IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK LEGAL ASSISTANCE GROUP, Plaintiff, v. ELISABETH DeVOS, in her official capacity as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	Case No. 1:20-cv-01414 (LGS)

BRIEF OF THE NATIONAL CONSUMER LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEW YORK LEGAL ASSISTANCE'S MOTION FOR SUMMARY JUDGMENT

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This brief is submitted by the National Consumer Law Center ("NCLC"). NCLC is a nonprofit organization specializing in consumer issues on behalf of low-income people. NCLC publishes a widely-used treatise on student loan law, Student Loan Law (6th ed. 2019), *updated at* www.nclc.org/library. NCLC's Student Loan Borrower Assistance Project has nationally recognized expertise in student loan law and provides information about student borrowers' rights, increases public understanding of student lending issues, and identifies policy solutions to promote access to education and lessen student debt burdens. The Project's attorneys provide direct representation to low-income student loan borrowers, many of whom enrolled in predatory schools that induced them to enroll using unfair recruiting tactics. NCLC also consults with civil legal services organizations across the country that represent borrowers harmed by predatory schools. *Amicus* participated in the 2016 and 2018 negotiated rulemaking process on borrower defense where it educated the Department of Education about students' experiences with predatory schools and barriers to accessing relief. NCLC's unique position as subject matter expert and consultant to legal service organizations allows it to provide insight into how the 2019 Rules will heighten burdens on borrowers and legal aid organizations alike.

INTRODUCTION AND SUMMARY

The Department of Education's (ED) regulations discharging student loan debt after a school commits misconduct are many students' only hope at recovery after a school scams them. For decades, low-income college students' aspirations have been exploited by predatory postsecondary schools. These predatory schools target students who have limited exposure to higher education, first-generation college students, disabled students, veterans, and students of color, and use their hopes of a better future against them. They lie to students about the quality of education offered and the career opportunities available after graduation, often charging exorbitant tuition to take students' federal student loan dollars, and then provide little more than a worthless degree. After taking out tens thousands of dollars in unaffordable debt, students discover that they are in a worse position than if they had not enrolled at all; often a student's association with a predatory school is a black eye in the job market. Students struggle with the debt for years, only reaching out to legal aid organizations at the point when it finally becomes too much—threatening their ability to provide housing and basic necessities for their family, or after

ED garnishes their wages, or seizes their tax refund and social security benefits. Even then few legal aid organizations provide student loan assistance; and these organizations are stretched to capacity and cannot fully respond to this overwhelming need.

Congress directed ED to intervene and help students recover from these predatory schools. In 1994, after it became evident that federal student loan dollars were being used to defraud those students and leave them mired in debt, Congress intervened and amended the Higher Education Act (HEA) to give borrowers the right to assert defenses to repayment ("a borrower defense") to discharge their federal student loans. In 2016, after the collapse of Corinthian Colleges made it clear that hundreds of thousands of defrauded students had been drowning in federal student loan debt for years, ED established a process for students to exercise their right to assert a borrower defense. ED recognized that students should not be expected to know student loan discharge regulations. So, it also created processes to extend relief to unaware borrowers and means to expose the predatory schools' practices.

When ED promulgated the rules currently at issue—the Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019) ("2019 Rules")—it ignored Congressional intent, its own prior justification for heightened student protections, and the experiences of the students Congress intended the HEA to help. Instead of reducing burdens for borrowers and increasing school oversight ED rescinded virtually all of the student protections it added in 2016.

The 2019 Rules establish relief eligibility criteria that will be nearly impossible for most defrauded borrowers to satisfy, even with the assistance of a lawyer—a resource low-income borrowers will not have. They rescind safeguards that protected defrauded students' access to justice and ensured borrowers would get relief if they could not finish their program because their school closed. Ultimately, the 2019 Rules leave students more vulnerable to predatory school practices while simultaneously making it more difficult for them to cast off the debt their schools left them ill-equipped to repay. They are a marked departure from ED's efforts to responsibly steward the federal student aid program.

Based on our extensive experience advocating for debt relief on behalf of low-income students harmed by abusive schools and consulting with legal aid attorneys across the country, *amicus* writes to

explain how the 2019 Rules arbitrarily and capriciously ignore the needs of borrowers, harm defrauded low-income students, and impose an enormous burden on legal aid organizations representing those borrowers. The Court should grant Plaintiff's Motion for Summary Judgment and stop the 2019 Rules from harming low-income borrowers and legal aid organizations alike.

ARGUMENT

I. The borrower defense rule is vital to ensuring borrowers can obtain relief from federal student loan debt after a school deceives them.

A. Predatory schools have a longstanding history of exploiting low-income students' dreams of improving their lives through education.

For decades, legal aid organizations have helped students cheated by schools seeking to profit off of federal student aid dollars.[1] Congress passed the HEA to create federal student aid and open the door to college for low-income students and students of color.[2] Predatory schools took students' federal aid and offered little in return. In 1991, Senator Sam Nunn led extensive hearings and published a report about fraud in the for-profit college industry and its terrible consequences for student loan borrowers.[3] Shortly thereafter, Congress amended the HEA to give students the right to assert a borrower defense to federal loan repayment.[4]

A 2012 report by the Senate Health, Education, Labor and Pensions Committee (the "HELP Report") documented the continued and widespread use of predatory practices at thirty different for-profit college chains.[5] The HELP Report detailed the deceptive recruitment practices about virtually

[1] Congress has long been concerned that federal student aid dollars not be used to students' detriment. *See* The Century Found., The Cycle of Scandal at For-Profit Colleges (2017), https://bit.ly/3er3DZX (several reports describing Congressional action from first GI Bill onward).

[2] *See* President Lyndon B. Johnson, Remarks Signing the Higher Education Act Into Law (Nov. 8, 1965), https://perma.cc/6GKJ-MNGE ("[The Higher Education Act] means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.").

[3] Abuses in Federal Student Aid Programs, S. Rep. No. 58 102d Cong., 1st Sess. (1991) (hereinafter "Nunn Report"). "The Subcommittee investigation uncovered [that]… unscrupulous, inept, and dishonest elements among [schools] have flourished…[They] have done so by exploiting both the ready availability of billions of dollars of guaranteed student loans and the weak and inattentive system responsible for them, leaving hundreds of thousands of students with little or no training, no jobs, and significant debts that they cannot possibly repay." *Id.* at 6. "[School] [f]raud and abuse [has had] perhaps the most profound and disastrous effect on the intended beneficiaries of Federal student financial aid—the students." *Id.* at 14.

[4] *See* Student Loan Reform Act of 1993, Pub. L. No. 103-66, Title IV, § 4021, 107 Stat. 340, 351 (codified as amended at 20 U.S.C. § 1087e(h) (2018); David Whitman, The Century Found., When President George H. W. Bush "Cracked Down" on Abuses at For-Profit Colleges (March 9, 2017), https://bit.ly/2ZvAjgU (the Nunn Report led Representative Maxine Waters to introduce "borrower defense" rules shortly before Congress added borrower defense to the HEA).

[5] U.S. Gov't Accountability Off., GAO-10-948T, For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices (2010); For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, S. Rep. No. 112-37 112th Cong., at 32 (2012) (hereinafter "HELP Report"), https://bit.ly/2OSjMgZ. The Department had possession of the HELP Report when it engaged in the 2016 and 2019 borrower defense rulemaking processes and referred to it as the "Harkins Report." *See* Ex. 4, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-3 at 1 (N.D. Cal. Dec. 23, 2019) (Memo to Under Secretary Ted Mitchell from Borrower Defense Unit (Oct. 24, 2016)); Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. Times (July 29, 2012) (discussing Senator Tom Harkin's role in the publication of the 2012 HELP Report).

every aspect of a postsecondary program to increase enrollment and revenues: the cost of degree programs, the likelihood of obtaining employment, the salaries graduates earned, program length, graduation rates, and the transferability of credits received from the school.[6] Schools told recruiters to do whatever was necessary to persuade as many students as possible to enroll, without regard to whether the educational program offered would benefit the student or position them to repay their loans.[7]

Disturbingly, the HELP Report also confirmed that predatory schools continued to target the most vulnerable students with enrollment lies and pressure campaigns. One for-profit school explicitly instructed recruiters to target "Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experience a Recent Death. Physically/Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future."[8] Other schools instructed recruiters to exploit students' vulnerabilities and "poke the pain" to get them to enroll in their schools.[9] The schools targeted students underserved by traditional non-profit colleges, amplifying the efficacy of their lies.[10] Black and Latino students are over-represented in for-profit colleges at 41% of the student body.[11]

The HELP Report reflected what legal aid organizations had long witnessed on the ground.[12] For example, the Legal Aid Foundation of Los Angeles helped a group of Spanish-speaking clients with debt from a medical assistant program. Recruiters told them the program would be conducted entirely in Spanish. Instead, instruction and class materials were all in English, which they could neither speak nor read.[13] Another legal aid client who was homeless and had a severe learning disability enrolled in the for-profit school Lincoln Tech after a recruiter promised that the school would provide housing and classroom accommodations so he could learn despite his disability. But when classes began, the school did not fulfill its promises, leaving the student stuck without a degree and crushing debt.[14]

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[6] *Id.* at 53.
[7] *Id.* at 46-63. *See* Legal Aid Community, Comment Letter on the Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations, at 34-5 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018-OPE-0027-29073 (hereinafter, "Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM").
[8] HELP Report, *supra* note 5, at 58 (quoting Vatterott, March 2007, *DDC Training* (VAT-02-03904)).
[9] *Id.* at 60-63 (quoting materials from ITT and Kaplan).
[10] *Id.* at 96, n. 369, 168.
[11] Lawyers' Committee for Civil Rights Under Law, Comment Letter on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations at 4 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018- OPE-0027-26266. *See also* Peter Smith & Leslie Parrish, Ctr. for Responsible Lending, Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Futures (Oct. 2014), https://perma.cc/LD9C-TKFS.
[12] Legal Aid Community, Comment Letter on Borrower Defenses 2018 NPRM, *supra* note 7 at 31 (explaining instances of recruiters targeting borrowers as they left welfare offices, were living in homeless shelters, or who had serious disabilities).
[13] *See* Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7 (Attachment 6 at 98-111).
[14] *Id.* at 31.

Legal aid organizations are all too familiar with the financial loss, depression, and loss of opportunities their clients experience after falling victim to predatory school practices.[15] Students who attend for-profit colleges earn *less* on average in the 5-6 years after attendance than they did before attending.[16] Yet, they still owe significant federal student loan debt—averaging over $14,000 in 2014[17]—and often owe additional private student loan debt. With staggering debt but no improved employment prospects, nearly half of all students attending for-profit schools default on their loans within five years of repayment.[18]

Yet schools continue to use the same deceptive practices to enroll students and optimize profits at students' expense. Even though the HELP Report revealed that schools were using predatory practices, nearly all of those schools continued receiving federal student aid from ED and, along with others, continued to defraud students.[19] For example, in January 2019, the Arizona Attorney General reached a $22 million settlement with Career Education Corporation for deceptive admissions practices.[20] And, in December 2019, the University of Phoenix settled with the Federal Trade Commission for $191 million for deceptive advertising practices.[21] But enforcement lawsuits rarely provide federal student loan relief for borrowers, and state attorneys general have urged ED to use its borrower defense authority to discharge their citizens' loans.[22] As long as schools are able to receive easy access to students' federal student loan dollars, students will need strong protections against school deception and misconduct.

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[15] Predatory schools are disproportionately for-profit schools. *See* Yan Cao and Tariq Habash, The Century Found., College Fraud Claims Up 29 Percent Since August 2017 (Sept. 22, 2015), https://bit.ly/32jMUFD ("[M]ore than 98 percent of the complaints [of fraud] are regarding for-profit colleges, many which have been under law enforcement investigations[.]").

[16] Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data* at 3 (Nat'l Bureau of Econ. Research, Working Paper, No. 22287, 2018), http://www.nber.org/papers/w22287.

[17] *See* Adam Looney & Constantine Yannelis, Brookings Papers, A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributes to Rising Loan Defaults at 41 (Fall 2015), https://perma.cc/46PY-22QB.

[18] *See id* at 82.

[19] *Compare* HELP Report, *supra* n. 5, at Part II, https://bit.ly/2OtDqj8 *with* U.S. Dep't of Educ., 2013-14, 2014-15 Title IV Program Volume Rep. By Campus-Based Programs, https://bit.ly/2B4j5ha. *See* Decl. of Robyn Smith at ¶ 62 ("Robyn Smith Decl." attached as Exhibit 1) (describing a client defrauded in 2016 by Brooks Institute Technology Institute, owned by Career Education Corporation, that was investigated in the HELP Report), ¶ 76-77 (Marinello Schools of Beauty closed "in February 2016 after [ED] determined that it had engaged in a fake high school diploma scheme to obtain federal student loans on behalf of non-high school graduates [ineligible] for federal…aid").

[20] Press Release, Mark Brnovich, Ariz. Att'y Gen., AG Brnovich Announces $22 Million in Debt Relief for Arizona Students Who Attended Certain For-Profit Schools (Jan. 3, 2019), https://perma.cc/TXH6-GVL7.

[21] Press Release, Fed. Trade Comm'n, FTC Obtains Record $191 Million Settlement from University of Phoenix to Resolve FTC Charges It Used Deceptive Advertising to Attract Prospective Students (Dec. 10, 2019), https://perma.cc/M3YC-M2NZ.

[22] *See Vara v. DeVos*, No. CV 19-12175-LTS, 2020 WL 3489679 (D. Mass. June 25, 2020) (ordering ED to decide the group borrower defense application the Massachusetts attorney general submitted to ED after receiving a favorable judgment in state court against Corinthian Colleges).

B. The 2016 Rules created processes for defrauded borrowers to access loan relief and implemented other student protections.

In 2016, "the collapse of Corinthian Colleges ('Corinthian') and the flood of borrower defense claims submitted by Corinthian students"[23] catalyzed ED to begin rulemaking to create a borrower defense process and other student protections.[24] After years of deceiving students, an array of enforcement actions pursued the school.[25] Corinthian abruptly sold or closed its 105 colleges in 25 states after being held liable for $1.6 billion in default judgments.[26] In the years that followed, numerous other for-profit schools facing state and federal enforcement actions shuttered their doors as well.[27]

Corinthian's closure left hundreds of thousands of former students with substantial student loan debt and either no degree or a worthless one. ED quickly acknowledged that, under the HEA, "borrowers have the right to submit defense to repayment claims, [and] the Department [of Education] must set up a process to review and adjudicate them[.]"[28] At the time, ED was committed to limiting the obstacles placed before students seeking relief[29] because, as then-Secretary John B. King Jr. stated, "dodgy schools [were] leav[ing] students with piles of debt and taxpayers holding the bag[.]"[30]

The 2016 Rules defined a path for defrauded and misled students to access relief[31] and created a new federal standard for borrower defense eligibility for loans issued after July 1, 2017.[32] It also put protections in place to make it harder for schools to hide deceptive practices from the public, including

[23] 2016 Proposed Rules, 81 Fed. Reg. 39,330, 39,331 (Proposed June 16, 2016).
[24] HELP Report, *supra* note 5, at 378-79 (Corinthian Colleges Inc., Form 424B1 at 3 (Feb. 5, 1999)).
[25] *See, e.g., Consumer Fin. Prot. Bureau v. Corinthian Colls.*, Case No. 1:14-cv- 07194, 2015 WL 10854380 (E.D. Ill. Oct. 27, 2015) (default judgment); *People v. Heald Coll.*, Case No. CGC-13-534793 (Sup. Ct. Cal. March 23, 2016) (default judgment); *People v. Corinthian Schs., Inc.*, Case No. BC374999 (Sup. Ct. Cal. July 31, 2007) (complaint and final judgment); *Commonwealth v. Corinthian Colls., Inc.*, Case No. 14-1093L (Sup. Ct. Mass. Aug. 1, 2016) (judgment); *State v. Corinthian Colls., Inc.*, Case No. 2014 CX 00006 (Wis. Cir. Ct. Oct. 27, 2014) (complaint).
[26] *See, e.g., Consumer Fin. Prot. Bureau v. Corinthian Colls.*, Case No. 1:14-cv-07194, 2015 WL 10854380 (E.D. Ill. Oct. 27, 2015) (default judgment finding Corinthian liable for $530 million)); *People v. Heald Coll.*, Case No. CGC- 13-534793 (Sup. Ct. Cal. March 23, 2016) (default judgment finding Corinthian liable for $1.1 billion); *Commonwealth v. Corinthian Colls., Inc.,* Case No. 14-1093L (Sup. Ct. Mass. Aug. 1, 2016) (default judgment finding Corinthian liable for $67 million).
[27] Michael Vasquez & Dan Bauman, *How America's College-Closure Crisis Leaves Families Devastated*, Chron. of Higher Educ. (April 4, 2019), https://bit.ly/2WnN0s1 (in last 5 years, 88% of closed college campuses were for-profit colleges).
[28] Exhibit 24, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66 (N.D. Cal. Dec. 23, 2019) (Letter from James W. Runcie, COO, Fed. Student Aid to Sharon Mar, Off. of Mgmt. & Budget (June 4, 2015)).
[29] Press Release, U.S. Dep't of Educ., Fact Sheet: Protecting Students From Abusive Career Colleges (June 8, 2015), https://perma.cc/DXL6-29FJ?type=image ("We will make this process as easy as possible [for defrauded borrowers], including by considering claims in groups wherever possible, and hold institutions accountable.").
[30] Press Release, U.S. Dep't of Educ., Education Department Proposes New Regulations to Protect Students and Taxpayers from Predatory Institutions (June 13, 2016), https://perma.cc/85DT-JRG9.
[31] 2016 Rules, 81 Fed. Reg. at 76,083-86 (Nov. 1, 2016); 34 C.F.R. § 685.222(e) (process for individual borrowers to apply for borrower defense relief); 2016 Rules, 81 Fed. Reg. at 76,083-86; 34 C.F.R. § 685.222(f)-(h) (process to discharge the debts of groups of borrowers without an application); 2016 Rules, 81 Fed. Reg. at 76,078-82; 34 C.F.R. § 685.214(c)(3)(ii) (creating an automatic closed school discharge process to discharge the debts of students who were unable to complete their program because their school closed); 2016 Rules, 81 Fed. Reg. at 76,070-73; 34 C.F.R. § 668.14(b) (requiring closing schools to inform students of the availability of a closed school discharge).
[32] 2016 Rules, 81 Fed. Reg. at 76,083; 34 C.F.R. § 685.222(a).

limits on when schools could force students into mandatory arbitration, and required schools to submit arbitral and judicial records to ED.[33]

ED illegally delayed implementation of most of the provisions within the 2016 Rules for over a year.[34] Even after a federal court ordered it to implement the rule, ED was slow to fully effectuate, or never enforced, aspects of the 2016 Rules.[35]

Such was the case with borrower defense decisionmaking. In January 2017, there were 50,000 pending borrower defense applications.[36] Instead of continuing to decide claims, by June 2018, ED stopped issuing final decisions on borrower defense applications altogether,[37] even though there were then 105,998 pending[38] and thousands of borrowers had already waited two years or longer for an adjudication.[39] From January 2017 until at least June 2019, ED stopped determining what claims would be eligible for a borrower defense discharge,[40] even though, by June 2019, 10 school chains were subject to over 1,000 borrower defense applications.[41]

II. The 2019 rules will transform borrower defense into an illusory remedy for many students defrauded by schools.

The 2016 Rules provided a necessary, minimum level of protection to save students from the burden of repaying debt borrowed for a worthless education. Faced with the backlog of 50,000 borrower

[33] 2016 Rules, 81 Fed. Reg. at 76,021-31; 34 C.F.R. §§ 685.300(b)(11)(d)-(i) (making the continued receipt of Title IV funds contingent on not compelling students to arbitrate claims that could be borrower defense claims); 2016 Rules, 81 Fed. Reg. at 76,088-89; 34 C.F.R. §§ 685.300(g), (h) (compelling schools to submit arbitral and judicial records to ED).
[34] Order and Opinion, *Bauer v. DeVos*, 325 F. Supp. 3d 74 (Sept. 12, 2018), ECF No. 87; Order and Opinion, *Bauer v. DeVos*, 332 F. Supp. 3d 181 (Sept. 17, 2018), ECF No. 91. However, the automatic closed school discharge provisions went into effect immediately. *See* Stacy Cowley, *Education Department Will Cancel $150 Million in Student Debt After Judge's Order*, N.Y. Times (Dec. 14, 2018), https://perma.cc/5P8F-VK45.
[35] For example, although at least two schools compelled students to arbitrate claims, both schools continue to receive federal student aid dollars. *See Kourembanas v. InterCoast Colls.,* 373 F. Supp. 3d 303 (D. Me. 2019); *Young v. Grand Canyon Univ.*, Case No. 1:19-cv-01707, ECF 29 (N.D. Ga. April 16, 2019); Fed. Student Aid, U.S. Dep't of Educ., AY 2019-2020 Q3 Loan Volume, Direct Loan Program Report, https://bit.ly/2B4j5ha.
[36] *See* Test. of James Manning, Transcript of U.S. Dep't of Educ. Borrower Def. and Fin. Rulemaking Comm., 8:18-9:6 (Nov. 14, 2017).
[37] *See* U.S. Dep't of Educ., Borrower Defense Reports for June 2018 until Dec. 2019, https://bit.ly/2OsJIQ4.
[38] U.S. Dep't of Educ., Borrower Defense Report for June 2018, https://bit.ly/2OsJIQ4.
[39] Statement, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 90 (N.D. Cal. Feb. 7, 2020) (ED statement that 18,884 claims had been pending for over three years and 2,828 claims had been pending for over four years).
[40] *See* U.S. Dep't of Educ., No. ED-OIG/I04R0003, Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process at 10 (2017), https://bit.ly/2CMfQeZ ("[f]rom January 20, 2017, through July 31, 2017, BDU did not complete or begin preparing any legal memoranda") (hereinafter "Borrower Defense IG Report (2017)"); Exhibit 32, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-5 (N.D. Cal. Dec. 23, 2019) (Testimony of Secretary DeVos in Response to Questions for the Record submitted by Senator Patty Murray (June 13, 2019), "Borrower Defense Applications By School Group"); Exhibit 26 at 2, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-5 (N.D. Cal. Dec. 23, 2019) (Letter from Kathleen S. Tighe, Inspector General of the Dep't of Education to Senator Richard Durbin (June 6, 2018).
[41] Exhibit 32, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-5 (N.D. Cal. Dec. 23, 2019) (Testimony of Secretary DeVos in Response to Questions for the Record submitted by Senator Patty Murray (June 13, 2019), "*Borrower Defense Applications By School Group"*). Eight of the schools with over 1,000 borrower defense claims were investigated in the HELP report. ED only adjudicated 1% of applications from ITT Tech, whereas all other applications remained pending. *Id.*

defense claims after the change in administration, ED could have promulgated regulations that allowed ED to provide an expedited and expanded relief process to more borrowers. Instead, ED did the opposite. In promulgating the 2019 Rules, it placed hurdles between deserving students and relief:

- it rescinded group discharge processes for cheated borrowers, which allowed ED to efficiently resolve claims based on common school misconduct;
- it established new, more difficult discharge standards that put a higher evidentiary burden on borrowers applying for a borrower-defense to discharge loans issued after July 1, 2020;
- it ended automatic discharges for borrowers who didn't complete their program because their school closed, only extending relief to borrowers able to navigate the discharge process;
- it removed measures that revealed schools' predatory practices to ED and the public.[42]

These changes will prevent borrowers from recovering from their schools' deceit and misconduct.

A. Most low-income borrowers are unaware that they can seek loan relief and will not recover from school fraud without the group relief process that the 2019 Rules eliminated.

As legal aid organizations have repeatedly informed ED, many borrowers do not know how to assert a borrower defense, or know that they have any right to relief at all, unless they have access to a legal aid attorney. In their comments to the 2018 NPRM, legal aid organizations explained, "For every client we see, there are dozens more who remain unaware of their legal rights."[43] Legal aid clients receive loan discharge misinformation from closing schools, duplicitous for-profit debt relief companies, their loan servicers, and fraudulent debt collectors.[44] As a result, legal aid organizations "have a constant influx of borrowers whose schools closed as many as 30 years ago and who have no idea that they are eligible for a discharge."[45]

The 2016 group discharge provisions allowed ED to provide a safety net for borrowers who would struggle to repay their debts—or fall into default—even though they would be eligible for relief if they

[42] 2019 Rules, 84 Fed. Reg. at 49,879 (removing group discharges), 49,926-29 (new relief eligibility criteria), 49847-48 (removing automatic closed-school discharges), 49,839-41, 49,845, 49,933 (removing limits on schools' use of arbitration and imposing arbitration disclosure requirements instead, rescinding requirement that schools disclose arbitral and judicia records to ED).
[43] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 1, 45 ("[T]he vast majority of students entitled to relief will never know of the opportunity to apply for such relief."). *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 16-17, 21, 25, 28, 31; Decl. of Johnson Tyler at ¶¶ 14, 15 ("Tyler Decl.," attached as Exhibit 2).
[44] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 17, 85-86. *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 19, 74, 76-78 (describing the misinformation students receive, including from fraudulent scam relief companies placing flyers on borrowers' cars while they attended a legal aid clinic).
[45] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 85. *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 17, 21; Ex. 2, Tyler Decl. at ¶¶ 9, 18.

applied. Under the 2016 Rules, ED could initiate group loan discharges for borrowers who attended the same predatory school without requiring individual applications.[46] ED explained it would use the group process if "there [were] common facts and claims that [] affect[ed] numerous borrowers" because "including [] borrowers [who didn't submit applications] would allow for faster relief for a broader group of borrowers than if the process [was] limited to just those who file applications for relief."[47] The 2016 group discharge rules made sense because ED is in the best position to receive school misconduct information and could discharge debts shortly after discovering misconduct instead of waiting for borrowers' claims to roll in for decades.[48] The group process would also ensure that outcomes for students were not based on their awareness of regulations or ability to decode an application form.[49]

In contrast, the 2019 Rules arbitrarily rescinded the group discharge processes for borrowers who receive loans after July 1, 2020 and instead requires each borrower to submit an individual application.[50] ED claimed that the group process created "onerous administrative burdens" and that group discharges could provide relief to undeserving borrowers.[51]

These explanations fail. They ignore that the 2016 Rules provide ED with discretion to invoke a group discharge process, allowing it to avoid using the process if the risk of providing relief to undeserving borrowers was too high.[52] Moreover, ED failed to explain how eliminating the group discharge process reduced the administrative burden of adjudicating individual applications.[53] Common sense would lead to the opposite. Requiring ED to evaluate the evidence of each individual claim seems far more onerous than relying on evidence of widespread harm to grant broad relief to a large group.

And importantly, ED did not consider the cost to borrowers. It failed to calculate how many defrauded students would be forced to repay the entirety of their federal student loan debt (plus fees and

[46] 34 C.F.R. §§ 685.222(f)-(h) (borrower defense group discharge processes for open and closed schools); 34 C.F.R. § 685.215(c)(8) (automatic discharges for borrowers who attend a school that falsifies satisfactory academic progress); 2016 Rules, 81 Fed. Reg. at 76,082 (adding same).
[47] 2016 Proposed Rules, 81 Fed. Reg. at 39,347.
[48] The three-year limitation period will not prevent borrowers from attempting to file untimely applications because they will be unaware of the time limit. *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 13. Without group processes, ED will still adjudicate untimely claims from otherwise deserving borrowers.
[49] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM *supra* note 7, at 45, 80-81 (borrowers miss questions on the closed school discharge application form and are denied relief, even when it is clear that the borrowers should qualify for a closed school discharge).
[50] 2019 Rules, 84 Fed. Reg. at 49,799-800.
[51] *Id.* at 49,879; 2018 NPRM, 83 Fed. Reg. at 37,244, 37,285.
[52] *See* 2016 Rules, 81 Fed. Reg. at 75,967.
[53] The 2019 Rules eliminate the group discharge process for loans disbursed on or after July 1, 2020, requiring each borrower to submit an application, and for ED to evaluate each claim individually. *See* 2019 Rules, 84 Fed. Reg. at 49,799, 49,879.

interest) because they did not know federal student loans *could* be discharged because of school misconduct.[54] Without group discharges, countless borrowers will needlessly suffer.[55]

B. The new 2019 borrower defense standards create arbitrary barriers to attaining relief.

The 2019 Rules' borrower defense standards require borrowers to satisfy complicated requirements to be eligible for any form of relief.[56] Under the 2019 standard, for loans issued after July 1, 2020, a borrower is only eligible for a borrower defense discharge if they (1) submit their claim to ED within 3 years of leaving school;[57] (2) prove they relied upon a "statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive" that "directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made";[58] (3) demonstrate that the school made the misrepresentation with "knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth";[59] and (4) prove they suffered "financial harm" in the form of "monetary loss" as a result of the school's misrepresentation.[60]

Amicus agrees with Plaintiff that these standards are an arbitrary and capricious.[61] But the standards also ignore legal aid organizations' comments on the realities defrauded borrowers face, putting the 2019 Rules at odds with the Congressional intent animating the creation of borrower defense.[62] As detailed below, each of these restrictions alone makes it far less likely that defrauded borrowers will access relief. Together, they put relief out of reach for many deserving borrowers.

1. The three-year limitation period arbitrarily puts relief out of reach for defrauded borrowers.

The 2019 Rules require borrowers to file a claim within three years of attending the school whose conduct is challenged. Contrary to ED's suggestion that a three-year limitations period is necessary to ensure schools retain records to defend against students' borrower defenses,[63] this requirement will cover up school misconduct and cheat deserving borrowers of relief.

[54] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NRPM *supra* note 7, at 16-17 (Despite the publicity surrounding the Corinthian Colleges' collapse, many borrowers who attended workshops hosted by legal aid organizations were unaware that they could apply for relief.).
[55] *See* Ex. 1, Robyn Smith Decl.; Ex. 2, Tyler Decl.; Ex. 3, Laura Smith Decl.
[56] Just because a borrower is eligible for relief does not mean their debt will be extinguished. The 2019 Rules allow ED to grant partial relief (which can be a nominal percentage of relief) to an eligible borrower. 34 C.F.R. § 685.206(e)(12).
[57] 34 C.F.R. § 685.206(e)(6)(i).
[58] 34 C.F.R. § 685.206(e)(3).
[59] *Id.*
[60] 34 C.F.R. § 685.206(e)(4).
[61] Pl. Br. at 22-25.
[62] *See* Nunn Report, *supra* note 3.
[63] *See* 2019 Rules, 84 Fed. Reg. 49,823-24.

As discussed above, many legal aid organizations report that they represent defrauded students whose schools' closed decades ago.[64] The three-year limitation will mean that many defrauded students with meritorious claims will be barred from accessing relief purely because they did not learn they had the option to seek relief within the limitations period.[65] More troubling, many students seek legal advice only after their student loans are in default, which occurs years after they attended their school.[66]

As explained in the legal aid comments to the 2018 NPRM, the evidence necessary to prove a claim—like that revealed through a government enforcement investigation or action, or sought via a FOIA or state records request, for example—may simply be unavailable within three years of a student's attendance at their school.[67] Contrary to ED's suggestion that the limitations period will clearly delineate whether a misrepresentation occurred[68] or deter frivolous claims,[69] it will only "encourage[s] the filing of 'use-it-or-lose-it' claims" for borrowers who are desperate for relief but do not yet have the clearest evidence of their school's misconduct.[70] The limitation will arbitrarily exclude defrauded students from receiving relief[71] and make it harder for ED to reach a fair resolution on borrowers' claims. The time limit, therefore, has no deterrent effect, but instead "punish[es] twice-over borrowers who have been mistreated once [already]."[72] This result is contrary to the reasons Congress created a right to borrower defense; to give cheated borrowers loan relief.[73]

2. The 2019 Rules arbitrarily impose difficult thresholds for unrepresented borrowers to meet to demonstrate that their schools committed a misrepresentation.

The 2019 Rules impose multiple arbitrary hurdles for borrowers to overcome to demonstrate that they reasonably relied on a substantial misrepresentation made by their school. Unlike the 2016 Rules, the 2019 Rules prove that the "the institution's act or omission was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth,"[74] a standard more demanding than

[64] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 10, at 85; Ex. 1, Robyn Smith Decl. at ¶ 17; Ex. 2, Tyler Decl. at ¶¶ 14, 15, 19; