald College." <http://www2.ed.gov/documents/press-releases/heald-fine-action-placement-rate.pdf>.

Recognizing these borrowers as having been falsely certified for loans, in addition to being able to assert a defense to repayment, may greatly simplify and improve the process for providing relief to harmed borrowers because false certification discharges have many advantages. For example, false certification regulations:

- allow for automatic group discharges, as discussed above;
- are based on a federal standard, avoiding the complexity of 50 separate sets of state laws;
- explicitly make discharges nontaxable; and
- provide for school accountability. The statute and current regulations give the Department clear authority to seek reimbursement from schools for all types of discharges. The HEA states that the Department “shall . . . pursue any [discharge] claim available to [a] borrower against the institution and its affiliates and principals...”¹⁹

For these reasons, we urge the Department to update and improve the false certification regulations and to discharge loans under false certification rules when it is more advantageous to do than under the current or new defense to repayment process.

Prevent Cohort Default Rate (CDR) and 90/10 Rule Manipulation

We join more than a dozen other organizations, multiple state attorneys general, and eight U.S. Senators in urging the Department to modify its regulations and take other actions to prevent companies from evading the law at the expense of students and taxpayers.²⁰ There is now abundant evidence that some for-profit education companies are using multiple strategies to evade the spirit, if not also the letter, of current program integrity laws, and in the process putting students at greater risk of defaulting on higher loan balances. Below we recommend specific regulatory and administrative actions to prohibit colleges from evading the law, including to:

- ***Prevent CDR evasion via abuse of forbearance and deferments by:***
 - Amending current regulations under the Higher Education Act (428(c)(3)(B)) to ensure that forbearance is “for the benefit of the student borrower,” not for the benefit of schools. This could be done by specifying that certain types of forbearance patterns (such as back-to-back forbearances) are rarely to borrowers’ benefit and requiring greater documentation for such forbearances, including why an income-driven repayment plan is not preferable to extending forbearance.

¹⁹ See 20 U.S.C. § 1087(c)

²⁰ For the comments from organizations and state attorneys general, see <http://www.protectstudentsandtaxpayers.org/who-supports-strong-regulations-2/>. For the comments from eight U.S. Senators, see Lautenberg, Frank. U.S. Senator. December 13, 2012. Press Release. “Senators Lautenberg, Harkin, Colleagues Call for Crackdown on Manipulation of Student Loan Default Rates.” <http://bit.ly/19IINPO>. See the December 12, 2012 letter from eight U.S. Senators to the U.S. Department of Education at <http://bit.ly/1t9KXod>.

- Amending current regulations to clarify what constitutes “a payment to prevent a borrowers’ default.”²¹ Schools and their contractors should not be permitted to lower their CDRs by providing borrowers with gift cards or other means that provide monetary value in exchange for an action by a borrower.
 - Issuing additional guidance to schools on beneficial vs. impermissible “default management.” The Department should clarify what constitutes proper default management and what constitutes CDR evasion.
 - Using default data to prompt warnings, investigations, program reviews, and/or audits. Serial forbearances and spikes in defaults after the three-year CDR window closes should be used as triggers to prompt public warnings to a school or servicer, an investigation of possible CDR evasion, a program review, and/or an audit.
- ***Prevent 90/10 manipulation through disbursement delays by:***
 - Counting any Title IV funds that a school disburses *or could have disbursed* in the 90/10 calculation for the reporting period that includes the start of that payment period.
 - ***Prevent CDR and 90/10 manipulation through the combining of campuses by:***
 - Prohibiting changes in Office of Postsecondary Education ID numbers (OPEIDs) when institutional compliance is in question or requiring continued compliance under former OPEIDs for at least three years after any change in OPEID.

