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Dr. Michelle Asha Cooper
Acting Assistant Secretary for Postsecondary Education
and Deputy Assistant Secretary for Higher Education Programs
United States Department of Education
400 Maryland Avenue, SW
Room 2C179
Washington, DC 20202

Dear Dr. Cooper:

Thank you for the opportunity to provide input on topics for negotiated rulemaking. These comments respond to the May 24, 2021, Federal Register notice of negotiated rulemaking (Docket ID ED-2021-OPE-0077) for programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA).

The Institute for College Access & Success (TICAS) is a nonprofit, nonpartisan organization advocating for student-centered public policies that promote affordability, accountability, and equity in higher education. For this upcoming round of negotiated rulemaking, we are pleased that the Department of Education (ED) intends to address issues relating to gainful employment requirements to protect students and taxpayers from poor-performing programs, and borrower defense to repayment for students harmed by their colleges' misleading practices. We also appreciate the Department's attention to loan repayment and improving the rules governing targeted student loan cancellation authorities for borrowers engaged in public service, with disabilities, or whose institutions suddenly close.

By addressing gainful employment, borrower defense, and income-driven repayment reform, ED will take on urgent priorities with significant potential to advance racial and economic equity. Students who stand to benefit most from strengthened accountability regulations include students of color, students from low-income backgrounds, and veterans. Predatory colleges target these populations to take their financial aid and GI Bill benefits, push them to take on heavy debt burdens, and leave them with credentials of little or no value. Borrowers of color and women also bear the heaviest weight of student debt. Reforming income-driven repayment will help more of these borrowers avoid default and find solid financial footing.

Below, we offer a set of recommendations and priorities for the upcoming negotiated rulemaking focused on better protecting students by addressing predatory practices and holding colleges accountable, as well as by improving the current income-driven repayment system. Our comments also recognize the Department's—and borrowers'—interest in effective and efficient administration.

In addition, we note areas where the Department can act without a regulatory process. In these instances, we encourage the Department to take immediate steps to implement programs, issue guidance, and use existing authorities. We have limited our specific comments to areas in which we have expertise, and where the stakes for borrowers are particularly high.

Student and Borrower Representation Among Negotiators

Include substantial representation of students and borrowers among negotiators.

Before addressing policy issues, we want to make a critical note on process. The best outcomes from negotiated rulemaking proceedings occur when the right constituencies and areas of expertise are represented at the table. Vendors and the entities regulated by the results of these proceedings have been disproportionately represented on previous committees at the expense of student, borrower, veteran, consumer, and public interest groups.

This rulemaking process offers the Department an opportunity to address undue industry influence and re-orient ED's regulations by ensuring that at least as many seats are available to groups representing the interests of the intended beneficiaries of the regulations as those offered to vendors, institutions, and their affiliated associations. Accordingly, we urge the Department to constitute rulemaking tables with a commitment to placing student and borrower interests at the center of concern.

As numerous speakers noted during the June public hearings, the negotiations must include substantial—and not just token—representation of students and borrowers most affected by the resulting regulations. Student and borrower negotiators must reflect the diverse population of today's students, including students with disabilities, student veterans, and Black and Latina/o borrowers, who disproportionately shoulder the heaviest student debt burdens.

Gainful Employment

Reinstitute the rescinded gainful employment rule, with some modifications.

Strong accountability measures are key to reducing the number of students left worse off by burdensome student debt. Stronger policies, oversight, and enforcement are urgently needed to address high-cost, low-quality programs and predatory practices that prey on vulnerable students, including our nation's veterans. These problems are of particular concern in the for-profit college sector, where borrowing rates, debt levels, and default rates are highest. For-profit colleges enroll only 9 percent of college students, yet they account for one-third of all student loan defaults.[1]

The 2014 Gainful Employment Rule (GE Rule)—which resulted from extensive expert input and analysis, negotiated rulemaking, and public comment—was a critical safeguard that prevented hundreds of thousands of students from taking on debts they were unlikely to earn enough to repay. To meet the gainful employment rule's threshold requirement, debt payments of a program's typical graduate could not be both greater than 8 percent of their earnings and 20 percent of their discretionary earnings. This rule protected student borrowers. The GE rule should apply to career education programs at public, nonprofit, and for-profit colleges, provide for disclosure of key information on program costs and

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[1] The Institute for College Access & Success. *Statement on the Release of Student Loan Default Rates*. 2019. https://bit.ly/3iNW9Gl.

outcomes, and require programs that consistently leave students with debts they cannot repay to improve outcomes or lose access to federal funding.[2]

Even before it was finalized, the GE Rule had significant positive effects. The prospect of sanctions under the rule prompted many colleges to eliminate their worst-performing programs, stem tuition increases, and implement other reforms to improve outcomes for their graduates. In 2010, as the regulatory process to implement the GE Rule was still underway, for-profit colleges began to improve the value they offered students. They had little choice but to act immediately: under the proposed rule, they could lose eligibility based on the experience of their currently enrolled and recently departed students.

According to one analysis, 65 percent of for-profit programs that were failing the gainful employment rule in early 2017 were no longer enrolling students as of August 2018.[3] In part because of these reforms, in early 2017, 9 in 10 colleges with rated gainful employment programs had no failing programs. Even among for-profit colleges, 8 in 10 had no failing programs.[4]

The GE Rule's required consumer-tested disclosure template on institutional websites and in materials for prospective students was an important transparency measure. Clear, simple, and prominent GE disclosures on website landing pages should complement other data-driven transparency efforts of the Department, including the College Scorecard and Net Price Calculator.

