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To: Ms. Nikki Harris, Office of Postsecondary Education, US Department of Education
cc: negreg.2011@ed.gov
From: Lauren Asher, The Institute for College Access & Success
Date: May 20, 2011
Re: Comments in response to Docket ID ED-2011-OPE-0003, the May 5, 2011 U.S. Department of Education Notice of Establishment of Negotiated Rulemaking Committees and Notice of Public Hearings

Thank you for the opportunity to provide input on topics for negotiated rulemaking. These comments are in response to the May 5, 2011 *Federal Register* notice of negotiated rulemaking (Docket ID ED-2011-OPE-0003) for programs authorized under Title IV of the Higher Education Act of 1965, as amended.

The Institute for College Access & Success (TICAS) is a nonprofit, nonpartisan policy research organization working to make higher education more available and affordable for people of all backgrounds. For this upcoming round of negotiated rulemaking, we are pleased that the Department is taking a closer look at issues relating to loan repayment, including the Income-Based Repayment program (IBR), and recourse for distressed and exploited borrowers.

Our goal in submitting these comments is to ensure that policies designed to make student loans more fair and manageable, and to encourage participation in higher education and public service, are as accessible and beneficial as possible to borrowers and their families. Our comments also recognize the Department's – and borrowers' – interest in effective and efficient administration. We have limited our specific comments to areas in which we have some expertise and the stakes for borrowers are particularly high. We focus particular attention on IBR because it is modeled on a proposal developed by our Project on Student Debt with support from students, parents, lenders, and the higher education community. Especially in these tough economic times, it is crucial that IBR work as smoothly and fairly as possible for borrowers, along with other policies and programs related to loan repayment, forgiveness, and relief.

Specifically, we recommend the Department:

- **Ensure that Income-Based Repayment and Income-Contingent Repayment are providing access to affordable loan payments and timely loan forgiveness** for all eligible borrowers.
- **Revise the Public Service Loan Forgiveness regulations** to remove confusion and ensure fairness to responsible borrowers working in public service.

- **Ensure that relief is available for financially distressed borrowers** and that those who default can get back into repayment and onto more secure financial footing.
- **Improve the fairness and effectiveness of the cohort default rate policies** for students, schools and taxpayers.
- **Revise the process for disability discharge determinations** to ensure it is fair.
- **Update and revise the false certification determination regulations** to ensure they are not unnecessarily limiting the scope of the law and denying much needed relief for borrowers harmed by false certifications of their eligibility for aid.
- **Improve the loan collection regulations** to ensure that private collection agencies follow the law and that the process is fair and better serves borrowers.
- **Adjust entrance and exit loan counseling regulations** to improve loan counseling's effectiveness in helping borrowers make informed decisions about borrowing and repayment.

Income-Based Repayment (IBR) and Income-Contingent Repayment (ICR)

Change forgiveness period to 20 years for IBR and ICR for all borrowers. The Secretary has the authority to set the maximum repayment period for both IBR and ICR – the period after which remaining loan balances are forgiven – as long as it does not exceed 25 years (for example, Sec. 493C (b)7(B)). We ask the Secretary to set the maximum at 20 years for both programs, rather than the 25 years in current rules. Providing forgiveness after 20 years of responsible, qualifying payments would reduce the risk that student loan payments permanently displace critical savings for retirement and children's education in households with little or no financial security. Indeed, after 20 years of qualifying payments any remaining balance would be only or mostly interest for the vast majority of borrowers. This change would also reduce considerable confusion and inequities among borrowers due to the 20-year IBR forgiveness period that is currently scheduled to go into effect only for students who borrow their first federal loan on or after July 1, 2014.

Clarify that qualifying payments for IBR and ICR do not have to be consecutive. Regardless of the length of the maximum repayment period, the rules should make clear that qualifying payments can accrue throughout the borrower's lifetime, as they can for Public Service Loan Forgiveness.