CDR evasion via abuse of forbearance and deferments

It is indisputable that some for-profit college corporations are abusing forbearance and deferment, using them as tools to manipulate their CDRs regardless of the students’ best interests. These corporations are using forbearance and deferment to *delay* defaults until after the period when schools are held accountable. According to a September 30, 2014 analysis by Compass Point, “the general improvement in CDRs among the for-profits is likely attributable to greater utilization of ‘default management’ whereby schools work to push defaults out beyond the three-year measurement window through the use of forbearance and/or deferment.”²²

The Department itself has repeatedly expressed concern about the manipulation of CDRs through abuse of deferments and forbearances. Indeed, in releasing its new College Scorecard, the Department noted that “the CDR is susceptible to gaming behavior that may push students toward forbearance and deferments, meaning they stay out of default but don’t make progress on

²¹ 34 CFR 668.183(c)(1)(iii)

²² Compass Point Research and Trading, LLC. 2014. *Higher Education Landscape: Fundamental & Policy Update Education Market Monitor - September 2014*.

repaying their loans and may continue to accrue interest.” Later, the Scorecard documentation states that default rates “can be manipulated through the use of allowable nonrepayment options like deferments and forbearances.”²³

While avoiding default is always in students’ best interest, increasing their loan balance and leaving them to default on a higher balance is not. Loans always accrue interest while in forbearance, and unsubsidized loans accrue interest during both forbearances and deferments. The additional interest accrued is added to the principal loan balance at the end of the forbearance or deferment, with the result that interest then begins accruing on an even larger balance. In most cases, students struggling to make loan payments are better served with counseling on how to repay their loans and the availability of income-driven repayment plans.

Documents from four large companies demonstrate that, on average, over 75% of the delinquent borrowers “cured” (i.e., prevented from defaulting) were put in forbearance or deferment, while only 24% made payments on their loans.²⁴ For instance, in 2010, 78% of the ITT borrowers were “cured” by its “default management” contractor by being placed in deferment or forbearance, two-thirds of whom were placed in forbearance.²⁵

Corinthian Colleges reduced its three-year CDR from 29.2% in FY2009 to 18.7% in FY2010, a *10.5 percentage point decrease in just one year*. As Corinthian executives told investors in May 2011, “Forbearance, as you well know, is a pretty easy – it’s just a question, you have to agree to it and you’re on your way.”²⁶ However, the executives made clear that the number of students repaying their loans had changed little: “Our repayment rate really hasn’t moved a whole heck of a lot from where it was prior to this effort.”

A 2012 report of the Health, Education, Labor and Pensions Committee of the U.S. Senate concluded that many of the tactics used by for-profit college corporations “appear to cross the line from default management to default manipulation.”²⁷ It notes that these efforts to prevent student default often “abruptly halt” after the period when schools are held accountable for defaults.

²³ U.S. Department of Education. “Data Documentation for College Scorecard” released September 12, 2015. <https://collegescorecard.ed.gov/data/documentation/>.

²⁴ U.S. Senate HELP Committee. 2012. *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*. http://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf.

²⁵ U.S. Senate HELP Committee. 2012. *Profile of ITT Educational Services, Inc.* http://help.senate.gov/imo/media/for_profit_report/PartII/ITT.pdf, Pp. 534-5.

²⁶ Corinthian Colleges, Inc. May 3, 2011. Q3 2011 Earnings Call Transcript. http://clips.corinthiancolleges.com/wp-content/uploads/downloads/2011/05/COCO_Q311_Transcript.pdf.

²⁷ U.S. Senate HELP Committee. 2012. *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*. http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf. Executive Summary and pp. 151-158.

In fact, Secretary Duncan has said that *the Department's own investigation* of forbearance abuse found that “some institutions are aggressively pursuing their former students to compel them to request forbearance from their loan servicer.”²⁸ Further, many borrowers “expressed the view that they were pressured or ‘forced’ to apply for forbearance and were not made aware of other options, such as deferment or the income-based repayment plan.” Most shockingly, one borrower who was current in her payments was offered a \$25 gift card to complete the forbearance process.