The GE Rule is a particularly important safeguard for students of color, low-income students, and women. For-profit colleges have a history of disproportionately enrolling Black and Latina/o students, leaving them with high levels of debt and an inability to pay down their loans. Data from the 2016-17 academic year showed Black and Latina/o students made up 34 percent of all postsecondary enrollments, yet they represented 51 percent of students at for-profit institutions.[5] Nine out of 10 Black and Latina/o students who graduated in 2015-16 from a for-profit undergraduate degree program borrowed, and they borrowed at least $10,000 more, on average, then those attending public colleges.[6] Black students attending for-profit colleges were more than twice as likely—and Latina/o students more than four times as likely—to take out private loans as their peers at other types of colleges.[7]

Rather than providing a path toward educational and economic opportunity, for-profit colleges often do the opposite. These students will benefit most when colleges are compelled to improve the value of poorly performing programs or lose their ability to participate in federal student loan programs. For

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[2] The Institute for College Access & Success. *Gainful Employment Rule Questions & Answers*. 2016. https://bit.ly/3cNAJp9.
[3] The Institute for College Access & Success, September 13, 2018, Detailed comments on the gainful employment notice of proposed rulemaking, pp 6- 8, http://bit.ly/2Z0YWCw; Comments of Clare McCann, Deputy Director for Federal Policy, Higher Education Initiative, New America, in response to Gainful Employment notice of proposed rulemaking, http://bit.ly/31xemvZ.
[4] U.S. Department of Education. *Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs*. January 9, 2017. https://bit.ly/3qkH9RN.
[5] The Leadership Conference Education Fund. *Gainful Employment: A Civil Rights Perspective*. https://bit.ly/3mzbcmw.
[6] Ibid.
[7] Ibid.

these reasons, the civil rights community concluded in 2014 that "it is imperative that strong gainful employment rules are put in place."[8]

Since the previous administration's 2019 repeal of the GE Rule, student and borrower advocates have grown increasingly concerned that the twin crises of the Covid-19 pandemic and economic turmoil will fuel a rise in predatory for-profit enrollment. Notably, in Fall 2020 enrollment at for-profit colleges increased compared to Fall 2019, even as other sectors experienced fall-to-fall enrollment declines.[9] Although more recent data suggests that enrollment at for-profit institutions has begun to level out, it is too soon to know what the ultimate impact of the pandemic will be on enrollment at for-profits.[10]

As the for-profit college industry seeks to enhance profitability and push back against regulatory guardrails, the Department must do its part to strengthen key accountability mechanisms that have proven successful in protecting students and improving the value offered by colleges.

We urge the Department to protect students and taxpayers by prioritizing gainful employment in this negotiated rulemaking process.

1. ***Reinstate the 2014 GE rule with modifications.*** To the extent possible, regulations should clarify that states and consumer groups have standing to ensure the rule is implemented and to challenge its repeal. The Department may also wish to consider modifying the 2014 GE rule with additional quality assurance metrics designed to ensure that students derive value from programs at colleges receiving Title IV funds and consider protections for students enrolled in programs that lose eligibility.

   The 2014 rule successfully drove career colleges to improve the value of their programs or stop offering them, creating better choices for students. Two federal district courts upheld the 2014 rule—decisions unanimously affirmed by an appellate court. Reinstating the rule would minimize the Department's legal risk relative to new approaches. In addition, the Department already has multiple cohorts of data that could be used to produce improved multi-year estimates of the effects of debt-to-earnings rates. By following the established GE blueprint, the Department can move quickly, allowing it to then turn its attention to other pressing priorities on its agenda.

2. ***Consider adopting a new definition of gainful employment based solely on student loan outcomes.*** Gainful employment could be judged by loan repayment rates (which measure negative amortization), a component of the 2011 rule. If the Department chose this approach, it could explore other sources of authority: for example, loan repayment rates potentially could be established through other statutory mechanisms related to administrative capability.

[8] The Leadership Conference Education Fund. *Gainful Employment: A Civil Rights Perspective*. 2019. https://bit.ly/3mzbcmw.
[9] National Student Clearinghouse*. Fall 2020 Undergraduate Enrollment Down 4% Compared to Same Time Last Year*. October 15, 2020. https://bit.ly/3qhQEkC.
[10] National Student Clearinghouse. *Spring 2021 Current Enrollment Estimates*. June 10, 2021. https://bit.ly/3j23ouD.

3. The Department could also, in combination with a newly negotiated GE rule, strengthen its scrutiny of colleges' practices through the program review process. In the process of routinely renewing colleges' program participation agreements (PPAs), Federal Student Aid (FSA) could evaluate colleges (or at least those that meet certain risk criteria) to demonstrate they prepare students for gainful employment by providing, for each program:

    - Occupation names and Department of Labor (DOL) occupation codes;
    - Data regarding the actual or anticipated occupations and earnings of program graduates, along with an explanation of the foundational basis for the data; and
    - Explanations if the earnings are not consistent with the relevant DOL earnings data.

Putting a gainful employment rule back into effect, coupled with other measures to protect students and borrowers, should guard against escalating debt resulting from poor-performing and misrepresented programs—debt that exacerbates existing racial, ethnic, and wealth disparities across the student borrower population.

Borrower Defense to Repayment

Revisit and strengthen the 2016 borrower defense to repayment rule.

Borrower defense to repayment (BD) is a critical tool for the Department both to protect borrowers from having to repay debt that should be forgiven and to deter prospective school misconduct. The regulation directs the Secretary of Education to discharge federal loan debt in instances of college misconduct. Though the regulation has existed since 1994 and the right to borrower defense has been written into every federal Direct Loan borrower's promissory note since that time, the rule's increased use was catalyzed by a single catastrophic event: the 2015 collapse of Corinthian Colleges, Inc., a large for-profit college chain with a history of fraud and misconduct toward its students. The Department's findings of widespread misconduct by Corinthian led officials at the time to create more structure and an easier process for borrowers to seek relief when schools that had engaged in misconduct failed. As a result, the Department began receiving an unprecedented influx of claims from borrowers seeking borrower defense relief.

The Department, never having been presented with the need to adjudicate such a large volume of claims, sought clarity for itself and the public by initiating a new rulemaking process in the fall of 2015. This initiative jumpstarted the effort to help introduce a new process to efficiently and effectively help defrauded borrowers discharge their loans. After months of negotiations and thousands of public comments, the Department published a new rule in November 2016, setting implementation for July 1, 2017. The 2016 rule established a new federal standard for borrowers and worked to rein in predatory school practices. The rule also provided a path for borrowers to hold their schools accountable and get the relief the law guaranteed. Under the rule, borrowers could argue they did not have to "pay back their loans under the following circumstances related to the loan or the education it afforded a borrower:

- A substantial misrepresentation (false, erroneous, or misleading statements that the borrower relied on, and that hurt them, like falsified job placement rates);

- A breach of contract (the school did not live up to its obligations to students, as set forth in a contract, like if a school promised to offer tutoring services in a contract but failed to do so); or
- A favorable judgment against the institution (one in which, based on state or federal law, a judge sided with the borrower)."[11]

The rule also established a process for the Department to offer group relief to borrowers with similar claims.

