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U.S. Department of Education
400 Maryland Ave., SW, Room 2C172
Washington, DC 20202

Docket ID ED-2021-OPE-0077

To whom it may concern:

On behalf of the National Association of Student Financial Aid Administrators (NASFAA) and our 3,000 member institutions, we respectfully submit to the U.S. Department of Education (ED) our comments on proposed changes to the Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program (Docket No. ED-2021-OPE-0077.)

NASFAA represents nearly 20,000 financial aid professionals who serve 16 million students each year at colleges and universities in all sectors throughout the country. NASFAA member institutions serve nine out of every ten undergraduates in the U.S.

NASFAA appreciates ED's attempts to streamline processes for borrowers by applying a single federal standard for borrower defense, closed school, and false certification discharges. The current landscape for these loan discharges, with different sets of criteria based on when loans were borrowed, makes it difficult for borrowers to understand when they would qualify for a discharge. Current rules also treat borrowers in similar circumstances unequally and adds unnecessary complexity that results in delayed discharges.

We commend ED's efforts to increase automation and to take advantage of existing information wherever possible. Using ED's own data, such as evidence of an institution's falsification of Satisfactory Academic Progress to automatically grant false certification discharges ensures that every borrower, not just those who know these programs exist, benefits from relief programs that Congress created for them.

Entering into data sharing agreements with other agencies like the Veterans Administration, Social Security Administration, and Office of Personnel Management to use information the federal government already holds in order to automatically grant total and permanent disability discharges and public service loan forgiveness is efficient, eases burden, and ensures greater uptake of these benefits for borrowers. We encourage ED to continue to seek new data sharing agreements to allow for even more automation.

Borrower Defense to Repayment

The Department's proposed borrower defense to repayment (BDR) rules make several important improvements to the current process that will simplify the borrower experience and clarify timelines and processes for both borrowers and schools. Ensuring that the new federal standard will not leave any borrowers worse off than they would have been under any of the current rules is critical, and the addition of a reconsideration process for denied claims provides added protection for borrowers in cases where new information becomes available after a determination was made on a claim.

We agree with ED's decision to revert to a single definition of misrepresentation throughout the regulations instead of using a separate definition exclusive to the BDR regulations, but we question whether ED's proposed definition of aggressive and deceptive recruitment tactics could be applied too broadly to encompass well-intentioned enrollment practices at open-access and selective schools.

In ED's proposed definition of aggressive and deceptive recruitment tactics or conduct at 668.501(a)(1), we question ED's assertion that the definition is adequate to prevent well-intentioned behavior from resulting in an approved BDR claim. As an example, open access institutions may have students enrolling up to and even on the first day of classes, and may have requirements that students have arrangements to pay their bill in full before they can attend classes. This may also happen at selective institutions that admit students from a waitlist close to the start of a term. It is conceivable that the student would have no ability to pay other than a loan. Would advising the student that they cannot enroll or attend classes without completing loan documents—in the context of having exhausted all other options—constitute aggressive and deceptive recruitment? We believe it would be difficult to distinguish between a well-intentioned conversation with a student that a loan appears to be their only option and a malicious attempt to demand or pressure a student to make a loan-related decision.

NASFAA agrees with allowing a group process for adjudicating borrower defense claims to allow ED to use all available evidence from all sources to ensure that individual borrower claims are not denied simply because an individual borrower lacks access to the breadth of evidence that may exist in support of their claim, such as evidence collected by state attorneys general. Institutions should also benefit from the group process by having to spend less time responding to individual claims.

We commend ED's proposed sub-regulatory improvement to the BDR process to allow Federal Family Education Loan (FFEL) borrowers to receive a decision on their claim prior to consolidating into the Direct Loan (DL) program, and allowing for the BDR application to serve as a consolidation application in the event of an approved BD claim. The current process likely dissuades FFEL borrowers from filing claims at all and, if they do apply and their claims are denied, they are worse off than if they hadn't applied for relief because their new consolidation loan principal balance now includes accrued interest. This is a simple and fair change that will greatly help FFEL borrowers.

Eliminating the limitations period for borrowers to file BDR claims while establishing a limitations period on recoupment from institutions in 685.409(c) balances the need for borrowers to be entitled to relief for as long as they hold loans while limiting liability to a timeframe when institutions would be best prepared to launch a defense. Similarly, leveraging processes already in place for recouping approved borrower defense claims streamlines that process for both ED and for institutions through standardization.

As to ED's request for feedback on the limitations period for recoupment from institutions, we recommend 3 years to match the financial aid records retention requirement for student loan data. ED argued during negotiations that it is rare that institutions rely on financial aid records to respond to BDR claims, but the fact that financial aid records are even sometimes used supports the use of a 3 year timeframe for recoupment of approved borrower defense claims. As argued earlier, students who have no choice but to borrow loans in order to enroll likely feel pressure to do so. If they file BDR claims in those instances on grounds of aggressive recruitment, schools should be able to use the financial aid office's records of those conversations as part of their defense. ED's stance that schools can choose to retain records longer than required is not practical given the significant expense and security risks of retaining sensitive data, and contradicts ED's own recommended best practices for records retention. If ED will only entertain a 5 or 6 year limitations period, we recommend 5 years to correspond to other federal limitations periods, as opposed to 6 years which corresponds only to common state limitations periods.

We agree with ED's decision to retain an option for institutions to respond to BDR claims and to provide for additional time for those responses in 685.405, as well as the separate opportunity for institutions to respond to ED during the recoupment process.

ED is to be commended for establishing limits on how long ED can take to adjudicate borrower defense claims before rendering the loan unenforceable. Many borrower defense claims have been outstanding for far too long and it is unfair to borrowers to force them to wait indefinitely for a decision. While three years for individual claims is still a very long time to keep borrowers waiting, we understand that this is the absolute limit and hope and expect that the majority of claims are processed in a timeframe of months versus years.

The addition of a rebuttable presumption of full relief in 685.408(a)(1) is a welcome change from the 2019 rule that based relief on how much harm a borrower could demonstrate they suffered as a result of the institution's misconduct. We agree with ED's conclusion that quantifying the amount of harm experienced was an unreasonable burden for borrowers, and we acknowledge that there may be instances where less than full relief is warranted and agree with ED's decision to retain that option in limited cases.

In 685.408, where ED establishes conditions where a Department official could rebut the presumption of full relief, we agree with (b)(1) and with corresponding example (1) provided in the preamble. In 685.408(b)(2) and (3), we recognize that certain institutional actions, despite being clear violations of institutional eligibility requirements, do not always merit a determination of full relief under BDR since they have limited to no impact on educational services provided or outcomes of the education provided. However, we would like to see more examples of when partial relief is appropriate and better detail on how partial relief would be determined. Understanding the Department's need for flexibility in order to exercise discretion on a case-by-case basis, it would be helpful for ED to quantify at least a range of dollar amounts or percentages of relief in cases where it indicates "small discharge", as in example (2), where ED should be more clear to indicate that "small" means a range of, say, 5-25% of the borrower's loan balance or whatever ED deems appropriate. Examples (3), (4), (5), and (7) are clear and reasonable examples of when full discharge should be granted. Example (6) provides a clear and reasonable example of when an application would be denied.

In 685.408(b)(1), we are concerned about ED's inclusion of the language "...or other charges that are not direct academic expenses…" in the types of conduct that might cause ED to rebut the presumption of full relief. While we agree that full relief is not appropriate where the amount of harm is easily quantifiable, we question how claims would be approved at all based on indirect academic expenses over which the institution has no control. We agree that misleading students about institutional charges should result in an approved BDR claim. However, institutions are required to provide good-faith estimates when developing cost of attendance (COA) components for which the institution does not charge. Although institutions are thorough in using multiple sources of data when developing estimates, they ultimately use average or median amounts, such that at least half of individual students might spend more than the school's estimate for expenses such as books, housing, and other unbilled charges. Further, in many instances, students might be making choices to spend more than the school estimates based on personal preferences, such as choosing to live in high-end housing without a roommate. Borrowers should not be able to receive a BDR discharge because they spent more than an institution estimated for a non-billed charge when the institution can prove it used a sound methodology in developing its estimates. We seek reassurance from the Department that such claims would not be approved in the first place.

The presumption of reasonable reliance on substantial misrepresentations and substantial omissions of fact is simpler for borrowers, as is ED's decision to remove the onus from the borrower of proving that a substantial misrepresentation was made with the institution's knowledge. We agree that ED can infer reliance even in instances where borrowers do not explicitly state reliance in their applications, and that students are harmed by institutional misrepresentation and omissions of fact regardless of institutional intent. However, we urge the Department to ensure that decisions as to institutional liability in such instances account for intent and, where clearly unintentional and not representative of a pattern of misconduct by the institution, are subject to minimal or no recoupment.

NASFAA appreciates ED's addition of 685.407(f)(1) that allows ED to reopen partially or fully denied BDR applications to account for the fact that new evidence could come to light that would allow ED to approve the application without the borrower initiating action.

Pre-Dispute Arbitration and Class Action Waivers Ban

We agree with ED's reinstatement of the ban on institutions requiring students to agree to pre-dispute arbitration and class action waivers. ED makes a convincing argument that consumers have difficulty understanding such agreements, and supports its position with research findings that the rate of findings in favor of consumers and the relief granted through arbitration are quite low.

Banning these practices allows borrowers to have their day in court by participating in the borrower defense to repayment process. It also allows for greater transparency for potential students.

Interest Capitalization

NASFAA supports[1] the elimination of all interest capitalization, and we appreciate ED using its regulatory authority to eliminate nonstatutory capitalization events. While much remains to be done to address the mounting burden of postsecondary student loan debt, the Department has taken a significant step in reducing student loan debt by ensuring students' loan balances do not continue to grow because of interest accruing on interest as a result of capitalization.

[1] https://www.nasfaa.org/uploads/documents/Protecting_Students_Advancing_Equity.pdf

As ED notes in its preamble, interest capitalization is not a common practice with other debt instruments, and borrowers are often unaware of how the choices they make when switching payment plans will affect the amount they will eventually repay. Student loans were created as a means to access postsecondary education; unreasonably high interest rates and capitalization events that can add thousands of dollars to loan balances are antithetical to the purpose of the federal student loan programs.

Closed school discharge

NASFAA agrees with ED's decision to end discrepant treatment for borrowers seeking closed school discharge based on loan disbursement date. As with borrower defense and false certification discharges, applying different standards based on disbursement date results in disparate treatment of borrowers in identical situations.

On ED's amended definition of school closure date to add that a school is considered closed when it ceases to provide educational instruction in most programs, negotiators raised valid concerns about orderly, planned closures of programs at branches or additional locations when the same program is offered by the same institution at a location in close proximity to a campus that would be considered closed, but that most students could likely attend without hardship. Recognizing the difficulty in defining a set distance that would represent a hardship given that five miles in a city, in a suburb, or in a rural area involve vastly different barriers to travel, there are instances where another campus may be one bus stop from a closed campus, or represent an additional 5 minute drive for most students. We believe in those cases a closed school discharge may not be warranted. We urge ED to consider how it will work with institutions that close a location or cease to offer instruction in most programs to determine how necessary a closed school discharge would be, given that the Secretary may seek to recover amounts discharged from institutions.

We are also aware of an internal document ED uses to determine whether they consider a school to be closed. ED indicated during negotiations that the document would be included in the preamble, but ED now indicates that it will appear in Volume 2 of the Federal Student Aid Handbook. We ask that ED release this information before then, given that Volume 2 has historically not been released until the February after the start of the award year, meaning that institutions would not be aware of ED's closed school criteria until 6 months after the regulations are effective.

We are also concerned about ED's proposal to define a borrower's program as multiple levels or CIP codes if the school granted a credential in one program while the student was enrolled in a different program. Understanding that some bad actors award retroactive degrees to prevent the amount of closed school discharge a borrower might be entitled to, many legitimate initiatives exist at the state and institutional level to retroactively grant degrees when a student has completed the necessary coursework as part of an effort to ensure more students have some type of postsecondary credential. ED must take steps to ensure that efforts to rein in bad actors doesn't inadvertently capture well-intentioned efforts at increasing the number of postsecondary credentials held.

NASFAA applauds ED's reforms to closed school discharges to grant automatic discharges within one year of school closure unless the borrower has both accepted and completed a teach-out. Government Accountability Office (GAO) data shared by ED indicating that 70% of borrowers who received automatic closed school discharges under the three-year provision were in default, and that only a small portion of borrowers receive closed school discharges outside of automatic discharges support ED's argument for granting closed school discharges automatically within a year of closure to prevent the borrower from entering default and to ensure that borrowers who qualify for a closed school discharge actually receive one.

Allowing students to enroll in a teach out or comparable program and still qualify for closed school discharge incentivizes completion by not forcing students to choose between a loan discharge and continuing enrollment elsewhere. A student might decide that the teach out isn't what they expected, and if they leave before they complete it, they should be made whole by receiving a closed school discharge. Further, the known challenges[2] students face when trying to transfer credits means even those who enroll in comparable programs are essentially starting over. Students who attend closed schools have often wasted both years of effort and years of lifetime Pell Grant and Direct Loan eligibility; discharging loans is a small step toward undoing the harm they suffer when their school closes.

We appreciate ED's extension of the timeframe for closed school discharge eligibility for borrowers who withdraw prior to the school's closure from 120 days to 180 days as well as the expanded non-exhaustive list of exceptional circumstances that would justify extending that window beyond the 180 days. There are frequently events that portend imminent closure that might cause students to choose to leave a program. Students shouldn't be faulted for leaving an institution when closure seems inevitable, especially considering the difficulty of transferring credits to a new program.

[2] https://www.gao.gov/products/gao-17-574

Total and Permanent Disability

NASFAA supports ED’s proposed changes to total and permanent disability (TPD) loan discharges. ED’s data-informed proposal to eliminate the three-year income monitoring period exemplifies sound policymaking. Knowing that the most common reason loans have historically been reinstated after borrowers were granted a TPD discharge was because the borrower had failed to provide the income monitoring information and that nearly all, in fact, had low enough earnings to retain TPD eligibility is a compelling argument in favor of removing this burden from borrowers with disabilities. Paperwork errors alone should not be sufficient for borrowers to lose TPD discharge eligibility, and this change is a welcome and necessary one.

Expanding the types of Social Security Administration (SSA) documentation that may qualify a borrower for TPD discharge and expanding the disability categories that qualify for TPD to acknowledge when a borrower has already been disabled for at least 5 years or when a subsequent scheduled review of disability status would occur at least 5 years from the onset of disability makes good common sense and simplifies the TPD discharge process for borrowers.

We also support the addition of physician assistants, nurse practitioners, and licensed psychologists to the list of medical professionals who can certify total and permanent disability status. This addition acknowledges some individuals’ lack of access to a full range of healthcare providers due to location and/or shortages, and will make it easier for borrowers with disabilities to prove they qualify for TPD discharges.

False Certification Discharge

As with borrower defense to repayment and closed school discharges, NASFAA agrees with ED’s decision to apply a single standard to false certification discharges regardless of loan disbursement date.

We also agree with ED’s removal of the provision that a borrower who attests to having completed high school is ineligible for false certification discharge. Both ED and negotiators made persuasive arguments that students may be coerced by institutions to falsify high school completion status on the FAFSA. Students should not lose eligibility for loan discharge when institutional misconduct of this type has taken place.

We agree with ED’s decision to include falsification of Satisfactory Academic Progress (SAP) as a condition for qualifying for a false certification discharge, and with limiting the loans discharged to those covered by the period when SAP was falsified, since those would be the only loans that were falsely certified. We also agree with ED’s proposal that automatic discharges be granted in such instances. Borrowers would be highly unlikely to be aware that an institution has falsified their SAP status and would therefore rarely apply for such discharges. Making these discharges automatic ensures all who are eligible receive them.

Finally, the addition of explicit language that provides for states and nonprofit legal service organizations to submit applications for group false certification discharges will ensure that students who aren't aware of the possibility of a false certification discharge will receive one when they qualify.

Public Service Loan Forgiveness

The Public Service Loan Forgiveness (PSLF) program has been plagued by problems for years. Congress imposed strict eligibility requirements in the program's creation, but ED compounded the problem by creating even stricter regulations beyond what is required in the statute. The combination of legislative and regulatory complexity and limitations resulted in hundreds of thousands of borrowers who provide valuable public service making payments that don't count toward PSLF due to technicalities[3]. This is especially troubling because the program was designed to recognize and reward individuals who choose to build their careers in public service, but has instead left many of those people defeated and indebted.

ED's temporary waivers in the PSLF program will help hundreds of thousands of borrowers who have worked or are on the path to working for ten years in public service. Codification of temporary waiver provisions such as allowing monthly payments made in installments and/or outside of the 15-day due date window, and counting Direct Loan payments made prior to consolidation to count toward the 120 qualifying payments makes great strides toward ensuring that borrowers aren't denied forgiveness on technicalities when they have otherwise met the PSLF eligibility criteria. Removing the requirement that borrowers be employed at a qualifying employer at the time of forgiveness ensures that borrowers who have satisfied their service obligation are not held responsible for the amount of time ED takes to process their PSLF application. The provision of a formal reconsideration process will restore borrowers' faith in the program, knowing that even if they fall through the cracks or are denied in error that they still have a path to forgiveness.

We understand that ED does not believe it has the statutory authority to allow FFEL payments made prior to consolidation to also count as eligible payments toward PSLF, but we urge ED to explore the legal options negotiators raised in the interest of treating all borrowers equitably.

[3]https://www.ed.gov/news/press-releases/us-department-education-announces-transformational-changes-public-service-loan-forgiveness-program-will-put-over-550000-public-service-workers-closer-loan-forgiveness

While the temporary waivers will help many FFEL borrowers in this regard, it is to be expected that some won't be aware of the waivers and will miss this limited opportunity.

We are concerned about the time period between the expiration of the temporary waivers on October 31, 2022 and the implementation date of the new regulations on July 1, 2023. ED has made great strides in establishing a single federal standard for loan discharges in other areas of this rulemaking. However, borrowers seeking PSLF will now have to know how to distinguish between the original PSLF rules, the rules under TEPSLF, the rules under the 1-year temporary waivers from October, 2021 to October, 2022, reverting back to the original rules for 8 months between October, 2022 and July, 2023, and the new rules that become effective next July.

Understanding that ED and loan servicers are the ones responsible for understanding and applying these different rules, we know that the reality since 2017 when the first loans could be forgiven has been that borrowers have had to be the experts and advocate for themselves to have their payments properly attributed to the PSLF program. It is not reasonable to assume that borrowers will understand this patchwork of different regulations and we fear that borrowers will continue to be forced to make more than 120 payments toward PSLF as has happened in the past.

It is critical that ED processes all waiver-related requests before the expiration date. We also urge ED to find a solution for the time period between the waiver expiration and the effective date of the new rules, either through early implementation of the codified waiver provisions or an extension of the waivers until July of 2023.

In keeping with ED's overall intention throughout this rulemaking to ensure that the rules are applied equitably and that similarly situated borrowers receive similar treatment, we appreciate the revisions to the definition of full-time employment to 30 hours per week regardless of what the borrower's employer considers full-time. We also support ED's decision to allow lump sum payments to count toward future qualifying payments for PSLF until the borrower's next income certification date.

NASFAA appreciates ED's willingness to enter into data sharing agreements to automatically verify employment for federal employees, and we urge ED to continue to explore new data sharing opportunities with states and nonprofit employers to ensure a simpler process for all borrowers, including those who are not aware of the PSLF program.

As to ED's directed questions about whether borrowers who provide services to a qualifying employer but are ineligible to provide those services as an employee due to state law, such as physicians in California and Texas, should be able to qualify for PSLF, we agree that they should. However, we question how ED would be able to establish that physicians in those states were not employees of hospitals exclusively due to state law as opposed to other circumstances when physicians are employed at nonprofit hospitals but are paid by physician groups or work as independent contractors. Given that physicians in other states working under such arrangements are not eligible for PSLF, we would not want to see ED making PSLF less equitable for physicians in the other 48 states in the process of trying to make it more fair for physicians in 2 states.

We agree as well to ED's other directed question regarding PSLF eligibility that ED should explore extending eligible employer status to for-profit early childhood education centers as well as to contractors at nonprofit organizations.

Recognizing the value that physicians and early childhood educators provide in their service, ED continues to fail to recognize the value of work done by other individuals performing public service at for-profit organizations by allowing them to benefit from PSLF, which the statute permits. ED argues that their longstanding position is that there are meaningful distinctions between for-profit and nonprofit organizations. While this is true, it says nothing of the work done at those organizations by the borrowers performing public service who lose out on PSLF because of ED's position. ED's other argument against including these individuals is the difficulty of administering the program based on type of employment versus employer. Understanding that this would be no small undertaking, we urge the Department to explore options for expanding PSLF eligibility to borrowers performing public service at for-profit organizations. ED has expressed a desire throughout this rulemaking to end disparate treatment of borrowers and, yet, borrowers doing the exact same job are treated differently based on the tax status of their employer. ED should seriously consider that there are instances where a more complex application and review process is an acceptable tradeoff to ensuring equitable treatment of all borrowers employed in public service fields.

We agree with ED's proposal to count months when payments are not required due to certain deferment and forbearance statuses as qualifying months toward PSLF. In some instances, such as economic hardship deferment and Americorps forbearance, if borrowers were not taking advantage of a payment pause they would likely qualify for a monthly payment of zero under an IDR plan. It makes sense not to penalize those borrowers for using deferment or forbearance when they are continuing to perform public service and wouldn't be making payments regardless of whether they remained in repayment status or sought deferment. In other cases like cancer deferment and military deferments, while payments may be possible, they are likely logistically difficult, which is why these deferments exist. It is similarly unfair to penalize borrowers who continue to perform a public service, but who face logistical challenges to making payments.

We agree with ED’s proposal in 685.219(g)(6) to hold harmless borrowers who had a prior deferment or forbearance that is not included among those that would count toward months of repayment under this proposed rule, but who voluntarily make payments, by having those payments count as eligible monthly payments toward PSLF. We note, however, that these payments will be difficult for servicers to distinguish from lump sum payments made toward future months of qualifying PSLF payments proposed in 685.219(c)(2)(iii). We urge ED to give servicers clear guidelines on how they are expected to advise borrowers on making these types of payments, how they should communicate with borrowers about making such payments, and to ensure that servicers are held accountable for applying payments according to borrowers’ wishes.

We appreciate the opportunity to comment on this proposed rule. If you have any questions regarding these comments, please contact us or NASFAA Senior Policy Analyst Jill Desjean at desjeanj@nasfaa.org.

Regards,

Justin Draeger, President & CEO

Jill Desjean, Senior Policy Analyst