Regulatory recommendation: amend current regulations to ensure that forbearance is “for the benefit of the student borrower,” not for the benefit of schools. In defining the authority to grant forbearances, the Higher Education Act (428(c)(3)(B)) specifies that contracts “may, to the extent provided in regulations of the Secretary, contain provisions that permit such forbearance *for the benefit of the student borrower* as may be agreed upon by the parties to an insured loan and approved by the insurer” (emphasis added). The Department could, for instance, specify that certain types of forbearance patterns are rarely to borrowers’ benefit and prohibit most back-to-back forbearances. Alternatively, the Department could require documentation for why income-driven repayment (IDR) is not preferable to forbearance before an extended forbearance is granted. Each of these rule modifications recognizes the importance of forbearance as short-term relief but prioritizes longer-term solutions, such as affordable repayment plans. They are also consistent with the guidance recently provided by the Office of the Comptroller of the Currency, which advises that forbearances should be temporary and used when a borrower “can demonstrate a reasonable prospect of increased income in the foreseeable future.”²⁹

Regulatory recommendation: amend current regulations to clarify what constitutes “a payment to prevent a borrower’s default.” Current CDR regulations consider any borrower whom a school has paid to avoid default to be in default. Specifically, 34 CFR 668.202(c)(1)(iii) defines which borrowers are considered defaulters for the purpose of CDR calculations, and includes those for whom “you or your owner, agent, contractor, employee, or any other affiliated entity or individual *make a payment to prevent a borrower’s default* on a loan” (emphasis added). The regulation does not specify exactly which payments count as “preventing a borrower’s default,” or even whether the payment must be made on the loan in question. For instance, the provision of gift cards or other means that provide monetary value in exchange for an action by a borrower that could affect a CDR should be considered “a payment to prevent a borrower’s default.” If such actions are not already prohibited under current regulations, the Department should propose changes to prohibit them.

²⁸ February 27, 2013 letter from Education Secretary Arne Duncan to eight U.S. Senators, available at <http://bit.ly/1yhrT6t>.

²⁹ May 14, 2013 letter from Thomas J. Curry, Office of the Comptroller of the Currency, to Richard Hunt, Consumer Bankers Association.

Administrative recommendation: use default data to prompt public warnings, investigations, program reviews, and/or audits. Outside of the rulemaking process, there are other steps that the Department can and should immediately take to prevent the abuse of forbearance and deferment to evade CDR thresholds. First, if the Department has not already done so, it should immediately analyze the extent to which companies are using forbearance and deferment, particularly serial forbearances and deferments, which are an indication that borrowers are not receiving proper counseling about IDR and other repayment options. Second, the Department should examine whether the number of defaults at an OPEID spikes after the CDR window closes. For instance, when four additional months were examined for the 2008 cohort, the number of OPEIDs with three-year CDRs over 40% more than doubled. The use of serial forbearances and spikes in defaults after the CDR window closes should be used as triggers to prompt public warnings to a school or servicer, an investigation of possible CDR evasion, a program review, and/or an audit. During the student loan negotiated rulemaking process that ended in March 2012, the Department publicly committed to scrutinize serial forbearances, including in program reviews and audits, but provided no timetable for doing so.

Administrative recommendation: issue additional guidance to schools on beneficial vs. impermissible “default management.” We applaud the Department for issuing practical new tools to help schools conduct appropriate default management.³⁰ However, much more is needed to clarify what constitutes proper default management and what constitutes CDR evasion, and on the additional steps the Department is taking to prevent both loan defaults and CDR evasion. In 2013, the Department committed to “identify best practices and provide guidance to institutions to develop optional debt management and default aversion programs,” and we urge the Department to fulfill this pledge.³¹

90/10 manipulation through disbursement delays

Other internal company documents obtained by the U.S. Senate HELP Committee indicate that some for-profit college companies are delaying giving students their federal aid for the sole purpose of moving these funds into the next fiscal year in order to keep the school below the 90% federal funding limit (known as the 90/10 rule).³² These delays occur without regard to what students want or need. As documented in the Senate report, Career Education Corporation senior executives instructed employees to delay students’ disbursements for weeks after students requested their refunds for the sole purpose of manipulating campuses’ 90/10 rates, while

³⁰ U.S. Department of Education. Federal Student Aid E-Training website. "Default Prevention and Management" training module. <http://fsatraining.info>.

³¹ February 27, 2013 letter from Education Secretary Arne Duncan to eight U.S. Senators, available at <http://bit.ly/1yhrT6t>.