Weeks before the 2016 rule was set to take effect, the Trump Administration announced it would delay the rule, suspending its implementation. In 2018, a court found this delayed implementation illegal. Despite the court ruling, the Department continued its refusal to act on student claims. By the end of 2019, more than 200,000 borrowers had loan discharge applications sitting idle before the Department. In 2019, rather than strengthening the 2016 rule, the Department adopted a new borrower defense rule with an evidentiary standard that made it virtually impossible for students to discharge their loans. By the Department's own estimate, under this rule *97 percent of loans of students who are connected to a school's illegal conduct will not be forgiven*. The rule likely will hold colleges responsible for only 1 percent of loans made based on misconduct.

The rule set such stringent requirements for students to receive relief that, in 2020, the House and Senate—on a bipartisan basis—used the Congressional Review Act to reject it. President Trump vetoed Congress' effort, and the 2019 rule is in effect for new borrowers.

Alternating periods of action and inaction, perfunctory denials, a partial relief approach that granted defrauded students only pennies on the dollar in relief have created an urgent need for revisiting and strengthening the borrower defense to repayment rule.

Principles for reform. Because the 2019 rule effectively offers no path to borrower defense for most borrowers—while also providing no disincentive to misconduct for schools—the Department must re-regulate. Guiding principles should enable a borrower defense process rule that:

- Makes borrower defense easier to understand and more accessible for borrowers;
- Allows stakeholders who could include borrower advocates, state attorneys general, and consumer protection agencies to file on behalf of similarly situated borrowers;
- Facilitates collection and review of evidence for resolving claims;
- Makes it easier for ED to provide relief to groups of borrowers, when appropriate;
- Ensures claims are processed transparently, expeditiously, and fairly;
- Deters future misconduct by institutions;
- Provides automatic discharges after one year for students whose institutions closed before they could complete;
- Provides strong financial responsibility safeguards to mitigate the risk of sudden institutional collapses; and
- Restores the provision of the 2016 rule that addressed borrower discharge in instances of schools falsely certifying student eligibility to borrow through federal loan programs.

[11] New America. *The Ins and Outs of the Borrower Defense Rule*. July 10, 2017. https://bit.ly/3wC0wZg.

These principles can be accomplished in a variety of ways, including by basing negotiations on the 2016 rule or the borrower defense provisions from the College Affordability Act introduced in the 116th Congress.

1. ***Base Rulemaking on the 2016 Regulation***

- Establishes a federal standard to determine misrepresentation, breach of contract, and applicable state or federal court judgments.
- Maintains ED's autonomy while keeping the lines of communication open with states via a liaison regarding instances giving cause for relief resulting from rule violations.
- Allows ED discretion to provide partial or no relief where appropriate.

2. ***Base Rulemaking on the College Affordability Act***

- Allows borrowers to file claims under either a state or federal standard, thus allowing state attorneys general to bring claims on behalf of groups of similarly situated borrowers.
- Streamlines the process with a straightforward, user-friendly application.
- Provides reasonable time limited response periods for schools.
- Allows legal advocates to bring group claims.
- Provides full relief on all approved claims while allowing the Department to establish a rebuttable presumption of full relief.
- Restores automatic closed school discharges and reduces the required time to discharge.

The Biden Administration has already moved to provide full loan relief for some student borrowers who previously received partial forgiveness on their approved borrower defense claims. More must be done. Hundreds of thousands of students who attended collapsed colleges—and colleges where state and federal investigations have found patterns and practices of deceptive and predatory action—continue to be saddled by student loans from these schools. Many borrowers are not aware of their borrower defense rights, or they do not see the value in applying because many original claimants have not yet succeeded in having their loans discharged.

The Department should continue actions such as these while it also takes immediate steps to provide relief to other borrowers not impacted by the 2019 rule. For example, ED should extend the eligibility (or look-back) periods for closed school discharges, allowing the Department to provide automatic discharges to more harmed students, consider seeking additional applications from state attorneys general as occurred in the American Career Institute (ACI) matter, and expand its overly incremental approach to group relief where a pattern and practice of deceptive conduct has been established.

Fully addressing these issues requires re-regulation. The Department should comprehensively address the unfair and unlawful borrower defense process used during the previous Administration, including reinstating the cursorily denied claims of students who have already been waiting excessively long for relief.

Income-Driven Repayment

Craft a new income-driven repayment plan built on REPAYE.

Income-driven repayment (IDR) plans are a critical safety net for student loan borrowers. Borrowers enrolled in an IDR plan default at much lower rates than those in a non-IDR plan. However, despite significant improvements to program design and generosity over time, too many borrowers continue to struggle with repayment, even if they never default. The following steps should be taken to improve the repayment system:

- Ensure borrowers are protected through any transition toward restarting repayments and the expiration of COVID-19 emergency provisions.
- Prioritize implementation of the FUTURE Act to streamline IDR enrollment and Total and Permanent Disability discharge.
- Work with lawmakers to enact legislation to allow the Department to automatically enroll severely delinquent borrowers in IDR to prevent default.
- Implement flexibilities to streamline IDR enrollment, such as temporarily permitting servicers to enroll borrowers into an IDR plan without requiring extensive paperwork—such as verbally, through a website, or through electronic communication.
- Make additional data on how borrowers navigate the repayment process available to researchers and the public.

The current IDR landscape is beset by several major challenges. Many borrowers encounter challenges enrolling and staying enrolled in an IDR plan, and servicers are not properly incentivized to mitigate these challenges. Separately, under the current formula, income-driven payments can still be too high for many borrowers. And while a low income-based payment can be more affordable month to month, many borrowers watch their balances grow under IDR if their payments do not cover interest.

Although there is a light at the end of the tunnel—any debt that remains after 20-25 years (depending on the plan) of income-driven payments is discharged—the financial and psychological toll of making regular monthly payments while sitting on a ballooning debt balance is likely to discourage IDR uptake. To address these challenges, the Department is considering creating a new IDR plan. In creating such a plan, we believe the Department should build from REPAYE, the newest and most generous existing IDR plan. The Department must address both bureaucratic hurdles and broader design flaws to create an IDR plan that is easy to access, provides a truly affordable monthly payment, and provides real relief after a reasonable number of payments.

As the Department considers creating a new IDR plan, it is important to note that, absent statutory change, the existing array of plans will still exist. ED should work with lawmakers to address this complication. One option would be to fully sunset the existing repayment plans after a transition period. Such a sunset provision would be the easiest for ED to administer and for borrowers to understand.

However, if any borrowers (potentially high-income borrowers) are asked to pay more under a new IDR plan, it may be difficult to remove existing benefits. One way to address this challenge is to give borrowers a small incentive such as an interest rate reduction to switch into the new plan, while still retaining some or all of the existing options.

In this section, we outline recommendations for the Department to consider in creating a new IDR plan through the upcoming negotiated rulemaking process.

1. ***Allow all student borrowers to access the new IDR plan, regardless of income.***

   Some existing IDR plans require borrowers to demonstrate a "partial financial hardship" (PFH) for eligibility. Plans that require a PFH are available only to borrowers whose calculated payment based on income and family size is less than what they would pay under the fixed 10-year plan (i.e., borrowers with a high income-to-debt ratio). Removing this eligibility requirement, as the existing REPAYE plan does, allows any borrower to make payments based on income, if they prefer. It also simplifies the process of selecting and enrolling in IDR because borrowers do not need to understand and satisfy the administrative requirements of demonstrating a qualifying debt-to-earnings level. It also simplifies the process for loan servicers, who do not need to calculate and track a borrower's PFH status.

2. ***Require that borrowers put no more than 10 percent of discretionary income toward their monthly loan payment and raise the threshold of "protected income" above 150 percent of the poverty line.***

   Multiple current plans, including the most recent REPAYE plan, limit a borrower's monthly payment to 10 percent of their discretionary income. Various proposals would lower this number to 5 percent, but other proposals retain the 10 percent figure. Regardless of the exact percentage, any new IDR plan should not require a borrower to put more than 10 percent of their discretionary income toward their monthly loan payment.

   Similarly, the current protected income threshold (separate from the discretionary income limit) needs to be raised above 150 percent of the poverty line. The existing threshold does not account for the varying costs of living in different communities, the cost of private education loans that many borrowers carry on top of federal student loans, and other individualized, often unpredictable expenses such as medical care and child and other dependent care. Some borrower advocates have called for the threshold to be raised to 250 percent for all borrowers; others have called for it to be set at 200 percent. Regardless of the exact amount, there is consensus among advocates that the protected income threshold should be raised above its current level.

3. ***Limit the IDR repayment term to no longer than 20 years for all borrowers.***

   The current length of IDR repayment terms can disincentivize IDR uptake. One solution would be to reduce the time for forgiveness to 15 years for all borrowers. However, some advocates have suggested that forgiveness be tiered using different borrower characteristics. As with other design details, there are tradeoffs between simplicity and cliff effects, and additional data is needed to inform the discussion.

   Options for calibrating the length of IDR repayment include the following:

- *Different Timeframes for Graduate and Undergraduate Borrowers.* For example, undergraduate forgiveness could occur after 15 years, while graduate borrowers stay at 20 years. However, this approach would create a cliff effect, where low levels of graduate debt can trigger longer payback times. Moreover, graduate debt is disproportionately held by Black borrowers, raising equity concerns.
- *Shorter Timeframe for Low-Balance Borrowers.* Long repayment periods can dissuade low-balance borrowers from using IDR, even if they would benefit from the lower monthly payments. Another approach would be to set a shorter forgiveness timeline for borrowers with balances under a set amount; for example, grant forgiveness after 10 years of income-driven payments if a borrower owes less than $10,000.
- *Calibrate Repayment Period Based on Amount Borrowed.* Another approach would be to calibrate a maximum payment length using the amount borrowed (e.g., three months of repayment for every $250 borrowed, capped at 20 years, where every $1,000 borrowed equals one year of repayment).
- *Calibrate Repayment Period Based on Degree Completion.* Policymakers could also consider setting different repayment periods or ongoing flat dollar forgiveness for borrowers who did not complete their degrees. Such approaches would allow those borrowers to retire their debt—which did not translate into increased earnings prospects—more quickly. Additional data to identify categories of borrowers who are unlikely to ever repay their loans would be helpful in evaluating these options.

4. ***Restrain unpaid interest growth by extending REPAYE's subsidy of unpaid accrued interest for all borrowers enrolled in IDR for the duration of their enrollment, regardless of loan type.***

Restraining the accrual of unpaid interest for borrowers with negatively amortizing loans is a targeted benefit that helps minimize the growth of loan balances for borrowers with low incomes relative to their debt.

Many borrowers in IDR (especially those with low or no income) are in negative amortization. These ballooning loan balances can be distressing, can add costs for borrowers, and can dissuade borrowers from enrolling in IDR even if they would otherwise benefit from doing so. Negative amortization also disproportionately affects borrowers of color.

Under REPAYE, for borrowers who hold subsidized loans and whose monthly payment amount is not sufficient to cover accruing interest, the federal government covers 100 percent of remaining interest that is due for the first three consecutive years of repayment. After the three-year period, the federal government subsidizes 50 percent of this unpaid accrued interest, rather than all of it. For borrowers with unsubsidized loans, the federal government covers 50 percent of unpaid accrued interest during all periods. Under an improved IDR plan, we recommend extending and expanding this benefit for all borrowers for the duration of repayment.

Note: At a minimum, a new plan should retain the interest subsidy currently available to borrowers in REPAYE. Another option to consider would be to implement a cap on accrued interest, which could be done monthly, or to cap total accrued interest at a set percentage (e.g., 25 percent) of the total loan balance.

5. ***End all instances of interest capitalization while a borrower is enrolled in IDR.***

   When capitalization occurs, the entirety of a borrower's unpaid accrued interest is added to their outstanding principal balance. As a result, borrowers may end up paying much more in total, over a longer period, or have larger amounts forgiven. The effect of interest capitalization is most pronounced for borrowers with low incomes relative to their debt for many years, during which time their IDR payments are lower than accruing interest.

   In all existing IDR plans, including REPAYE, interest capitalization is triggered by different events that vary by plan. Fully eliminating this interest capitalization would limit the growth of loan balances for borrowers whose incomes are low for extended periods of time, as well as for borrowers who need to take a deferment or forbearance while in IDR because of unexpected life events or expenses. It also greatly simplifies IDR implementation and communication.

6. ***Require all borrowers to pay the same proportion of their income, and count household incomes and family sizes consistently for married borrowers who file taxes separately.***

   Some existing IDR plans cap monthly payments at the amount a borrower would have had to pay were they enrolled in a fixed 10-year plan (called the "permanent standard" amount). This results in some high-income borrowers paying a smaller share of their income than lower-income borrowers.

   Eliminating the cap, as was done for REPAYE, means all IDR borrowers make monthly payments based on the same share of their income. While this feature makes REPAYE less generous than other IDR plans for some higher-income borrowers, it allows policymakers to better target IDR benefits to the lowest-income borrowers.

   As in REPAYE, married borrowers who file separately should not be able to include their spouse in the family size calculation if they do not include spousal income as an asset in determining their monthly payment amount. (Not all existing IDR plans treat married borrowers equally: some plans allow married borrowers who file taxes separately to have their spouse's income excluded from the monthly payment calculation, while still including that spouse in the family size used for the calculation of income exclusion.)

7. ***Allow defaulted borrowers to access IDR.***

   Both the Income-Based Repayment (IBR) and Income-Contingent Repayment (ICR) statutes permit borrowers in default to access IBR or ICR; only the regulations prohibit defaulted borrowers from using them. The IBR statute also allows IBR payments made while in default to count toward forgiveness (the ICR statute does not).

   Defaulted borrowers need an affordable repayment option, and involuntary collection tools take a far higher share of resources from borrowers than those same borrowers would pay under an IDR plan. In addition, some borrowers are not eligible to get out of default, while others may not be prepared to because, in most cases, they have only one chance to resolve a default through loan rehabilitation and one chance to resolve a default through loan consolidation when they are not yet prepared to pursue those options. Even if they remain in default status, it is better across the board to have these borrowers actively engaged in repayment than not.

Note: The following two recommendations will require the Department to work with Congress to enact statutory changes.

8. ***Automatically enroll severely delinquent borrowers in IDR to prevent default.***

   While borrowers should have a choice between a fixed repayment option and an income-driven option, borrowers who are severely delinquent on their loans should be automatically enrolled in income-driven repayment to help them avoid the severe consequences of default.

   While IDR is not right for everyone, it is always preferable to default, and IDR payments can be as little as $0 for borrowers with very low incomes. Borrowers should be notified that they will be enrolled in IDR if they do not act; they should be given the opportunity to opt out before a set deadline.

9. ***End taxation of all forgiven debt.***

   Currently, the IRS does not consider as taxable income loan balances discharged after 10 years of payments under the Public Service Loan Forgiveness program or because of death or permanent disability. In March 2021, Congress passed a law to temporarily eliminate the taxation on all forgiven student debt, regardless of the reason. This provision extends through the end of 2025. The Department should work with lawmakers to make this exemption permanent for all types of forgiven student debt.

   Forgiven debt is not income and should not be taxed. Student borrowers should not be hit with a tax bill after making responsible payments for many years, particularly since the borrowers who end up receiving loan forgiveness will be those with low incomes relative to their debt for a long period of time. It serves no policy goal for the government-as-lender to forgive debt so that a borrower may move on only to have the government-as-tax-collector immediately demand further payment.

Total and Permanent Disability Discharge

Modify program criteria to better reflect congressional intent, automate and simplify the program, and eliminate the post-discharge monitoring period.

We urge the Department to (1) take immediate steps to provide discharges to qualified borrowers with total and permanent disabilities, and (2) improve the regulations governing the program through the negotiated rulemaking process.

Recent data indicates that more than 517,000 borrowers qualify for student debt discharge because of total and permanent disability but have not yet received loan cancellation. The Department should provide automatic relief to these borrowers.

In looking to revise the program's regulations, the Department must ensure that a disability advocate is represented at the negotiating table. The Department should focus its regulatory efforts on modifying the criteria for the program to reflect congressional intent, automating and simplifying the program, and eliminating the monitoring period.

<u>Public Service Loan Forgiveness</u>

Improve the appeals process, strengthen servicer oversight, and improve program administration.

The Department should also consider issuing revised regulations for the Public Service Loan Forgiveness program that focus on improving the program's administration and providing additional clarity for borrowers throughout the process. Such regulation could include establishing a fair, consistent, and straightforward appeals process for both borrowers and public service organizations; improving servicer performance by increasing oversight; providing additional clarity on program administration; properly aligning incentives so borrowers are prioritized; and better serving borrowers who were in a non-qualifying payment plan but would otherwise quality for forgiveness.

<u>State Authorization and Accreditation</u>

Add state authorization of distance learning programs and accreditation to the regulatory issues addressed through this round of negotiated rulemaking.

State Authorization. We urge action to strengthen regulations of state authorization for distance learning programs. Institutional eligibility for Title IV funding requires accreditation from an agency recognized by the Department; an agreement with the Department; and authorization by a state to offer postsecondary education. Collectively, these three requirements provide a means of oversight and consumer protection for students, families, and taxpayers.

For many years, however, the state authorization requirement has meant too little. With significant variation in capacity, will, and knowledge to conduct oversight, some states have virtually no requirements for obtaining authorization. Moreover, with the rise of distance learning, both the risks to students and the challenges of state oversight have grown substantially larger. Students enrolled exclusively online represent nearly half (47 percent) of all for-profit college enrollment, with 83 percent of these students enrolled at schools outside of their home states.

Today, 49 states (excluding California), the District of Columbia, and several territories have joined the National Council for State Authorization Reciprocity Agreements (NC-SARA), in which member states delegate their role in approving and overseeing colleges to the state in which a college is located. By making it easier for a college to attain authorization in each state it operates, reciprocity agreements help institutions expand and enroll students across state lines. However, the specific terms of agreement must be sufficiently robust. Instead, the terms of NC-SARA's agreement undermine key higher education safeguards and consumer protections in many states.

The changes recommended below address the need to raise the floor on state oversight activities, resolve deficiencies of NC-SARA, and take up opportunities for improvement in accountability and oversight efforts. We specifically recommend:

1. ***Lift the floor for state authorization processes and capacity.***

    - The 2010 state authorization regulations established a basic floor for authorization, requiring all states to have a process for authorizing colleges and to act on student complaints. However, that floor provides only the most basic protections to students. Because NC-SARA effectively requires states to defer to the authorization practices of the state where the institution operates, and nearly every state has joined the agreement, now is the time to raise that floor.

    - In addition to the current requirements of a process for authorizing institutions, the Department could require that an expiration date be placed on the authorization (e.g., not longer than five years). Such time limits will ensure institutions regularly go through a full renewal process with states, rather than being authorized effectively in perpetuity. Five years mirrors the typical length of time for which an institution signs an agreement for Title IV eligibility with the Department. The length of accreditation for institutions varies considerably, but five years is also the maximum timeframe for an accrediting agency to hold recognition with the Department before going through a required renewal process.

    - Specifically, the regulations should require that states review annually:

        - Colleges' financial circumstances. States that regularly review institutions' finances typically look at audited financial statements, due annually. SHEEO notes that, in addition to audits, states should also look at "any additional financial information they need to measure the financial viability of the institutions, and to ensure they are operating in accordance with relevant laws and regulations." The Department's regulations could leave the requirement relatively open-ended to allow states to develop their own processes, but regulations should require (at a minimum) an annual submission by the institution—and review by the states—of audited financial statements and such other financial documents that states deem necessary.

        - Student outcomes. According to work by SHEEO, 36 of 70 state authorizing agencies do not require any measure of student outcomes be reported; many only require a graduation rate—a data point that can be easily misinterpreted, given that colleges with shorter programs (often for-profit, certificate-granting schools) typically have the highest graduation rates.

          The Department should create state-specific data dashboards that publicly disclose student outcomes by institutions including graduation rates, transfer rates, loan repayment rates, and median earnings. States should be required to use the data to evaluate institutions not less than annually. In coordination with proactively providing student achievement information to states and the public, this approach should ensure states are looking more critically at the outcomes their institutions provide.

- Student complaints. Prior to renewing the authorization of an institution, a state should review student complaints it has received about the school. States are already required to act on student complaints but tying the review of institutions' authorization to a review of complaints about their education and other consumer protection issues will help ensure states connect the dots.

2. ***Ensure programs lead to licensure, if applicable.***

- Past instances of abuse by institutions of higher education have included suggestions or misrepresentations by the college to students that their education will lead to employment in their chosen field, when, in reality, the program does not meet the minimum requirements for state licensure.

- This issue is a particular challenge for distance education programs, which often enroll students across multiple states, and thus need to (and sometimes do not) meet differing licensure requirements in those multiple states.

To ensure limitations on programs that do not meet licensure requirements are enforceable, and to minimize burden on institutions, the Department should mandate that, as part of state authorization requirements on institutions, states submit licensing body information to the Department to be maintained in a publicly available database. A central recording of licensure requirements would ensure no institution has an excuse to claim lack of awareness, and would provide helpful and actionable information to states, Department reviewers, other licensure bodies, and students.

Additionally, the Department should clarify in regulations that no program designed or advertised to lead to licensure may enroll Title IV-recipient students unless the program meets licensure requirements in the student's state of residence, unless the student is willing to draft an acknowledgement and waiver. These regulations could be included only for gainful employment programs (a narrower subset, since it excludes nonprofit and public degree-granting institutions), or for all Title IV eligible programs in 34 CFR 668.8, the definition of an eligible program. The Department should also require such institutions to certify on their eligibility and certification approval reports (ECARs) which programs are designed to meet licensure requirements—and that they meet those requirements—to enable enforcement efforts.

Improve oversight of distance education programs through regulation. The proliferation of online education has had a profound impact on the higher education landscape nationally. Students now commonly enroll in online programs at institutions headquartered in other states, which adds to the complexities and challenges faced by all higher education stakeholders. State authorization creates a burden on both state governments and institutions, requiring the former to conduct more oversight over distant operators, and obligating institutions to comply with the state laws and requirements in any state in which they operate. However, this system is essential to protect students from predatory institutions.

Previous state authorization regulations contained several protections to ensure states had the authority to enforce their own consumer protections, but the 2019 rule rolled back or removed these provisions. If the rule were to be renegotiated again, the 2016 rule should be used as a guide, and additional elements should be incorporated—including codification of the above suggested administrative actions—to further strengthen the rule.

Most importantly, reciprocity agreements must be defined in a more consumer-friendly manner. Reciprocity agreements should not undermine the state role in the regulatory triad. They must permit states to enforce their consumer protection laws, including those laws written with the specific intent of protecting higher education students. Further, the Department should clarify that these agreements must actually be between states in the form of interstate compacts, approved by all relevant entities within the states, and that third party entities cannot be a party to the agreement.

Especially when enrolled in online programs operated by out-of-state institutions, students can find it very difficult to determine their rights should they want to withdraw or should their school close entirely. The Department should require that reciprocity agreements create consistent withdrawal and school closure protections for students.

The current NC-SARA agreement not only requires states to forfeit authority to oversee participating institutions headquartered out of state, but also restricts their authority to limit or reject the institution's approval to operate within their borders. Because states serve as program quality gatekeepers, they should retain the authority to enforce limitations on enrollment if they have credible concerns about the risk an institution poses to resident students.

Lastly, the Department should ensure that the state authorization rule includes the same guidance on independent complaint systems articulated in the preamble to the 2010 rule, clarifying that states may not rely on institutional complaints processes to meet the requirement.

Accreditation**.** Like states, accrediting agencies also serve as gatekeepers for institutions to access federal funds. But recent and dramatic failures of institutional oversight demonstrate the need for clearer guidelines around how accreditors should treat institutions that fall short of quality control expectations and requirements.

For example, weak oversight by the Accrediting Commission of Career Schools and Colleges over the schools operated by the Center for Excellence in Higher Education led to years of waste, fraud, and abuse. This lax oversight resulted in excessive costs to taxpayers when fraudulent colleges suddenly shuttered and students taking on a collective $1.8 billion in federal student loans they were poorly situated to repay. Exacerbating this failure of oversight are the previous Administration's actions to weaken the accreditation recognition requirements related to failing schools. To protect students and shore up the quality of institutions accessing federal financial aid, the Department should address accreditation in this negotiated rulemaking process.

Effective Oversight and Enforcement

Enhance the following additional oversight and enforcement mechanisms to protect students and oversee institutions more effectively.

Online Program Managers (OPMs). About one-third of colleges and universities with online programs in all sectors of higher education hire outside companies, online program managers (OPMs), to design and operate their online programs, and this share is expected to grow over time.[12] OPMs have thus become big business, and they will likely become bigger as the higher education community continues to adapt to the impact of the coronavirus on in-person higher education offerings. Despite this trend, when in 2019 the Department approved a new distance education rule, it failed to ensure states can enforce their higher education laws to students enrolled across state lines. Oversight and monitoring of the growing population of online students since then has become increasingly challenging.[13]

Tuition-sharing contracts reportedly bind colleges for long periods of time, and they contain provisions that require large payments should the college wish to terminate the agreement early--provisions OPMs say are needed because of large upfront investments they make.[14] The tuition-sharing model creates an evident incentive to recruit.[15] Because OPMs are for-profit entities, they focus on growth—both in terms of the number of colleges and programs they serve, and in enrollment within programs. If compensation is based on tuition revenue, the enrollment must increase for the revenue stream to grow.

Contractors that operate online programs for nonprofit and public colleges should not engage in abuses across higher education sectors. We specifically recommend that the Department:

- Withdraw existing guidance that permits unaffiliated entities including OPMs to offer "bundled services" based on tuition revenue generated from student enrollments.
- Require transparent reporting of revenue-sharing OPM contracts to ensure that institutions retain sufficient control over academic standards, marketing budgets, and enrollment; contracts are not one-sided; and contracts do not impose requirements on institutions at odds with the nonprofit mission of institutions or the best interests of students.

***Standards of Administrative Capability*.** While the Department acted in 2010 to clarify that recruiters and financial aid staff may not be compensated based on the number of students they enroll, the Department has taken few, if any, steps to enforce these provisions or otherwise protect against

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[12] Kevin Carey. "The Creeping Capitalist Takeover of Higher Education." *Huffington Post*. April 1, 2019. http://bit.ly/2Eq4Npe.

[13] 84 FR 58834, final regulation. *Student Assistance General Provisions, The Secretary's Recognition of Accrediting Agencies, The Secretary's Recognition Procedures for State Agencies*. November 1, 2019. https://bit.ly/2syKoLI.

[14] Stephanie Hill and Talea Dudley. The Century Foundation. *Dear Colleges: Take Control of Your Online Courses*. The Century Foundation. September 12, 2019. ("Over a quarter (27 percent) of the total contracts reviewed lock in schools with strict exiting terms. These terms include things like requiring a years-in-advance termination notice, automatic renewals, and clauses prohibiting schools from contracting with other companies for similar services after termination.") http://bit.ly/2RY5bTS.

[15] Ibid. See also Paxton Ritter. "Five Myths About Online Program Management," *Educause Review*. March 13, 2017. https://bit.ly/3w8Y0bZ; Kevin Carey. "The Creeping Capitalist Takeover of Higher Education," *Huffington Post*. April 1, 2019. http://bit.ly/2Eq4Npe.

predatory recruiting. Meanwhile, the use of third-party recruiting and payment of "lead generation" companies has expanded dramatically across all sectors of higher education. The comprehensive regulatory process offers an opportunity for the Department, in conjunction with the Office of the Inspector General, to create a secret shopper-type enforcement program that better ensures compliance with the ban on incentive compensation and the use of predatory recruiting tactics.

***Certification for Participation and Loan Origination*.** Each institution that participates in the federal Title IV financial aid programs signs a PPA committing to comply with the laws and regulations governing those programs. This agreement creates an obligation between the institution and the Department, providing the Department with broad enforcement authority, including the ability to set conditions on participation.

To date, the Department has not vigorously exercised its authority to enforce PPA provisions and address noncompliance, allowing schools to remain on provisional or even "temporary" status for unacceptably long periods of time, often without coming into compliance. At the same time, penalties have not always matched the scope of wrongdoing. We urge ED to exercise its existing authority more fully as it simultaneously explores rules to enhance its ability to oversee institutions more effectively.

***Arbitration*.** As a condition for enrollment, many for-profit colleges include a requirement in enrollment contracts that students waive their rights to pursue litigation to recoup losses sustained as a result of misconduct by the colleges. Defrauded students are, instead, forced into arbitration, a private resolution process through which colleges enjoy insulation from public legal action and public scrutiny. Meanwhile, students have access to limited recourse; they are prevented from joining in class action lawsuits, keeping the existence of similar claims of misconduct hidden from public view. The Department should restore the ban on forced-arbitration agreements and class-action waivers in enrollment contracts. ED should also prohibit non-disclosure requirements, in order to protect the full rights of defrauded borrowers and help illuminate illegal conduct by schools.

***Financial Responsibility*.** We support an overhaul of the financial responsibility system in a manner that provides transparent, forward-looking assessments by trained financial analysts. These assessments should ensure institutions have adequate assets and financial holdings commensurate with the volume of federal and student dollars they put at risk. Financial responsibility standards should ensure that institutions have the resources to provide the educational services they promise—and to cover losses and liabilities if they fail.

The 2016 borrower defense rule contained important early warning events and triggers that could result in risky schools losing certification or providing increased collateral to cover liabilities, including closure-related costs. We support restoring an early warning approach, but also note that a backward-looking, opaque system will continue to fail to identify risks until it is too late for meaningful action. In addition to financial responsibility standards, the Department should explore cash management regulations and fiduciary responsibility obligations to protect Title IV payments from waste, abuse, and financial loss.

***Implement 90/10 Loophole Closure*.** Earlier this year, Congress acted to close the 90/10 loophole that has allowed hundreds of for-profit colleges to skirt the Department's 90/10 requirements by counting military and veteran student benefits as non-federal revenue, thereby incentivizing the schools to aggressively target veterans and military-connected students with deceptive and fraudulent recruiting and enrollment practices. The statute sets October 1, 2021 as the earliest date to begin rulemaking, and we urge action on or near that date to complete implementation as quickly as allowed by the rulemaking process.

Transparency and Improved Data for Accountability and Addressing Equity Gaps

Make improved data and transparency high priorities.

Improved data is essential for shining a spotlight on inequities in higher education—revealing who has access to a high-quality postsecondary education, who attains a postsecondary degree, and who does not. Improved data is an essential way for policymakers to better understand, assess, and develop strategies to effectively address these longstanding inequities.

The Department should prioritize improving the publication and utility of federal higher education data over the coming years, including improved information on student outcomes across racial and ethnic groups. This focus on data improvement should include working with Congress to pass the College Transparency Act, along with improving the utility of consumer-facing data tools such as the College Scorecard and the GI Bill Comparison Tool. Consumers and taxpayers alike deserve to know which institutions are serving students of all races, ethnicities, and income levels well, and where they are more likely to get a return on their higher education investment.

Data transparency, data coverage, and data connection remain a persistent challenge in postsecondary education regardless of data source (federal or state). The federal government collects data on key student outcomes, including whether students graduate, how much they make after college, and how many borrow for college and struggle to repay their loans. But few available data points include all students and are fully disaggregated by demographics such as race and ethnicity, or by contextual factors such as academic program.

Available federal data, in many cases, are disaggregated by either race and ethnicity or socioeconomic status—but not both. At the state level, not all states link their K-12, postsecondary, and workforce data sets together, and types of data collected and linkages between data vary by state. These disconnects make it difficult to attain a deeper understanding of factors that affect student outcomes. Further, most states do not collect earnings data across state lines; data on students transferring to private colleges or out of state can be inconsistent or incomplete.

To provide the public and policymakers more complete information that could help them better address equity gaps, the federal government should:

1. Enact and implement the College Transparency Act;
2. Support the creation of state equity dashboards;
3. Collect FAFSA completer demographic data; and
4. Disaggregate key equity indicators on college affordability, completion, and post-enrollment outcomes by race and ethnicity, and socioeconomic status.

These actions will provide policymakers, institutions, and the public the information they need to fully assess and intervene to narrow postsecondary equity gaps. In the meantime, current federal and state data can add value to state and institutional planning and improvement efforts that focus on racial and economic equity. Policymakers should use data currently available—imperfect as it is—to identify and target resources where they are most needed now.

Pell for Justice-Involved Students

Open eligibility for Pell Grants to incarcerated students as soon as possible, as provided for by the 2021 Consolidated Appropriations Act.

The federal 1994 crime bill excluded incarcerated students from access to Pell Grants. As a result, the number of education programs in prisons dropped from more than 350 in 1990 to only a dozen in 2005. As a result, the percentage of incarcerated individuals participating in postsecondary education programs dropped by half, from 14 percent in 1991 to 7 percent in 2004. Coupled with the subsequent rise of mass incarceration nationwide, the Pell Grant ban effectively shut out millions of people from access to educational opportunities.

The opportunity to pursue postsecondary education can prepare justice-involved students for successful re-entry, strengthen their communities, and help them realize personal goals through improved employment prospects and reduced chances of recidivism. The Second Chance Pell experiment demonstrated the promise of restoring Pell Grant eligibility through the last two administrations.

The 2021 Consolidated Appropriations Act restored federal financial aid eligibility for incarcerated individuals and established participation requirements for prison education programs. The law allows the Department to implement Pell-eligible prison education programs before (but not later than) July 1, 2023.

Rather than leave justice-involved students without access to Pell for the duration of a negotiated rulemaking process, the Department should move forward with all deliberate haste to open access to high-quality programs that provide access to degree-granting coursework. Quality assurances for higher education in prison programs can and must be established through Department guidance. Groups including The Education Trust, New America, the Institute for Higher Education Policy, and the Alliance for Higher Education in Prison have published research- and practice-informed resources to inform the guidance process, which we urge the Department to pursue on an expedited basis without subjecting it to negotiated rulemaking.

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The need for stronger accountability measures in higher education, particularly to protect students against predatory and fraudulent for-profit institutions, is clear. Student borrowers who attended one of the nation's nearly 700 for-profit colleges—collectively just 8 percent of all enrolled postsecondary students—account for nearly one-third of student loan defaults. Measures such as the gainful employment rule and the borrower defense rule, when implemented with fidelity, establish critical guardrails to identify and shut down low-quality and fraudulent programs and institutions. They position students for academic and financial success while protecting taxpayers' investment in college financial aid programs.

Strengthening the income-driven repayment system—as well as regulations governing accreditation, state authorization, and key enforcement and oversight mechanisms—can similarly provide greater protection to students and borrowers. These protections should enhance equity for populations historically underserved across postsecondary education and too-often targeted by predatory and deceptive institutions.

Thank you for the opportunity to provide these comments and recommendations, as well as for your work to serve the interests of students and student loan borrowers. We look forward to partnering with the Department throughout the upcoming process to strengthen protections against waste, fraud, and abuse, as well as to improve loan repayment and advance educational equity. We remain available to answer questions or provide further information as needed.

Sincerely,

Richard Kazis
Interim President