Require lenders to notify borrowers before they need to re-submit income verification information. Under 34CFR685.221(e)(2), the Department has specified that the standard repayment plan is designated to a borrower if the borrower fails to renew the required written consent for income verification. Currently, lenders are not under any obligation to notify or remind borrowers of the need to annually submit their income verification form for IBR and ICR eligibility. The need and required timing for annual submission is far from obvious to borrowers. The current Direct Loan income verification form gives the Department access to five specific years of the borrower's adjusted gross income (AGI), including some future years for current applicants. FFELP borrowers are simply instructed to submit IRS Form 4506-T as part of their "initial application." It is in both the Department's and borrowers' interest to make participation in these programs as efficient as possible, and annual notification before new forms are due will

reduce unnecessary paperwork and confusion as well as disruptive shifts in payment requirements for borrowers whose payment caps rise unexpectedly and unaffordably due to the absence of updated income information.

Clarify that borrowers can remain in IBR if their income verification is delayed and can quickly restore payment caps based on partial financial hardship. Many low-income borrowers move frequently and often do not receive paperwork needed to retain program benefits, such as IBR's required annual authorization to release IRS records for the purposes of determining if the borrower has a partial financial hardship. Borrowers who are forced to make payments based on a 10-year standard repayment plan because they did not submit the necessary annual paperwork need to be able to quickly restore their eligibility for IBR payment caps based on a partial financial hardship, and their previous IBR payments need to count towards forgiveness. This is very important since IBR and ICR are often the only realistic options borrowers have to stay out of default. Currently, the regulations (34 CFR 685.221(e)(2)(i)) state that borrowers whose income information is out of date will be treated like borrowers who no longer have a partial financial hardship, without explicitly specifying that the borrower can stay in IBR until their income has been verified. This should be made explicit to inform the actions of lenders and servicers, avoid unnecessary paperwork for both borrowers and the Department, and ensure that borrowers are not forced to make unaffordable payments for extended periods of time. In addition, any borrowers that may have been forced out of IBR and into a standard repayment plan due to delays in providing income information should be able to re-enter IBR immediately upon providing that information.[1]

Ensure that borrowers who elect to exit IBR are not penalized for leaving the program. Under current regulations, IBR borrowers can face severely limited repayment options if they elect to exit IBR, especially if they did not consolidate their loans before entering IBR. Some people exiting IBR will face monthly payments far in excess of what they would have paid under a standard 10-year plan, directly contradicting the statute (PL110–84, Section 493C(b)(6) and (8)). It is our understanding that for borrowers who remain in IBR without a partial financial hardship, the Department currently and appropriately bases their payments on a 10-year standard plan in which the 10 years begin when their payment is recalculated. There is no statutory or practical reason to treat borrowers who exit the IBR plan more harshly by imposing lump sum or otherwise likely unaffordable payments based on a truncated repayment timeline. The current regulations should be changed to avoid this outcome and to be consistent with both current law and ICR policy.

Ensure that the term "standard repayment plan" is defined clearly and used consistently. The IBR program's success hinges on both the Department's use and the borrower's understanding of the term "standard repayment plan." This "plan's" timeframe determines the monthly payments for any borrower either electing to leave IBR or remaining in IBR while they do not have a partial financial hardship. In addition, standard 10-year payments are the only payments other than IBR and ICR payments that count as qualifying payments for loan forgiveness through IBR or Public Service Loan Forgiveness.

[1] For details see TICAS June 22, 2009 negotiated rulemaking comments at http://ticas.org/pub_view.php?idx=484.

In the development of the regulations for IBR, College Cost Reduction and Access Act (CCRAA) negotiators needed to develop several versions of "standard" to differentiate among various meanings of the term in various parts of the regulations (including "standard-standard," "permanent-standard" and "expedited-standard"), but the regulations themselves do not necessarily make these distinctions. In a conversation with an employee at the Department of Education, we were told that when the term "standard repayment plan" occurs in the statute and fails to specify a repayment period, it, by default, means the 10-year standard repayment plan. While this interpretation presumes that only a fixed 10-year repayment plan is a "standard plan," both the Department and other lenders define it differently in some contexts. For example, we have heard from borrowers with consolidation loans looking to change into a 10-year "standard" repayment plan who were told that the only "standard" repayment plan for their loan amount is longer than 10 years. It is important that the term is defined clearly and used consistently – in regulations and elsewhere -- to minimize confusion and questions by borrowers, ensure that borrowers who ask to make "standard" payments are not unfairly prevented from qualifying for forgiveness through IBR or Public Service Loan Forgiveness, and make the federal loan program run more smoothly.

