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August 28, 2013

Jessica Finkel
U.S. Department of Education
1990 K Street, NW, Room 8031
Washington, DC 20006-8502

Re: Docket ID ED–2013–OPE–0063

Dear Ms. Finkel:

We are pleased to have the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on July 29, 2013. The proposed rules take several important steps towards strengthening protections for distressed federal student loan borrowers, such as making it easier for borrowers to rehabilitate their defaulted loans and helping borrowers obtain a loan discharge if their school closes.

The Institute for College Access & Success (TICAS) is an independent, non-profit organization that works to make higher education more available and affordable for people of all backgrounds. Our Project on Student Debt seeks to increase public understanding of rising student debt and the implications for our families, economy, and society.

We write to express our support for selected proposed regulations and to recommend important improvements. Our comments are grouped by topic: forbearance for post 270-day defaulted loan borrowers, reasonable and affordable payment standard for rehabilitation of defaulted loans, participation rate index (PRI) appeal for cohort default rates, and closed school loan discharges. Unless otherwise noted, page numbers refer to the July 29, 2013 Federal Register notice.

Forbearance for Post 270-Day Defaulted Loan Borrowers (34 CFR 682.211(d) and 685.205)

Since the negotiated rulemaking panel met in early 2012, significant evidence has emerged documenting how some colleges abuse forbearances to manipulate their cohort default rates (CDRs) by delaying defaults until after the period when schools are held accountable. For example, the July 2012 report of the Senate Health, Education, Labor and Pensions Committee investigation of the for-profit college industry included extensive documentation of egregious abuses by some companies, many of which were also described in an August 2012 TICAS memo.[1] The Senate report found that some companies are using forbearance and deferment to manipulate the school's CDR regardless of the student's particular situation or whether it is in the student's best financial interest, and noted that these practices often "abruptly halt" after the

[1] TICAS memo on CDR manipulation. August 21, 2012. http://www.ticas.org/pub_view.php?idx=856.

period when schools are held accountable for defaults.[2] Eight senators subsequently urged the Department to modify its regulations and take other actions to curb such abuses.[3]

Secretary Duncan's February 27, 2013 response to the senators indicates that the Department's own investigation concluded that "some institutions are aggressively pursuing their former students to compel them to request forbearance from their loan servicer," and that he agrees that "institutional debt management or default aversion programs that focus only on a borrower securing short-term relief through forbearance is not a satisfactory debt management program and may benefit the institution more than the borrower."[4] Secretary Duncan's letter goes on to say:

> According to the students' accounts, institutional representatives assisted them in completing forbearance request forms or initiated three-way calls with loan servicers to facilitate the borrower's *oral* request for forbearance….Many of the 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*. One borrower stated that she was current in her payments, but was offered a $25 gift card to complete the forbearance process. [Emphasis added]

The Department's reference materials state that a loan forbearance allows borrowers to postpone or reduce their monthly payment amount "for a limited and specific period if you are *temporarily* unable to make your scheduled loan payments for reasons including, but not limited to, financial hardship or illness" [emphasis added].[5] Guidance recently provided by the Office of the Comptroller of the Currency similarly advises that forbearances should be temporary and used when a borrower "can demonstrate a reasonable prospect of increased income in the foreseeable future."[6] This is because interest continues to accrue during forbearance and any unpaid interest is capitalized at the end of the forbearance period, which can greatly increase the cost of the loan. As a result, if a borrower's situation is not expected to be temporary, most borrowers would be better off switching to an income-based repayment plan, in which their monthly payments may be as low as $0 if they have no or a very low income and unpaid interest is not capitalized unless borrowers' income rise above a certain level or they change repayment plans.

During the negotiating rulemaking panel's consideration of amending the regulations to authorize forbearances based on oral requests when a borrower has not made a payment for more than 270 days, negotiators representing State Attorneys General, students, and consumers raised

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

[3] Senator Frank R. Lautenberg. December 13, 2012. Press Release. "Senators Lautenberg, Harkin, Colleagues Call for Crackdown on Manipulation of Student Loan Default Rates." http://bit.ly/19IINPO.

