Arnold Ventures

August 12, 2022

Michelle Asha Cooper, Ph.D.
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 comments on the Notice of Proposed Rulemaking issued on July 13, 2022 (Docket ID ED-2021-OPE-0077). Arnold Ventures is a philanthropy dedicated to tackling some of the most pressing problems in the United States. For the past six years, we have invested in research, policy development, litigation, and advocacy to end predatory behavior in higher education and increase the return on investment of higher education for both students – especially students who have been historically marginalized – and taxpayers.

Below, we provide further backing for strong measures to protect students and taxpayers' investment in federal financial aid programs. We also provide recommendations on improvements to the proposed regulations. By incorporating these recommendations, the Department can add further assurance to students and taxpayers that their investments in higher education will be to their benefit as well as to the benefit of our broader citizenry and economy.

Weak oversight and accountability especially endanger students from low-income backgrounds, students of color, women, and veterans — populations that are disproportionately targeted by predatory for-profit schools. Nine out of 10 Black and Latina/o students who graduated from a for-profit undergraduate degree program had to borrow, and they borrowed at least $10,000 more, on average, than those attending public colleges. Black students attending for-profit colleges are 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. These data, coupled with the lived experiences of so many students and borrowers, make it critical for the Department of Education (ED) to revive and strengthen protections through the regulatory process.

Borrower Defense to Repayment. The borrower defense to repayment (BD) regulation is a critical tool that enables the Department to both protect borrowers from having to repay debt that should be discharged and to deter prospective school misconduct. Actions by the Department since many of us submitted comments in July 2021 on proposed negotiated rulemaking topics only add further evidence of the need for strengthened protections for student borrowers victimized by predatory institutions. These actions have included:

- In February 2022, the Department approved approximately 3,800 BD claims for student borrowers who attended DeVry University, Westwood College, the nursing program at ITT Technical Institute, and the criminal justice programs at Minnesota School of

Business and Globe University. These approved claims resulted in nearly $131 million of relief.
- In April 2022, ED approved BD discharges totaling [$55.6 million for 1,800 borrowers] for claimants defrauded by Westwood College, Marinello Schools of Beauty, and the Court Reporting Institute.

The BD rule put in place by the previous administration 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, however, and the 2019 rule is in effect for new borrowers. Alternating periods of action and inaction, perfunctory denials, and a partial relief approach that granted defrauded students only pennies on the dollar in relief — and that the current Department has thankfully rejected — have created an urgent need for revisiting and strengthening the BD rule.

We appreciate the proposed rule's provisions to clarify omission or misrepresentation of facts about an institution or program that can serve as a basis for borrower defense; add aggressive and deceptive recruitment of students as a basis for BD claims; and set timelines for adjudicating claims, among others. Such steps will help ensure more borrowers will not have experiences like Juaquin Brown, a claimant who shared during the December 9, 2021, negotiated rulemaking public comment period that he was approaching the five-year anniversary of filing a BD claim without yet receiving a response. "I have two degrees from a school that I can't put on my resume," said Mr. Brown. He continued, "I don't know how hard that is for anybody here to swallow, but for me, that's hard."

Juaquin Brown's experience is far from unique. As evidence of the scale of borrowers awaiting BD claim adjudication, on June 22, 2022, the Department announced a proposed settlement agreement with plaintiffs in *Sweet v. Cardona* that would cancel at least $6 billion in fraudulent student loans for approximately 200,000 borrowers.

Here, we offer a set of recommendations to further strengthen the final rule. We encourage the Department, in the final rule, to:

- Enable legal aid organizations to serve as third-party requestors that can initiate the group discharge process. This adjustment would revert to the Department's final position at the conclusion of negotiations.
- Enable all borrowers — or third-party requestors acting on their behalf — to assert state law claims simultaneously with claims under the proposed federal standard during the initial application process.
- Ensure all borrowers with a granted claim are entitled to full relief in the form of a discharge, refund, and the deletion of adverse credit history. Approved claimants should also have their Title IV eligibility restored. If the Department insists on providing itself with partial relief authority, the final rule should only allow partial relief for the specific claims the Department excludes from full relief.
- Require individual applications to be reviewed under a liberal pleading standard; these applications should be afforded a presumption of reliance. In addition, the Department should clarify that both group or individual BD claims can be substantiated on borrower attestations or sworn statements alone.

- Affirm *individuals* pursuing BD claims will have a rebuttable presumption that claimants reasonably relied upon an institution's act or omission giving rise to the borrower defense claim. The current proposal includes the rebuttable presumption for *group* (§685.406(b)(2)) but not *individual* (§685.406(c)) claims.
- Clarify application of "substantial misrepresentation" and "misrepresentation," as well as the indication of a borrower's reliance on inaccurate or deceptive expectations programs or institutions may have shared with prospective students. With certain types of false, erroneous, or misleading statements being identified as "misrepresentation" in §668.72, §668.73, and §668.74 and not as "substantial misrepresentation," we are concerned the regulations may be misconstrued to mean that if a student demonstrates only the conduct specifically identified defined as "misrepresentation," then they will have failed to meet the threshold requirement of a "substantial misrepresentation."
- Strike all references to a "materially complete" individual application; ED should begin forbearance and pause collections upon receiving a claimant's application.
- Provide a careful review of denied claims, commensurate with the level of review that is provided to claims that are granted.

