Congress of the United States
Washington, DC 20515

August 28, 2018

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, D.C. 20202

Re: Docket ID ED-2018-OPE-0027

Dear Secretary DeVos:

I write in strong opposition to the U.S. Department of Education's (the Department's) notice of proposed rulemaking (NPRM) issued July 31st, 2018 that would reduce loan relief for defrauded students by $12.7 billion over 10 years and make it nearly impossible for students to have their loans discharged. Students who have been misled by their institution of higher education have a legal right to relief from their federal student loans. First enacted in 1993, Congress created this provision to protect students and taxpayers from fraud.

Following the 2015 closure of Corinthian Colleges, Inc., the Department initiated negotiating rulemaking and extensive public comment to streamline the loan relief process for the more than 15,000 students left with considerable debt and no degree. Instead of using the 2016 rule to assess the growing backlog of claims, your disregard for the thorough rulemaking process and insistence on delay and reregulation has left students without relief. In fact, there are still 2,865 outstanding applications for relief in my state.[1]

The Department's proposed rule undermines Congressional intent and shortchanges students to benefit corporations with a history of fraud and abuse. Specifically, the proposed rule:

Makes it substantially harder for defrauded borrowers to assert a claim. By eliminating the state law standard found in the 1995 regulation and even excluding final judgements made by Federal or state courts against an institution from the list of defenses, the Department seeks to nullify state consumer protection laws and would require a borrower who successfully sues their school for fraud in state court to continue repaying loans used to attend that school while the school continues to reap the benefits of Federal student aid. Additionally, the proposed requirement that borrowers prove intent on the part of a fraudulent institution would make it nearly impossible for a borrower to assert a defense and successfully receive an adjudication by creating an unreasonable obstacle for students. Further, the Department is using the proposed standard for the misrepresentation as an excuse to prohibit automatic discharge. Lastly, the NPRM's preamble mentions the possibility of using a higher evidentiary standard for some borrowers based on their repayment status. Given the use of "preponderance of the evidence" in the 2016 final rule and the overwhelming use of this standard in civil litigation, I encourage the Department to maintain this standard for all borrowers.

Seeks to deter defrauded borrowers from asserting a claim. The Department's proposal to accept only claims from borrowers who are in post-default collection proceedings would overturn the Department's longstanding process and incentivize defaults, which have dire consequences for borrowers and additional

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[1] U.S. Department of Education (2018, May). Answers to Senator Durbin's Questions for the Record (Table A). Retrieved from https://www.durbin.senate.gov/imo/media/doc/BD%20data%20QFR%20response%20Attachment%207.2018.pdf

costs to taxpayers. Additionally, the proposed requirements that borrowers waive their right to privacy and provide personal information, including confirmation of the "borrower's ability to pass a drug test, satisfy criminal history or driving record requirements, and meet any health qualifications..." treat the borrower like a criminal – not an injured party, are irrelevant to the question of institutional misconduct, and are clearly intended to dissuade borrowers from asserting claims of fraud.

Undermines the legal right of students to seek relief through failure to prohibit mandatory arbitration and class action waivers. In recent years, an uptick in restrictive clauses that protect the financial interests of an institution at the expense of a student's legal right have been found hidden in enrollment contracts, particularly at for-profit institutions.[2] Two such clauses–mandatory arbitration and class action waivers–were specifically banned under the 2016 final rule. While the Department recognizes that these restrictive clauses are not well understood by consumers and prevents the agency from noticing patterns of abuse, the proposed rule refuses to prohibit the use of these clauses. Instead, the Department puts corporations ahead of students. I urge the Department to ensure students retain their legal rights and ban mandatory arbitration and class action waivers.

Limits quality completion options for students attending or recently enrolled in closed schools. While expanding the eligibility for students who left a school before closure (from 120 days to 180 days) is a positive step, the proposal would simultaneously limit the availability of discharge by disallowing students who were enrolled at the closed school prior to or during closure from seeking a discharge if the institution offers a teach-out plan. While I agree that more institutions should offer teach-out plans, it is widely known that the quality of teach-out plans vary widely and the process for determining an acceptable teach-out plan lacks rigor and consistency. In fact, your own Department acknowledged this inconsistency and lack of quality in its announcement of intent to enter negotiated rulemaking concerning teach-out plans.[3] Further, for some students, completing their degree through a teach out plan may be undesirable. The 2016 final rule provided students with the option to choose. I recommend retaining the closed school discharge option for students enrolled or previously enrolled at a closed school, regardless if the institution has a teach out plan.

Allows even the most financially unstable institutions on the brink of closure to continue benefitting from federal student aid: Recognizing the Department's fiduciary responsibility to taxpayers, the 2016 final rule listed mandatory and discretionary triggers that could be used as early warnings for potential risk and required institutions to provide financial protection through letters of credit. Compared to the 2016 final rule, the proposed rule makes several of the mandatory triggers discretionary, eliminates several of the original discretionary triggers, and makes the triggers less predictive by narrowing the remaining triggers. These changes would make it easier for institutions to continue operating even when there is high likelihood for closure, shifting the burden of risk to taxpayers and away from low-quality institutions.

In sum, the Department's proposed rule will have significant, negative implications for both defrauded borrowers and taxpayers. I reiterate my strong opposition to the proposed rule. I urge the Department to revise the proposal to address these concerns and move quickly to provide all students the relief to which they are entitled, as intended by Congress.

Sincerely,

Nydia M. Velázquez
Member of Congress

[2] Tariq, H. & Shireman, R. (2016, Apr 28). How college enrollment contracts limit students' rights. The Century Foundation. Retrieved from https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights
[3] Federal Register, Vol. 83, No. 147. Retrieved from https://www.gpo.gov/fdsys/pkg/FR-2018-07-31/pdf/2018-15929.pdf