Technical change to ensure that forgiveness is available to both ICR and IBR borrowers. Since IBR went into effect, the ICR forgiveness regulations were moved from the section on ICR to the IBR forgiveness section (Sec. 685.221(f)). The problem is that the IBR forgiveness section states that borrowers must have participated in IBR. This technical glitch should be corrected to ensure that borrowers who meet the forgiveness criteria for ICR can actually get forgiveness.

Technical change to date reference in ICR regulations. We urge the Department to make a technical change to regulations for the ICR program (CFR 685.209). Currently, (c)(4)(ii) states: "(F) Periods after October 1, 2007, in which the borrower makes monthly payments under any other repayment plan that are not less than the amount required under the standard repayment plan described in Sec. 685.208(b); or (G) Periods of economic hardship deferment after October 1, 2007." The preceding section (E) applies only to "borrowers who entered repayment before October 1, 2007." Therefore, sections (F) and (G) should be amended to read, "Periods beginning on or after October 1, 2007," to be reflective of statute.

Public Service Loan Forgiveness (PSLF)

Simplify and remove inequity in the definition of full-time employment for PSLF (CFR 685.219). Section 401 of the CCRAA defines a "public service job" specifically as a full-time job, but it does not define "full-time." In its final regulations governing PSLF (Sec. 685.219(b)), the Department has defined "full-time" as:

> working in qualifying employment in one or more jobs for the greater of –
> (i)(A) An annual average of at least 30 hours per week, or
> (B) For a contractual or employment period of at least 8 months, an average of 30 hours per week; or

(ii) Unless the qualifying employment is with two or more employers, the number of hours the employer considers full-time.

The second half of clause (ii) creates both unnecessary administrative complexity and inequity for individuals whose employers consider full-time to be more than 30 hours per week. Borrowers will have to submit proof of their employer's definition of full time, and the Department will have to collect and verify this information for each borrower in the PSLF program. There is no statutory language that requires this dual definition for full-time. Deleting section (ii), thereby defining full time as 30 hours per week for all applicants, would greatly simplify the administration of the program and ensure that all borrowers are treated equitably with regard to how much they have to work to qualify for PSLF.

Ensure that borrowers retain time earned toward forgiveness after consolidation. This is a critical fairness issue for forgiveness through IBR, ICR and PSLF. For example, many borrowers graduate from undergraduate colleges and work for a number of years at non-profit or government organizations. During that time they can make payments that count towards forgiveness. They should not lose the benefit of time earned toward forgiveness during these years even if they later go to graduate school and consolidate new loans with the old. There is precedent for the Department to separately consider the underlying loans in a consolidation loan for possible cancellation. For example, the Department has clarified that it does this for purposes of false certification and closed school discharges. There is no current regulation prohibiting this practice for the purpose of other types of loan forgiveness, but we understand that the Department is taking a restrictive interpretation so that all time earned toward forgiveness is lost after consolidation. We urge the Department to instead ensure that borrowers retain time earned toward forgiveness after consolidation.[2]

<u>Distressed Borrower Issues</u>

We support the recommendations of the National Consumer Law Center on the following issues:

- Conform Direct Loan regulations to the FFEL regulations and FTC Holder Rules.
- Expand and clarify the extenuating circumstances that allow borrowers to obtain closed school discharges even if they do not meet the 90-day standard.
- Ensure that Income-Based Repayment (IBR) is an avenue to rehabilitation by defining "reasonable and affordable" as no more than what the borrower would pay in IBR and no less than $5.
- Require creditors to remove all negative history on a credit report after rehabilitation.
- Eliminate the requirement that guaranty agencies must sell loans to new holders prior to rehabilitation, or if it is not eliminated, clarify when sale is required.
- Ensure that borrowers in economic hardship may request to have the amount collected reduced or suspended, as is currently the case under the Debt Collection Improvement Act.

[2] See, e.g., 34 C.F.R. § 685.212(d) In the case of a Direct Consolidation Loan, the Secretary discharges the portion of the consolidation loan equal to the amount of the discharge applicable to any loan disbursed, in whole or in part, on or after January 1, 1986 that was included in the consolidation loan.

Clarify definition of income for economic hardship deferment eligibility. We recommend the Department clarify that the monthly income used for determining economic hardship deferment eligibility is one-twelfth of the borrower's AGI, limiting it only to taxable income.

Cohort Default Rates (CDRs)

Technical correction to make the Participation Rate Index (PRI) appeal thresholds consistent for both sanctions based on three-year Cohort Default Rates (CDRs). The Department should make the appeal thresholds for sanctions based on three-year CDRs consistent, as they currently are for sanctions based on two-year CDRs. Doing so will make it simpler and more equitable for colleges to use the participation rate index (PRI) appeal as a safeguard against undue sanctions.

Colleges with CDRs above certain thresholds can face sanctions that affect their continued eligibility to offer federal financial aid to students. These CDR sanctions are an important and appropriate accountability measure for schools, particularly as there are a number of safeguards that protect colleges from undue sanctions. One such safeguard is the participation rate index (PRI) appeal, which acknowledges that CDRs for colleges where small shares of students borrow may not represent typical student outcomes.

Sanctions can be applied to schools when their CDRs exceed certain levels: three consecutive years of two-year CDRs at or above 25% (or three consecutive years of CDRs at or above 30% for FY 2011 and beyond); or any one single year with a two-year CDR above 40% (the threshold remains 40% in any one year once the three-year CDRs go into effect). Sanctions and the PRI basis for appeal based on three consecutive CDRs are statutory, while sanctions and the PRI basis for appeal based on one CDR are regulatory.

A college's PRI is its default rate times the share of its eligible students who borrow loans. To successfully appeal sanctions based on two-year CDRs, the school's PRI must be 0.0375 or less for sanctions based on three consecutive CDRs, or 0.06015 or less for sanctions based on any one year. For either sanction type, this means that colleges where less than 15 percent of eligible students borrow may be able to appeal CDR sanctions.[3] For fiscal years beginning October 2011, when the three-year CDRs will be official and subject to appeals, the Higher Education Opportunity Act increased the maximum allowable PRI for appeals to 0.0625 for three-year sanctions, covering schools where less than about 21 percent of eligible students borrow. However, no parallel change has been made to the regulations stipulating the appeals threshold for sanctions based on one year's CDR.

Keeping the allowable participation rate for PRI appeals equal for the two types of sanctions once three-year CDR sanctions go into effect will make it easier for colleges to use and understand this safeguard. The Department should use the rulemaking process to adjust the PRI

[3] .For instance, a college with a CDR of 25 percent at which 15 percent of students borrow would have a PRI of 0.0375 (0.25 * 0.15 = 0.0375).

appeal threshold for the regulatory, single-year CDR sanctions to conform with the updated PRI appeal threshold for the statutory, three-year CDR sanctions.

Use three-year CDRs for single-year sanctions beginning in 2013 rather than 2014. As stipulated in the Higher Education Opportunity Act, statutory sanctions based on three consecutive CDRs will not be based on colleges' three-year CDRs until there are three years' worth of official three-year CDRs. The first "official" three-year CDR will be for FY09, so the first time sanctions based on three consecutive CDRs would use three-year CDRs will be 2014, when there will be three-year CDRs for FY09, FY10, and FY11. That makes sense, since three official CDRs are needed for these sanctions to apply. However, there is no need for regulatory sanctions based on one year's CDR to wait for three years of data to accumulate. Current regulations would have the Department first use three-year CDRs to determine sanctions based on one year's CDR in 2014, three years after official three-year CDRs are available – delaying much-needed oversight and accountability for colleges. We recommend that the Department revise the current regulations so that colleges with official three-year CDRs higher than 40% would be subject to sanctions as soon as possible, beginning in 2013.

Hold schools and students accountable at the same time for defaults. For borrowers of federal student loans, default occurs on or after 270 days of nonpayment. However, schools are not held accountable for student defaults until loans are 360 days past due.[4] This significant discrepancy is profoundly unfair to student borrowers and means the official cohort default rates (CDRs) do not reflect the extent of actual defaults within even the limited time period that they cover. We recommend the Department hold both schools and students accountable for defaults at the same time to address this inequity and strengthen the effectiveness of the CDRs as an accountability mechanism. Regardless of when a default occurs, the consequences for borrowers are severe and long-lasting, from ruined credit ratings to garnished wages and even reduced Social Security benefits.

Disability Discharge Criteria and Process

We strongly agree that the Department should review and revise the process for disability discharges to ensure it is fair. In particular, we urge the Department to accept other federal agency determinations as presumptive proof for Department of Education discharges.

False Certification

Broaden Relief to Conform to Statutory Authority. 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 loans amounts from the schools and its affiliates.

[4] http://ifap.ed.gov/eannouncements/022511DefiDefaultEligiCDR.html

The current false certification regulations (e.g., 34 C.F.R. § 685.215) explicitly provide for the false certification of Ability-to-Benefit (ATB) tests for students who do not have a high school diploma or GED. The regulations need to be revised to reflect the Higher Education Opportunity Act's creation of a six-credit-hour alternative method to demonstrate a student's ability to benefit. This is also an opportunity to clarify other aspects of the false certification regulations to ensure that they more explicitly address other forms of false certification. The Department has interpreted the false certification provisions very narrowly, yet the statutory authority is broad.

The statute is not limited to specific types of false certification. It provides for relief for a range of illegal and abusive acts. For example, borrowers should be eligible for relief in any case in which a school falsely certifies eligibility, not just in the context of ATB testing. Relief should also be available if the school improperly or falsely certifies a student's satisfactory academic progress, which is a necessary requirement for student eligibility.[5] 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 a range of circumstances.

Adopt the Fair Credit Reporting Act standard of proof for identity theft cancellations. In 2006, Congress provided for the cancellation of loans resulting from identity theft false certifications. However, the current regulations require borrowers to prove that a crime was committed in order to obtain relief, even though police rarely prosecute cases of identity theft. The Department should adopt a standard of proof similar to the Fair Credit Reporting Act, which defines identity theft as fraud committed or attempted using the identifying information of another person without authority. The Department could rely on the same type of documentation that credit reporting agencies rely on to determine if a crime of identity theft has occurred, to place fraud alerts or to remove erroneous information from credit reports.

Address problems with the burden of proof. Currently, the Department regularly requires borrowers to present independent evidence, including proof of federal or state investigatory findings of fraud. However, in many cases, the schools have not been investigated and such evidence does not exist. The Department has been relying on a 1995 Dear Colleague letter that states that an absence of findings of improper practices raises an inference that no improper practices were reported because none were taking place.[6] The regulations should clarify that the Department should look at evidence of findings from oversight agencies or other evidence such as student complaints. The regulations should specify that assuming the borrower's statement and any other evidence is credible, the Department must grant discharges if it does not find evidence contradicting the information in the borrower's application. The Department should

[5] For examples of teachers being pressured to manipulate grades in order to retain students, see Kelly Field, "Faculty at For-Profit Colleges Allege Constant Pressure to Keep Students Enrolled", Chronicle of Higher Education (May 8, 2011)

[6] U.S. Department of Education, Dear Colleague Letter Gen-95-42 (Sept. 1995).

also reinforce in regulations the guidance in the 2007 Dear Colleague letter for FFEL loans requiring agencies to check for the availability of evidence to support false certification allegations and to make inferences in certain circumstances that problems or violations have occurred.[7] The Department should also be required to keep all evidence that it collects in evaluating discharge applications and promptly make the information available to borrowers on request. Once presumptive eligibility is established based on the borrower's application, the burden should shift to the Department to disprove the borrower's eligibility.