[4] Letter from Secretary of Education Arne Duncan to Senator Tom Harkin. February 27, 2013. http://bit.ly/19X6gQQ.

[5] U.S. Department of Education. 2013. "Exit Counseling Guide for Federal Student Loan Borrowers." P. 12. http://www2.ed.gov/offices/OSFAP/DirectLoan/pubs/exitcounselguide.pdf.

[6] Office of the Comptroller of the Currency, letter to the Consumer Bankers Association. May 14, 2013. Provided in Appendix C of TICAS' June 4, 2013 comments on upcoming negotiated rulemaking topics. http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf.

concerns about the misuse of forbearance requests by institutions of higher education attempting to manipulate their default rates. As a result, the Department publicly committed to scrutinize "serial forbearances" and other signs of forbearance abuse, including in program reviews and audits. However, the NPRM preamble currently states only that "The Department agreed to monitor the use of forbearances in its oversight of schools and third-party servicers who are working on default aversion services on behalf of the schools" (p. 45631).

As it publicly committed to do during the negotiations, **the Department should state explicitly that it will look for evidence of abuse of forbearances to manipulate CDRs**, including serial, or back-to-back, forbearances at campuses, and other signs, such as sharp increases in defaults after the three-year CDR window closes, and that it will do so in program reviews and audits or whenever the Department sees evidence of potential abuse.

To try to prevent institutions from evading the consequences of high default rates by pressuring borrowers to request oral forbearances during the CDR tracking period, the proposed regulations limit to 120 days any forbearance granted to a defaulted borrower or endorser based on an oral request and affirmation, and prohibit a servicer from granting the borrower or endorser consecutive 120-day period forbearances. However, we are concerned that borrowers in such circumstances may still be given serial forbearances based on oral requests because after the 120-day period, they may still be given an administrative or other form of forbearance, regardless of whether it is in the borrower's best interest. Therefore, **we urge the Department to amend the proposed regulations to ensure that after the 120-day period, borrowers are given an additional forbearance only if they can demonstrate a reasonable prospect of increased income in the foreseeable future.** For additional regulatory and administrative steps the Department can take to prevent the abuse of forbearance to manipulate CDRs, see TICAS' recent comments for negotiated rulemaking.[7]

Under the proposed regulations, lenders are required to send a written notice to the borrower or endorser within 30 days of an oral forbearance agreement confirming the terms of the forbearance and the borrower's or endorser's affirmation of the obligation to repay the debt. **We recommend that the written notice also include information about borrowers' other repayment options and how borrowers can exit forbearance**. Given the Department's finding (described in its February 2013 letter) that borrowers who were pressured into forbearance reported that they were not made aware of other repayment options, borrowers requesting forbearance should be given *both* oral and written information on their other repayment options. The draft regulation requires that lenders orally review other repayment options with the borrower, but that information should also be required in the written notice to ensure that borrowers have as much opportunity as possible to understand and be able to easily reference their other repayment options. This is particularly important because borrowers may not have received that information previously. Although the Department states that information on available repayment plans is already required to be sent to delinquent borrowers in their monthly billing statements (p. 45631), the Department's own data show that a significant number of borrowers who default were never successfully contacted by their lenders because their

[7] TICAS' comments on topics to be included in the Department of Education's upcoming negotiated rulemaking. June 4, 2013. http://www.ticas.org/files/pub/TICAS_June_2013_neg_reg_comments.pdf. Pp. 14-19.

lenders did not have current contact information.[8] As such, it is unclear whether borrowers are receiving the information being sent to them. Lenders granting oral forbearances are well positioned to confirm borrowers' contact information and deliver the written information borrowers may have missed previously, and can do so without incurring additional burden since they are already obligated to provide written information about the oral forbearance agreement.