³² For more information about the 90/10 rule, see TICAS. 2015. *Q&A on the For-Profit College “90-10 Rule.”* http://ticas.org/sites/default/files/pub_files/90-10_qa_0.pdf.

providing disingenuous explanations to students inquiring about the delays.³³ For example, Career Education Corporation admitted doing this in August 2012, stating in a filing that, “The Company has implemented several initiatives in order to assist certain of our institutions in complying with the 90-10 Rule, including... delaying until the first quarter of 2013 the disbursement and subsequent receipt of up to \$25.0 million of Title IV funds.”³⁴

In general, colleges and universities are required to disburse Title IV funds to their students once per payment period. More frequent disbursements are permitted if the institution determines that a more frequent disbursement schedule “best meets the student’s needs” (e.g., regulations on the frequency of payments for grants – 34 CFR 690.76). Subregulatory guidance provided in the Federal Student Aid Handbook goes further and specifies that aid “must be provided to students in a timely manner to best assist them in paying their educational expenses.”³⁵

Count any Title IV funds that a school disburses *or could have disbursed* in the 90/10 calculation for the reporting period that includes the start of that payment period. Current 90/10 regulations generally require institutions to presume that any Title IV funds disbursed to students will be used to pay institutional charges, including tuition and fees. The oversight of institutional compliance with the 90/10 rule would be improved by including a similar presumption regarding disbursements of Title IV aid. That is, the institution should be required to presume that any Title IV program funds it disbursed *or could have disbursed* to students during a payment period be considered as Title IV revenue for the 90/10 reporting period that includes the start of that payment period. This will eliminate the incentive for a school to delay disbursements based on the interests of the school rather than on the interests of the student.

CDR and 90/10 manipulation by combining campuses

Still other companies are combining campuses for reporting purposes so that their new “combined campus” complies with the CDR thresholds and/or 90/10 rule. Consolidating campuses with high CDRs and 90/10 rates with those that do not has the potential to *mask* serious, known quality problems at campuses that may otherwise have exceeded thresholds for federal funding.³⁶

³³ U.S. Senate HELP Committee. 2012. *Profile of Career Education Corporation*.

http://www.help.senate.gov/imo/media/for_profit_report/PartII/CEC.pdf. Pp. 348-350.

³⁴ Career Education Corporation. July 31, 2012. Form 10-Q. Quarterly Report to the U.S. Securities and Exchange Commission. <http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=87390&fid=8304039>.

³⁵ U.S. Department of Education. 2014. *2014-15 Federal Student Aid Handbook*. Volume 3 (Calculating Awards and Packaging), Chapter 1 (Academic Calendar, Payment Periods & Disbursements). <http://ifap.ed.gov/fsahandbook/attachments/1415FSAHbkVol3Ch1.pdf>. P. 3-24.

³⁶ CDR and 90/10 calculations disaggregated by college campus or location (eight-digit OPEIDs) could help to identify poorly performing campuses. We encourage the Department to explore the viability and potential efficacy of such an approach.

The Department's CDR Guide defines CDR evasion as "an attempt to avoid cohort default rate sanctions by changing a school's name, location, corporate structure, OPEID, or other status."³⁷ As the Senate HELP Committee abundantly documents and as explained below, this is exactly what several large for-profit colleges appear to be doing, including Corinthian Colleges (Corinthian), Career Education Corporation (CECO), and ITT.

CDRs and 90/10 ratios are calculated based on assigned six-digit OPEIDs, rather than by campus or corporate owner. Many for-profit companies have multiple six-digit OPEIDs, each of which may consist of a main campus and multiple branch campuses.³⁸ Schools with multiple six-digit OPEIDs can and do shift campuses to different OPEIDs and classify them as branches regardless of their geographic proximity, even when they are located in far-flung states.

For example, ITT merged 29 separate six-digit OPEIDs into just three OPEIDs. According to the then-CEO of ITT:

[T]he reasons for doing that certainly relate to our compliance efforts and risk mitigation associated with all of the different regulatory controls ... So, this impacts your CDR, your 90/10 and all those other metrics that exists, including any new metrics that may come our way as a result of regulatory change.³⁹

In February 2012, CECO told investors that it had submitted an application to the Department seeking to consolidate up to 19 of its 26 OPEIDs into one OPEID. If it had been approved, CECO would have operated just eight OPEIDs. At the time, CECO had six OPEIDs with 90/10 rates above 90% in FY2011, and all six were among the 19 the corporation sought to consolidate.⁴⁰ Four of these six OPEIDs also had three-year FY08 CDRs over 24%. Its annual report stated "another result of this consolidation will be the calculation of a single student loan

³⁷ U.S. Department of Education. *Cohort Default Rate Guide – Glossary*.

<http://ifap.ed.gov/DefaultManagement/guide/attachments/CDRGuideGlossary.pdf>.

³⁸ Branch campuses that share a single six-digit OPEID often have unique eight-digit OPEIDs that are based on the common six-digit one. These campuses report a CDR together (under the six-digit OPEID) but report other data separately, such as graduation rates.

³⁹ ITT Educational Services, Inc. May 12, 2011. "ITT at Barclays Capital Inc. Global Services Conference." *Lexis Nexis*. Cited in U.S. Senate HELP Committee. 2012. *Profile of ITT Educational Services, Inc.* http://help.senate.gov/imo/media/for_profit_report/PartII/ITT.pdf. P. 540.

⁴⁰ The six CECO OPEIDs with 90/10 rates over 90% in FY2011 were Sanford Brown in Atlanta, GA; Boston, MA; Farmington, CT; Fenton, MO; and McLean, VA, and Missouri College. From CECO's February 27, 2012 Form 10-K: "The six OPEIDs with estimated 90-10 rates above 90% for fiscal year 2011 are all among the institutions included in the pending application for consolidation. These six institutions will cease to separately exist if and when ED approves the consolidation. We would not expect ED to issue them separate 90-10 rates for fiscal year 2012 since they would not exist as separate institutions at the end of fiscal year 2012, but we cannot be certain of ED's procedures in this situation. If ED approves the consolidation, it is uncertain whether the fiscal year 2011 90-10 rates for this smaller group of institutions will affect how ED will calculate or apply the fiscal year 2012 90-10 rate for the larger consolidated institution." <http://bit.ly/1DygeDn>.

cohort default rate and a single rate under the 90-10 Rule for all of the campuses within the consolidated institution.”⁴¹

Prohibit changes in OPEIDs when institutional compliance is in question or require continued compliance under former OPEIDs for at least three years after any change in OPEID. To prevent the evasion of accountability measures such as CDR thresholds and the 90/10 rule, the Department should either not allow changes in OPEIDs in cases where institutional compliance is in question, or require continued compliance under former OPEIDs for at least three years after any change in OPEID and sanction any that would have exceeded the CDR thresholds but for the change in OPEID.⁴² Such monitoring would be well in line with other steps the Department takes to prevent gaming of accountability measures: the Department’s Federal Student Aid Handbook for 2015-16 explicitly provides for the continued monitoring and enforcement of 90/10 rates when a school converts from for-profit to nonprofit.⁴³

Provide Equity to Any Borrowers Whose Defaults Are Removed from Colleges’ CDRs

In September 2014, the Department announced it had adjusted the CDRs of colleges that would otherwise be subject to sanctions, removing from the numerator of those colleges’ CDRs “certain borrowers who defaulted on a loan but who had one or more other Direct or FFEL Program loans... that did not default.”⁴⁴ As a result, some colleges avoided sanctions that would otherwise have been imposed due to unacceptable levels of default.

If the Department has determined that the servicing of some loans in recent years was so problematic that it is inappropriate to hold the borrowers’ colleges accountable for them, then it is equally inappropriate to hold the borrowers accountable for them. Neither schools nor borrowers can choose their loan servicers. Yet these borrowers are being left in default, subject to high collection and default fees and to damaged credit.

⁴¹ Career Education Corporation. February 27, 2012. Form 10-K. Annual report to the U.S. Securities and Exchange Commission. <http://bit.ly/1DygeDn>. Later in 2012, CECO withdrew its application to consolidate these OPEIDs to expedite the approval of new programs.

⁴² The Higher Education Act (20 USC 1085(m)(3)) specifically authorizes the Secretary to act to prevent CDR evasions, stating “The Secretary shall prescribe regulations designed to prevent an institution from evading the application to that institution of a default rate determination under this subsection through the use of such measures as branching, consolidation, change of ownership or control, or any similar device.”

⁴³ U.S. Department of Education. 2015. *2015-16 Federal Student Aid Handbook*. Volume 2 (School Eligibility and Operations), Chapter 4 (Audits, Financial Standards, Limitations, & Cohort Rates). <http://ifap.ed.gov/fsahandbook/attachments/1516FSAHbkVol2Ch4.pdf>. P. 2-66

⁴⁴ U.S. Department of Education, Federal Student Aid. September 23, 2014. Electronic Announcement. “Adjustment of Calculation of Official Three Year Cohort Default Rates for Institutions Subject to Potential Loss of Eligibility.” <http://1.usa.gov/1r830tQ>.

If defaults are removed from schools' CDRs due to faulty servicing, they should be eliminated from borrowers' records as well. We believe that doing so is well within the Department's existing authority. The Department has clear authority to provide forbearances to borrowers in default,⁴⁵ and servicers can and do provide borrowers with retroactive forbearances to erase prior delinquencies. Borrowers who defaulted in prior fiscal years might require multiple forbearances to become current, but neither statute nor regulations limit the number of forbearances that can be granted in such circumstances. Further, separate federal rules already provide precedent for reversing determinations of default, as well as for updating reports to consumer credit agencies to reduce the harm of an earlier default determination.⁴⁶ If the Department believes that under current regulations defaults removed from colleges' CDRs cannot also be removed from borrowers' records, then this issue should be added to the negotiated rulemaking panel's agenda. In addition, the Department may use its authority to compromise loans for these borrowers.⁴⁷

Prohibit Mandatory Pre-Dispute Arbitration Clauses and Class Action Waivers as a Condition of Title IV Funding

Many for-profit college enrollment contracts and private education loan contracts contain sweeping arbitration clauses and class action bans that make it difficult for borrowers to seek redress and that protect unscrupulous schools and lenders from being held to account. These forced arbitration clauses severely limit a consumer's ability to seek redress for harmful or abusive practices by: (1) limiting discovery; (2) mandating an arbitration forum hand-picked by the lender, (3) allowing the lender to determine how arbitration costs will be allocated; and (4) waiving the borrower's right to appeal. Forced arbitration clauses also commonly prohibit class action proceedings, nearly completely shielding schools and lenders from liability by curbing individual actions and explicitly prohibiting class actions.

A 2015 report by the Consumer Financial Protection Bureau (CFPB) found that arbitration agreements restrict consumers' relief for disputes by limiting class actions.⁴⁸ The report found that, in the consumer finance markets studied, very few consumers individually seek relief through arbitration or the federal courts, while millions of consumers are eligible for relief each

⁴⁵ 20 USC 1080

⁴⁶ 34 CFR 685.206

⁴⁷ See, for example, 20 USC 1082(a) (FFEL); 31 USC 3711 (General authority to compromise government debts); 34 CFR 30.70.

⁴⁸ Consumer Financial Protection Bureau. 2015. *Arbitration Study*.

http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

year through class action settlements. Further, the CFPB report found that 86 percent of the largest private education lenders include arbitration clauses in their contracts.

Other federal agencies have acted to protect consumers from contracts containing mandatory pre-dispute arbitration clauses. For example, in a report to Congress, the Department of Defense (DOD) notes that: “[s]ervice members should retain full legal recourse against unscrupulous lenders. Loan contracts to service members should not include mandatory arbitration clauses . . . and should not require the service member to waive his or her right of recourse, such as the right to participate in a plaintiff class.” To protect service members, the DOD recently broadened its existing ban on forced arbitration clauses to significantly more credit products offered to service members and their families.⁴⁹

We join the National Consumer Law Center and others in urging the Department to follow the DOD’s lead by limiting participation in Title IV programs to institutions that prohibit mandatory pre-dispute arbitration clauses and class action waivers in enrollment contracts and that do not accept the proceeds of private loans with contracts that include mandatory arbitration agreements or class action waivers. The Department could do so by amending the regulation regarding the terms of Program Participation Agreements.

Thank you for the opportunity to comment on topics for negotiated rulemaking. If you have any questions about our comments, please feel free to contact Pauline Abernathy or Debbie Cochrane by phone at (510) 318-7900, or by email at pabernathy@ticas.org and dcochrane@ticas.org.

⁴⁹ See 32 CFR 232.8(a)(2), (3).