Require Evaluation for Group Discharges. The Department should be required to grant group discharges in cases where the Department determines that a school committed pervasive and serious violations of false certification provisions (e.g., if the Department determines that a school was systematically falsely certifying ATB tests during a certain period of time). Individual borrowers simply do not have access to the full range of information that guaranty agencies and the Department collect, and the Department should not be able to avoid group discharges in cases of serious widespread violations affecting an identifiable group of students.

Collection Issues

To increase fairness and lower costs, we urge the Department to consider eliminating the use of private collection agencies, as the Internal Revenue Service has done. In the federal loan programs, private collection agencies are given authority to act on behalf of the loan holder in everything from rehabilitation to information about discharges to loan compromises. Yet dispute resolution is not their primary mission, they are not adequately trained to understand and administer the complex borrower rights available under the Higher Education Act, and there is insufficient oversight of their activities. As a result, consumers are deprived of important options to which they are legally entitled. Even worse, some collectors misrepresent these rights or steer consumers into options more profitable for the collector.

In the meantime, there are ways to improve the loan collection system so that private collection agencies follow the law and better serve borrowers. The regulatory issues we urge you to consider in this round include: limiting collection charges to those that are bona fide, reasonable and actually incurred; ensuring that collection letters include information about exemptions and other rights; and prohibiting collection activities while the borrower is in rehabilitation.

Loan Counseling

Require individualized entrance and exit counseling. With most entrance and exit counseling occurring online, it can and should be tailored to each student's situation, estimating total and monthly payments given their current and anticipated total borrowing. Individualized information will help make the counseling relevant and compelling to borrowers and enable students to make more informed and conscious decisions about whether and how much to borrow. The National Student Loan Data System (NSLDS) contains information on each student's federal loans that could be imported into the online counseling. As a result, the counseling could show exactly what each repayment plan would mean for each borrower. With all new loans being originated through the Direct Loan program, this could be achieved through

[7] U.S. Department of Education, Dear Colleague Letter No. FP-07-09 (Sept. 20, 2007).

the Department's online counseling system. We recommend that the Department individualize its online counseling system and require schools not using the Department's system to provide similarly individualized counseling as well.

Require counseling before each additional student loan, not just the first, and when students can act on the information. By requiring individualized counseling with both the first *and* each additional loan, the counseling could inform students of their cumulative borrowing, warn them when it rises above the average level, and point to constructive steps they could take to reduce their borrowing. It could also underscore the importance of completing a degree so students have the earning power to repay their loans. Repeated variations of entrance counseling, if well designed, would also have the benefit of reinforcing important messages over time, a tactic used successfully in social marketing as well as commercial advertising. As noted above, with all new loans now originated through the Direct Loan program, the Department could provide individualized online counseling for each loan without burdening schools. Some colleges already voluntarily require annual online counseling prior to every loan disbursement. Furthermore, it is crucial that this counseling occur at a time when students can act on the information. For instance, the Department should change its regulations to specify that entrance counseling occur *before* a student signs the promissory note, not just before the loan is disbursed.

Require schools to have a policy to enforce the exit counseling requirement. Exit counseling has the potential to help students select an appropriate repayment plan and avoid default. For this reason, schools are required to ensure that exit counseling is conducted shortly before a student borrower ceases at least half-time study at the school. If the counseling is conducted online, the school is required take reasonable steps to ensure that each student borrower completes the counseling. However, compliance appears to vary significantly. Some schools ensure students go to exit counseling by placing a "hold" on the student's account until they have gone, affecting their ability to receive academic transcripts. Others appear to do little to ensure compliance with the requirement. With all new loans being originated through the Direct Loan program, the Department can easily determine whether the requirement is being enforced and ensure that schools have policies in place to ensure students receive timely loan counseling.