To ensure that the written notice provides effective information, **we recommend that the form of the written information be prescribed by the Secretary based on consumer testing.**

"Reasonable and Affordable" Payment Standard for Rehabilitation of Defaulted Loans (34 CFR 682.405(b) and 685.211(f))

Federal law allows borrowers who have defaulted on their loans to rehabilitate those loans by making nine "reasonable and affordable" payments over a ten-month period. With debt collectors paid a share of revenue collected, federal student loan servicers have had little incentive to offer reasonable and affordable payments that are based on an objective analysis of the borrower's financial standing. Instead, the incentive has been to push borrowers to make as large a payment as possible, regardless of whether such a payment is either reasonable or affordable.[9] As a result, a clear definition of reasonable and affordable payments for borrowers seeking to rehabilitate their loans after default is urgently needed.

Through income-based repayment (IBR), existing federal law already sets a clear standard for what constitutes a manageable student loan payment for borrowers who cannot afford their 10-year standard payment. As the preamble points out, throughout the negotiations, student and consumer negotiators argued strenuously that borrowers seeking to rehabilitate their loans should initially be offered a payment amount based on the IBR formula. Apart from federal precedent, there are other rationales for using a borrower's calculated IBR payment as the appropriate starting point for a reasonable and affordable payment. For example, starting with a simple, established formula provides the simplest path to getting back on track, with less documentation required of borrowers, as explained below. Further, borrowers who successfully rehabilitate their loans will be able to enter IBR and make payments calculated under the IBR formula, so encouraging them to make IBR-sized payments during rehabilitation will best position borrowers for repayment post-rehabilitation.

The consensus NPRM language defining reasonable and affordable payments would allow for use of IBR payments, but only *after* borrowers have been offered and objected to a different amount calculated by servicers. The initial payment offer would be calculated based on information provided by borrowers on a form provided by the Department and determined subjectively by the servicer. Borrowers would have to complete this long and complex form to the servicer's satisfaction, including providing any and all requested documentation, before being allowed to request a reasonable and affordable payment based on the IBR formula.

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[8] U.S. Department of Education, Office of Federal Student Aid. Delinquency and Default Prevention Training webinar. November 18, 2010. http://www2.ed.gov/offices/OSFAP/training/materials/defaulttranscript.pdf. P. 27.

[9] Hechinger, John. March 26, 2012. "Obama Relies on Debt Collectors Profiting From Student Loan Woe." *Bloomberg*. http://www.bloomberg.com/news/2012-03-26/obama-relies-on-debt-collectors-profiting-from-student-loan-woe.html

While we appreciate that the form is intended to ensure that payments are, in fact, reasonable and affordable, the draft five-page form is itself an example of why IBR should be offered first to borrowers seeking to rehabilitate their loans. The current draft form is not just long but also complex, asking borrowers, for example, about "amounts paid toward insurance premiums, but do not include any amount that is deducted from your paycheck and reflected in Sections 3 or 6." Borrowers are also asked about their spending on "legally required child care" and are expected to know whether they are subject to "Treasury offset." Such detailed financial questions may reflect important information needed to conduct a thorough, personalized analysis of borrowers' income and expenses, but for many borrowers it is simply unnecessary and may be a substantial roadblock to rehabilitating their loans.

The draft form requires borrowers to detail and document far more information than would be needed to calculate an IBR payment amount. If IBR payments were the starting point for reasonable and affordable payments, servicers could quickly and easily determine the likely payment amount based on the borrower's estimate of their income and family size. If the borrower agrees to the payment amount, the servicer would then only need to verify the stated income and family size using the existing IBR application form and process.

We appreciate that the IBR formula may not best reflect the financial circumstances of all borrowers, and that there is value in a subjective review of both borrowers' income and expenses. However, such value is best added on a case-by-case basis for individual borrowers for whom a simpler, more streamlined approach is not sufficient. **We strongly urge the Department to reverse the order in which the two payment options are provided to borrowers.** Starting with an IBR standard and moving to a personalized assessment, if need be, will best position borrowers for longer-term repayment success and minimize the burden on both students and servicers.

