



NASPA[®]

Student Affairs Administrators
in Higher Education

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August 29, 2018

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave. SW
Mail Stop 294-20
Washington, DC 20202

Dear Mr. Gaina:

Thank you for the opportunity to submit comments on the recent changes to the borrower defense to repayment (BDR) rule, Docket ID ED-2018 OPE-0027, pertaining to the Notice of Proposed Rulemaking (NPRM) published on July 31, 2018 by the Office of Postsecondary Education, Department of Education, 83 Fed. Reg. 37242.

NASPA is the leading association for the advancement, health, and sustainability of the student affairs profession and represents over 15,000 individual members and 1,100 institutions of higher education. Student affairs is a critical component of the higher education experience, and these professionals collaborate with colleagues across institutions of higher education to offer students valuable learning opportunities, safe and inclusive environments, and success pathways to credential completion. NASPA members support students at all stages of their educational journeys; for these comments, we are most concerned with the possible impact of the proposed regulations on first-generation students who frequently lack the social networks to help guide them in navigating to and through college. These comments also address students who reside in educational deserts¹ and may have limited options for completing their educations should their closest college or university close or mislead them. While NASPA acknowledges that most of our member institutions are unlikely to be subject to the rule directly, many students who pursue relief under this proposed rule will seek to complete their educations at our member institutions, and their financial well-being and success will become our concern.

A crucial part of ensuring student success and providing an inclusive environment lies in offering fair and equitable financial assistance options along with protections for student loan borrowers. Particularly for students who may start their post-secondary education at an institution later found to have misled them regarding their likely post-graduation outcomes, ensuring sufficient protections and financial support to ensure completion is in the best interest not only of the individual student, but also of

¹ Hillman, N. & Weichman, T. 2016. *Education Deserts: The Continued Significance of "Place" in the Twenty-First Century*. American Council on Education. Washington, DC. Retrieved 8/17/2018 from <http://www.acenet.edu/news-room/Documents/Education-Deserts-The-Continued-Significance-of-Place-in-the-Twenty-First-Century.pdf>

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of the student affairs profession*

American taxpayers. Students who complete their credentials have been found to be more likely to repay their student loans². NASPA is concerned with the implications in the Department's NPRM that would require students who have been misled by an institution as to their possible outcomes to choose either between continuing their studies, rather than having to restart them, or repaying debt that they may not have incurred without the misrepresentation of their first institution. We feel that students who have been misled by an institution should be entitled both to relief of the debt they incurred unnecessarily and to options to salvage what they can from their time to build from at another institution.

While there are aspects of the proposed rule we find appropriate, such as the updating of financial accounting standards and calculations of the financial ratios (83 FR 37270-37285) and the extension of the window to qualify for a closed school discharge from 120 days to 180 days (83 FR 27268), NASPA finds that the Department's NPRM would, if implemented as proposed, reduce the amount of and increase eligibility criteria for relief available for defrauded borrowers. It also would create significant negative impacts for defrauded borrowers and may create unintended consequences that would increase unnecessary borrower default. Thus, NASPA, on behalf of student affairs administrators across the country and the undersigned associations, wishes to submit the following comments for consideration in order to promote comprehensive borrower protections and institutional accountability for the betterment of the higher education community as a whole.

NASPA supports the continuation of both "affirmative" and "defense" borrower defense claim options. The Department asks for public comment on two alternative proposals which it labels § 685.206(d)(2)—Alternative A and § 685.206(d)(2)—Alternative B (83 FR 37252). Alternative A proposes that the Department consider borrower defense claims from borrowers who have been engaged in collection activities as a last resort measure. Alternative B proposes to continue the long-standing³, though less used prior to the 2015 closure of Corinthian Colleges, practice of allowing borrower defense claims from borrowers prior to entering collection activities in addition to claims from those engaged in collection activities. NASPA supports Alternative B, provided the preponderance of evidence standard remains in place (see below), and does not support Alternative A.

NASPA recognizes, as the Department alludes to in referencing homeowner behavior from the 2008 mortgage modification program, that incentivizing borrowers to default can severely impact students' futures due to damaged borrower credit scores. We agree with the Department that an affirmative claims process could limit this form of strategic default by student borrowers (83 FR 37252), but we question the extent to which borrowers may intentionally default on their loans given the significant limitations such an action would place on their ability to continue their educations. For instance, unlike mortgages, default on federal student loans precludes students from receiving any other future federal

² Delisle, J.D., Cooper, P., & Christensen, C. 2018. *Federal Student Loan Defaults: What Happens After Borrowers Default and Why*. AEI, Washington, DC. Retrieved 8/14/2018 from <https://www.aei.org/wp-content/uploads/2018/08/Federal-Student-Loan-Defaults.pdf>

³ Connor, E, Project on Predatory Student Lending, Letter to Jean-Didier Gaina in response to Docket ID ED-2018 OPE-0027, pertaining to the Notice of Proposed Rulemaking (NPRM) published on July 31, 2018 by the Office of Postsecondary Education, Department of Education, 83 Fed. Reg. 37242, August 2, 2018, <https://predatorystudentlending.org/wp-content/uploads/2018/08/LSC-Prelim-Cmt-FINAL.pdf>

financial aid, significantly reducing borrowers' ability to continue or complete their credential. This has not only immediate impacts on borrowers' day-to-day finances and credit histories, but also would result in compounding opportunity costs from lost wages and inability to advance in a borrower's chosen career. We believe the already significant and long-lasting, indeed possibly life-long, effects of default on student loans, therefore, provide sufficient deterrent to prevent most so-called "strategic" defaults. Given these significant and long-lasting financial repercussions stemming from student loan default, NASPA believes the Department should take all prudent steps to offer students options for relief in the case of unexpected school closure or institutional misrepresentation prior to engaging in collection activities.

The Department also requests public comment on "mechanisms that could be utilized to discourage the submission of frivolous claims" (83 FR 37252). NASPA is concerned by repeated language in this NPRM indicating that borrowers may, if given the opportunity through the affirmative claims process, submit "frivolous" and "unjustified" claims "simply because they are dissatisfied with the education received or with his or her ability to get a particular job" (83 FR 37243). This language indicates an assumption about student borrowers that fails to match the reality. The vast majority of borrowers that have submitted claims for relief under the borrower defense to repayment rules were enrolled at for-profit institutions found to have behaved in misleading or fraudulent behavior. A November 2017 report by the Century Foundation (TCF),⁴ which analyzed data from 98,868 borrower defense claims received through a Freedom of Information Act request between August and November of 2017, found that the vast majority of claims were from borrowers who attended for-profit institutions. While borrowers from Corinthian Colleges comprised the largest total number, the analysis found that over 94 percent of the 23,535 non-Corinthian claims were filed by students of for-profit institutions. As for-profit institutions only made-up 18 percent of the outstanding federal loans as of November 2017, students filing borrower defense to repayment claims are disproportionately from for-profit institutions. This indicates that students are likely filing claims based on misleading claims of for-profit institutions, rather than finding ways to scam non-profit institutions into providing loan relief. While the Department has not released borrower defense complaint data, these data further show that should affirmative claims remain in effect, most borrowers appear to be filing appropriate borrower defense claims. Rather than limit the options for borrowers who have been misled by unscrupulous institutions, we encourage the Department to continue regulatory pressure to reduce incentives for institutions to mislead potential students, such as by maintaining affirmative borrower defense to repayment claims.

NASPA supports the creation of a federal standard (proposed § 685.206(d), 83 FR 37252), but encourages the Department to frame it as a regulatory floor rather than a ceiling. Under the NPRM, a federal standard would be created to be used in conjunction with guidance released relative to the 1994 Direct Loan rules (§685.206 (c)). This federal standard would supersede the previous deferral to state laws and create a single process and set of criteria for evaluating claims for borrower defense to repayment. NASPA supports the development of a federal standard (§685.206 (d), 83 FR 37252) to act as a baseline that provides detailed information on how borrower defense to repayment should be

⁴ Cao, Y. & Habash, T. 2017. *College Complaints Unmasked*. The Century Foundation. New York, NY. Retrieved 8/17/2018 from <https://tcf.org/content/report/college-complaints-unmasked/?agreed=1>

operationalized nationwide, but does not limit benefits to students in those states that hold a standard more favorable to borrowers. We acknowledge the appropriateness of a federal process for determining the outcomes of federal student loan resources, but recognize the diversity of our individual and institutional membership nationwide, and that oftentimes state-level policy may offer additional relief or assistance above what may be available at the federal level. For instance, according to an April 2018 Pew research article,⁵ at least five states have enacted a student loan “bill of rights”; NASPA supports this form of state-level policy in addition to the regulatory floor provided by a federal standard.

NASPA requests that the Department clarify that institutions should not withhold official transcripts from students who are granted successful relief under these rules.

The Department asserts in a number of places that “if the borrower receives a 100 percent discharge for the loan, the institution has the right to withhold an official transcript for the borrower, as has always been the case in instances in which the borrower has been awarded student loan discharge through false certification, closed school or defense to repayment discharge” (83 FR 37253). The Department further posits this as a reason to discontinue group discharges and class actions, but this practice does not seem to be supported or encouraged in existing legislation or other regulations. While regulation exists from a Dear Colleague Letter published in 1998⁶ related to the Federal Perkins Loan Program that instructed institutions to withhold official transcripts from students with outstanding financial obligations, a properly authorized discharge of federal student loans would not, in any case, be equivalent to a student owing an institution money, so it is not an analogous situation. In fact, in the case of a successful discharge of federal student loans under the proposed rule, it would be a case of an institution owing a debt to the Department. It seems inappropriate in such a case to punish borrowers by allowing institutions who are found by the Department to have engaged in misleading behavior to withhold official transcripts, especially as no such prohibition would exist for students who did not require federal loans to finance their education. Given that we are unable to find support in either legislation or regulation for this supposed right of institutions to withhold official transcripts, we find the Department’s repeated assertion of this supposed institutional right in these proposed regulations troubling and misleading. Further, as no such institutional right seems to exist, we cannot agree with the claims by the Department that it should be used a primary reason to remove the option for group discharges or class actions for borrowers who may otherwise be eligible to join such actions. Therefore, we oppose the Department's proposal to disallow class actions or group discharges in these regulations, which we will address more fully below.

NASPA asks that the Department revisit the rule of misrepresentation identified in the proposed rule and revise it to one that is achievable by borrowers within the requirements of the claims process. As noted by other advocates and higher education associations in their comments in response to this NPRM, the proposal would require students to prove that the college “acted with an intent to deceive, knowledge of the falsity of a misrepresentation, or a reckless disregard for the truth” (83 FR 37256) As it

⁵ Povich, E. 2018. *To Help Strapped Borrowers, States Turn to Student Loan Ombudsmen*. Pew Charitable Trusts. Washington, DC. Retrieved 8/17/2018 from <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/04/10/to-help-strapped-borrowers-states-turn-to-student-loan-ombudsmen>

⁶ “Federal Perkins Loan Program (Formerly National Direct/Defense Student Loan Programs) Assignment Submission Procedures for Schools with Cohort Default Rates of 19 Percent and Lower As of June 30, 1993” Retrieved 8/17/2018 from https://ifap.ed.gov/dpceletters/doc0358_bodyoftext.htm

is highly unlikely that borrowers have access to evidence that could prove such malintent on the part of the school -- particularly without the benefit of legal counsel or the process of discovery -- requiring them to prove as much would effectively deny relief to most applicants. If borrower defense to repayment claims are, as described by the Department, to “[p]rovide students with a balanced, meaningful process... to ensure that borrower defense to repayment discharges are handled swiftly, carefully, and fairly,” (83 FR 37242) this definition must be revised to a standard that is achievable by borrowers within the requirements of the claims process.

NASPA asks that the preponderance of evidence standard remain the burden of proof a borrower must meet to have a successful claim, regardless of whether a claim is defensive or affirmative. The Department requested public comment on “whether it should require clear and convincing evidence of misrepresentation and financial harm (as opposed to a preponderance of the evidence of misrepresentation and financial harm) in the event it continues to consider affirmative cases” (83 FR 37253). While the Department maintains that a successful claim be considered under the preponderance of evidence standard in 685.206(d)(2)—Alternative A (83 FR 37245) the Department repeatedly seeks comment on the notion that increasing the evidentiary standard to clear and convincing might “discourage borrowers from submitting unjustified claims” in 685.206(d)(2)—Alternative B (83 FR 37254). NASPA agrees with the Department that the preponderance of evidence standard “will allow claims to be asserted and handled in a manner that is genuinely fair to students, taxpayers, and institutions” (83 FR 37245). We assert that even in the case that a borrower is filing an affirmative claim, requiring a borrower who has been misled to meet a higher evidentiary standard in order to limit claims would create a more permissive regulatory environment for unscrupulous actors at the expense of individual borrowers. Rather than implement regulations that would make it harder for individuals to seek appropriate relief, we would encourage the Department to create a regulatory environment that would deter unscrupulous actors from engaging in misleading behavior. NASPA also reminds the Department of the point raised in negotiated rulemaking, that the preponderance of evidence is the most commonly used standard in civil proceedings and that the Department uses this standard in other borrower debt proceedings (83 FR 37258).

Under the Federal Standard, NASPA asks the Department to retain the more comprehensive protections for borrowers from misrepresentation by including provisions which keep institutions accountable. Specifically, NASPA asks the Department to retain: the provision allowing a judgement against the school and finding of breach of contract as grounds for a borrower to assert a defense to repayment; a discharge option for students subject to unexpected school closure if a teach-out plan proves unsuccessful or of poor quality; and, the rules from the 2016 rule preventing institutions from requiring students to sign pre-dispute arbitration agreements and class-action waivers. The 2016 rules included a number of measures to prevent and diminish misrepresentation by institutions who may seek to take advantage of borrowers. Following the 2015 and 2016 closures of Corinthian Colleges and ITT Tech, institutions of higher education were subject to increasing interest from students about the financial health and credit-worthiness of their institutions. NASPA applauded measures instituted by the Department to increase loan servicer transparency and institutional accountability, such as the gainful employment rule, and ongoing oversight protections through the Consumer Financial Protection Bureau (CFPB). With the recent release of plans to rescind of the gainful employment rule and the shift in the

Department from information sharing with the CFPB in August 2018, NASPA asks the Department to include measures that maximize institutional accountability within the final BDR rules. We expand on our reasoning for each below.

Judgement against schools and findings of breach of contract as sufficient evidence to establish eligibility for relief. The 2016 rule added rulings resulting in findings of breach of contract and a favorable judgement against an institution as indicators students of the institution would be eligible to initiate a BDR claim. These were added as a cautionary measures in response to the then-recent unexpected closures of Corinthian Colleges and ITT Technical Institute, but also due to increasing evidence of fraudulent practices among especially for-profit institutions. The outcome of criminal and civil court proceedings against institutions typically ends in a settlement as a way to maintain the vitality of that institution⁷. Given the rarity of cases such as the 2016 American Career Institute finding where the institution admitted wrong-doing, we assert that such findings should be more than sufficient evidence to establish grounds for relief.⁸ NASPA further agrees with 2016 public comments from The Institute for College Access and Success (TICAS) that those court proceedings that result in settlement and point to a wrong-doing by the institution should also be considered a “judgement against a school.”⁹ Along these lines, as court outcomes often times do not come to fruition until years after a student has left that institution or that institution has closed, as was the case with American Career Institute where an outcome was not reached until three years after school closure, NASPA recommends that finding of an institutional breach of contract with a student also provide grounds for BDR.

Provisions to allow borrower defense to repayment claims for students when a teach-out plan is unsuccessful or of poor quality. Proposed §§ 674.33(g)(4)(i)(D), 682.402(d)(3)(iii), and 685.214(c)(1)(ii) would disqualify a borrower from a closed school discharge if the school offers a teach-out plan. While we agree that incentives to offer educational completion pathways to students are to be encouraged, we recognize that the results of the plan must be evaluated to avoid unnecessarily limiting the student borrower in the process. However, we feel that it would be inappropriate to unnecessarily limit options for borrowers in an attempt to incentivize institutions. Further, should a teach-out plan be offered that does not meet the needs of an individual borrower, or which is of poor quality for the planned course of study for an individual borrower, we feel it is inappropriate to remove the option of pursuing a borrower defense claim from borrowers. NASPA is aware of the intersecting nature of the higher education community, and acknowledges that upon closure of a school, the best option for certain students may be the receipt of a full discharge while that student borrower works on juggling the rest of life’s responsibilities. A student should be offered the choice to determine whether a full discharge or a teach-out plan would be in their best interests. Furthermore, borrowers should remain eligible to

⁷ Halperin, D. 2018. “Law Enforcement Investigations and Actions Regarding For-Profit Colleges.” Republic Report. Retrieved 8/17/2018 from <https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/>

⁸ Final Judgment by Consent as to Defendants The Career Institute, LLC; Advanced Career Technologies, Inc.; ABC Training Center of Maryland, Inc.; Andree Fontaine and Robert Payne. 2016. Commonwealth of Massachusetts Superior Court Department Civil Action No. 2013-CV-4128H. Retrieved 8/17/2018 from <https://www.scribd.com/document/314969635/American-Career-Institute-Consent-Judgment>

⁹ Comments from The Institute for College Access & Success in response to Docket ID ED-2015-OPE-0103. 2016. Retrieved 8/17/2018 from https://ticas.org/sites/default/files/pub_files/ticas_detailed_bd_nprm_comments.pdf

pursue a full discharge for a reasonable amount of time, determined in the 2016 BDR rule as three years, in the event the teach-out plan proves unsuccessful (83 FR 37266).

Protections from mandatory pre-dispute arbitration and class action waivers. Allowing institutions to force students to sign pre-dispute arbitration and class-action waivers upon enrollment limits the ability of the students to seek relief from misleading or fraudulent outcome information. Especially in light of the proposed rule's creation of a federal standard, by preventing borrowers from pursuing a solution within the judicial system for actions other than discharge of federal loans is unnecessarily restrictive. Students do not typically enter institutions assuming they have been misled about the outcomes of their chosen program and may incorrectly believe they will never have need of these options, signing away their rights prematurely. Maintaining protections for student borrowers is essential.

NASPA asks that the Department provide more protective and less punitive measures for defaulted borrowers. These proposed regulations severely limit the rights of defaulted borrowers. While the proposed regulations do not set a statute of limitations on the filing of a BDR claim, upon receipt of wage garnishment due to default, a borrower must raise a claim within 30 days (83 FR 37260). The longest period of time a defaulted borrower has to submit a claim is 65 days in the case of Federal salary offset (83 FR 37299). Therefore, a borrower only has between 30-65 days to submit a BDR claim upon initiation of collection activities. This timeframe does not seem sufficient for a BDR claim and non-defaulted borrowers are not subject to any such limitation. We ask that the Department better explain the reasoning behind this punitive measure. The measure seems unnecessary especially in light of the positive incentive the proposed rule provides for students engaged in collection activities that would prohibit guarantors from charging a collection cost for borrowers who file within 60 days of receiving notice of default (83 FR 37282). NASPA sees this positive incentive as capable of providing sufficient motivation for borrowers to file BDR claims within a specified timeframe. Therefore, NASPA asks the Department to maintain the positive incentives to borrowers to file claims, such as prohibited collection costs, and to remove the constricting timeframe which is unnecessarily punitive.

NASPA asks that the final rules include processes for filing both individual and group claims. The Department makes an argument against group processing of BDR claims (83 FR 37263) by asserting that some potential penalty, namely the withholding of official transcripts, may apply to individual borrowers inappropriately if they were included in a group claim. Notwithstanding our belief that this penalty is not actually provided for in law or previous regulation, we find this argument insufficient to preclude group claims. The Department seems to indicate that the specific nature of misrepresentation is so unique as to require each borrower to file a claim. However, as misrepresentation, such as the false reporting of an inflated job-placement rate or expected salary, may occur for all students enrolled within a particular program at a particular institution, it is reasonable to expect that a group claims process at least to establish the facts of misrepresentation would be more expedient than an individual claims process. The Century Foundation analysis¹⁰ referenced earlier points to a pattern in the data on individual claims that offers further insight on the value of a group claims process. The analysis identified fifty-two institutions that generated the bulk of BDR claims, twenty or more claims per institution, between August and

¹⁰ Cao, Y. & Habash, T. 2017. *College Complaints Unmasked*. The Century Foundation. New York, NY. Retrieved 8/17/2018 from <https://tcf.org/content/report/college-complaints-unmasked/?agreed=1>

November of 2017. Since it seems the majority of claims are filed at a small number of institutions, group claims would offer a way to streamline the process and would provide for a more timely adjudication process. Even if individual borrowers were required to submit applications to appropriately determine their amount of relief, allowing for a group claim to establish the basic facts of misrepresentation would be a far more efficient use of Departmental resources. We encourage the Department to continue to allow group claims to establish the facts of misrepresentation even if applications are required of individual borrowers to determine their appropriate level of relief.

Thank you for this opportunity to provide input on where the Department's proposed borrower defense to repayment regulations may need to be modified and strengthened. We urge the Department to consider maintaining regulations that provide for appropriate consumer protection and which creates an environment that deters unscrupulous actors from taking advantage of federal taxpayer resources.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Kruger". The signature is fluid and cursive, with a large initial "K" and "K".

Dr. Kevin Kruger
President

On behalf of:

NASPA - Student Affairs Administrators in Higher Education

ACPA-College Student Educators International

Association of College Unions International

Association of College and University Housing Officers-International

NODA-Association for Orientation, Transition and Retention in Higher Education