Arbitration. We commend the Department's affirmation of students' rights to pursue claims against fraudulent institutions through the justice system, rather than being forced into arbitration. All too often, arbitration is stacked against students and in favor of the interests of institutions. The proposal would advance the Department's and the public's interests in transparency, institutional accountability, and borrowers' rights.

Closed School Discharge. As negotiators discussed in fall 2021, institutional closure represents a clear and direct harm for borrowers who hold credentials from institutions that cease to exist. In August 2021, the Department made discharges available to 115,000 borrowers who attended the now-defunct ITT Technical Institute. ITT notoriously spent years misleading students and defrauding financial aid programs before collapsing in September 2016. These borrowers waited nearly five years for this justice.

To improve closed school discharge process for the future, we echo the legal aid community's support of several key improvements the Department proposes for closed school discharge. The provisions include:

- Removing the "comparable program" exclusion and a loophole that has allowed institutions to avoid liability by counting graduates from programs other than those in which affected students were enrolled. This change will recognize the real harm borrowers experience when institutions to which they have given significant time and money cease to be going concerns—regardless of whether they ultimately find a way to complete a credential elsewhere. Many former students from shuttered schools—some of which closed precipitously—have reported the difficulty they have encountered securing in-field employment when their resumes include mention of those defunct institutions.
- Increasing eligibility for automatic discharges and reducing wait times before discharges are provided. As the Government Accountability Office noted in September 2021, a three-year re-enrollment period is too long. Over 70 percent of borrowers who received automatic closed school discharges under the three-year provision had fallen into default. By shortening the time borrowers from closed schools must wait to receive

discharges, the Department would reduce the instances of borrowers in this difficult position from quickly re-enrolling in low-quality, often high-cost programs that may not align with their educational and professional goals.
- Opening eligibility for borrowers from schools that closed prior to November 1, 2013—a group especially unlikely to be aware of their rights to discharges and, as a result, in need of targeted outreach to know of this possibility.
- Enabling borrowers who attended within 180 days of a school's closure to obtain relief.

We recommend several additional provisions to further strengthen closed school discharge beyond those in the NPRM:

- Implement an automatic one-year grace period between the school closure date and the date borrowers are entitled to the automatic discharge. This approach would ease the burden on student loan borrowers, who will not have to enter repayment for six months, as well as on the Department, which will not have to collect payments only to refund borrowers six months later.
- Ensure the lookback period includes whenever a closing school announced its intentions to go out of business. Under current provisions, schools can avoid liability by announcing that they will close more than 180 days in advance. They know many students will withdraw upon learning of the school's impending closure. The Department should close this loophole by making the extended lookback standard procedure.
- Amend 34 CFR 668.14 to require that an institution inform the Department it will close concurrently with its public announcement of closure. This change — which would guard against significant time delays in ED becoming aware of impending school closures — would reinstate important requirements in the 2016 rule that the 2019 rule omits.
- Mandate that the institution provide borrowers with notices informing them of their rights shortly after announcing that the institution will close.

We applaud the Department's intent to expand eligibility to more borrowers affected by school closures. Over the years, the Department has interpreted this provision in ways that are both permissive and restrictive, but the statutory right is explicit and unchanged: if borrowers cannot complete the program in which they are enrolled because of an institutional closure, they are entitled to a discharge. We believe that the proposed rules will help ensure affected borrowers realize the intent of this statutory guarantee.

False Certification. We welcome the consensus language negotiators found on proposed rules to protect students whose institutions falsely certify them for Title IV aid eligibility. We support proposed regulations in the NPRM to expand the documentation ED would consider when borrowers file for false certification discharge. In addition, we support the proposal's provision enabling groups of borrowers who experience the same behavior by their institutions to receive discharges of their federal student loans.

Interest Capitalization. We were pleased negotiators reached consensus on proposed language for ending the damaging practice of interest capitalization. We commend the Department for its efforts to remove all instances of interest capitalization not required in statute.

As part of its commitment, the Department should also fully remove §685.209(a)(2)(iv) to ensure that accrued interest is not capitalized when a borrower is determined to no longer have a partial financial hardship on an income-contingent repayment plan. This is an important step toward ensuring that borrowers do not experience unnecessary balance growth and will reduce confusion in an already complex system.

We also urge ED to work with Congress to eliminate the remaining instances of interest capitalization—including when borrowers leave deferment, in some instances in income-based repayment plans, and for borrowers with FFELP loans—to ensure consistency in the repayment system.

Removing interest capitalization is only one step toward restricting balance growth. As part of its new income-driven plan, the Department should safeguard the benefits that come with lower payments by fully eliminating negative amortization.

Growing balances cause financial and psychological barriers to repayment and make it more expensive to attend college for student borrowers who can least afford it. These borrowers often include those for whom racism, structural discrimination, and a lack of resources contribute to their debt and the challenges they face in repayment.

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Thank you for the opportunity to provide comments, and for your work to serve the interests of students and student loan borrowers. We look forward to the process and actions ahead to strengthen protections against waste, fraud, and abuse. These measures will ensure accountability provisions are in place to advance the interests of students and borrowers, rather than the institutions that too often take advantage of them. If you have any questions or need any clarification of these comments, please do not hesitate to contact us.

Sincerely,

Kelly C. McManus
Director, Higher Education
Arnold Ventures