We also offer the following recommendations:

- **Do not require borrowers to submit information twice** (p. 45636). The consensus language would require borrowers to submit documentation needed for the calculation of reasonable and affordable payments *twice* if they choose to object to the first payment offered. The Department asks whether this is appropriate. It is not. There is no reason to ask borrowers to submit the same information twice to the same entity. As such, we recommend the regulation be modified to clarify that borrowers need not submit documentation of income or expenses if the servicer already has the information.

- **Use IBR rather than the IRS National Standards** (p. 45635). The Department asks whether the initial reasonable and affordable payment offered to borrowers should be standardized by using available data on typical household expenses, such as the Internal Revenue Service National Standards. We believe it should not be. To the extent that the consensus reflected an agreement that a combination of standardized and tailored payment options would best meet the needs of borrowers, standardizing the more tailored approach would be a step in the wrong direction. We appreciate the Department's desire to provide a more standardized approach to borrowers up front, and recommend doing so by offering the standardized, IBR payments to borrowers first.

- **Do not force borrowers to wait for a written offer in order to object** (proposed 682.405(b)(1)(v) and 685.211(f)(1)(iii)). The consensus language provides borrowers the option of objecting to an offered reasonable and affordable payment amount provided in a written agreement. In reality, many borrowers will be offered payment amounts orally, and they should be able to object to the offered payment amount at that point. Requiring them to wait until they receive a written offer will only delay or deter the borrowers' rehabilitation. Given the frequent challenge of locating and communicating effectively with borrowers, this provision may significantly decrease the chance that borrowers rehabilitate their loans.

- **The borrower's right to object should be stated at the *top* of the income and expense form** (ED-2013-OPE-0063-0005). Regardless of whether the IBR formula payment is offered first, the borrower's right to object to the payment amount offered, and to choose an IBR formula payment amount instead, must be specified at the beginning of the form. Burying that information in small print on the bottom of page 4 reduces the number of borrowers who will understand and exercise their rights.

Participation Rate Index Appeal for Cohort Default Rates (34 CFR 668.204 and 668.214)

Colleges with cohort default rates (CDRs) above certain thresholds can face two different types of sanctions that affect their continued eligibility to offer federal financial aid to students. These CDR sanctions are important and appropriate accountability measures for schools, particularly because 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. Under current law, colleges with three consecutive CDRs at or above 30 percent may lose eligibility to offer federal grants and loans, but colleges where less than 21 percent of students borrow may be eligible to appeal sanctions. Currently, under the separate regulatory sanction, colleges with a single CDR above 40 percent may lose eligibility to offer federal loans, but may be eligible to appeal if less than 15 percent of their students borrow. The proposed regulation allows those colleges to appeal if they have up to 21 percent of students borrowing, like the statutory threshold for colleges with three consecutive CDRs at or above 30 percent. We appreciate the Department making the participation rates below which colleges may appeal sanctions consistent across the two types of sanctions, as we had previously called for.[10]

Keeping the allowable participation rate for PRI appeals equal for the two types of sanctions will make it easier for colleges to use and understand this safeguard, but more must be done. The recent example of the Yuba Community College District in California, where the fear of sanctions led to a decision to stop offering federal student loans despite the college being at no risk of sanctions, demonstrates that too few colleges that could benefit from appeals know about

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[10] TICAS. 2011. *Still Denied: How Community Colleges Shortchange Students by Not Offering Federal Loans.* http://www.ticas.org/pub_view.php?idx=737.

them or understand how they apply for them.[11] **The Department needs to promptly assure community colleges around the nation with low borrowing rates that they are not at risk of sanctions.** There are many actions the Department could take without additional regulations to ensure colleges understand the PRI appeal and how it applies to them.[12] As just one example, see the PRI worksheet created by TICAS to help colleges calculate their PRI and understand its applicability to their college.[13]

Second, **the Department should allow colleges to file a PRI appeal at any time.** The Department's implementation of the PRI appeal process is hugely problematic, as it does not provide colleges with the assurance that they are not at risk when it is most needed. Colleges may lose eligibility for both federal grants and loans when they have three consecutive years of default rates at or above 30 percent, but they can appeal those sanctions if their borrowing rate for any one of those three years is sufficiently low. The problem is that the Department makes colleges wait until the third high-CDR year to let them appeal, without assuring colleges in years one or two that they are not at risk of sanction and thus denying them the chance to make an educated decision about continuing to offer student loans.

Without such knowledge or assurance, colleges will continue to make decisions to stop offering loans. Nationally, nearly one in 10 community college students do not have access to federal student loans. California stands out as the state with the greatest number of community college students – over 200,000 and growing – without access, but is by no means the only state. If we are serious about helping community college students complete their programs, community colleges need to participate in the federal loan program. For students who can't otherwise afford to attend or finish school, federal student loans are the safest way to borrow.

The Department's current regulation governing PRI appeals is based directly on the Higher Education Act, which explicitly provides an opportunity for relief when an institution is facing an immediate CDR sanction. However, there is nothing in the statute that prevents the Department from accepting appeals before the institution is facing an immediate sanction. In other words, the Department could choose to allow an institution to appeal its CDR based on its PRI at any time. An institution would simply be appealing the applicability of its CDR towards a sanction, rather than appealing a sanction based on its CDR. If the Department thinks of its current rule as implementing a statutory "appeal" policy, then there is no reason it could not think of this proposal as a "petition" process.

Allowing annual PRI petitions or appeals would provide institutions with relatively few borrowers—particularly community colleges, at which borrowing is less common—with an ongoing, yearly assurance that their Title IV program participation is secure. Doing so would reassure colleges that they are not subject to any looming program termination and prevent them from making rash decisions that would deny students access to much needed financial aid.

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[11] Kalb, Loretta. July 15, 2013, revised July 31, 2013. "Yuba Community College District Suspends Federal Student Loan Program." *The Sacramento Bee.* http://www.sacbee.com/2013/07/15/5566610/yuba-community-college-district.html.

[12] For more information, see TICAS. July 24, 2013. Blog post. "Low-Hanging Federal Loan Fruit." http://views.ticas.org/?p=1183.

[13] TICAS' PRI worksheet is available here: http://projectonstudentdebt.org/files/pub/TICAS_PRI_Worksheet_2013.xlsx.

Closed School Loan Discharge (34 CFR 674.33(g), 682.402(d), and 685.214)

We commend the Department for extending the window for students who leave before a school closes from 90 days to 120 days, and adding examples of exceptional circumstances under which the Department may extend the 120-day window. These proposed changes will help protect students who withdraw from a school due to signs of trouble from facing loan payments for programs they are unable to complete, by no fault of their own.

The rationale for providing closed school discharges is that, should a student's entire school close unexpectedly, the student would have no means of completing an academic or vocational program at that school. This differs from instances where a student's program closes and the student may be able to easily change programs at the same school. However, online programs constitute a notable and increasingly relevant exception to this logic, and the regulations treat students enrolled in online programs unfairly.

The proposed regulations define school as "a school's main campus or any location or branch of the main campus, regardless of whether the school or its location or branch is considered eligible" (proposed 685.214(a)(2)(ii), p. 45711). In the preamble, the Department argues that online programs are not "locations" and states that "borrowers enrolled in an online course would receive a closed school discharge only if the main campus of the school closed" (p. 45628). This interpretation is highly problematic for students enrolled in distance education programs who, due to geographic constraints, may not be able to finish their programs at the college's main campus if the online division of the school closes. For instance, for a Minnesotan enrolled in an online program of a school based in Georgia, the existence of a Georgia ground campus is of no use should the online program be discontinued.

We recommend that the Department carefully evaluate whether the statute permits it to treat online students more fairly. If statutory changes are required, we urge the Administration to consider this issue in developing its recommendations for the reauthorization of the Higher Education Act.

Thank you for the opportunity to comment on these proposed regulations. If you have any questions about our comments, please feel free to contact me at (510) 318-7900 or dcochrane@ticas.org.

Sincerely,

Debbie Cochrane
Research Director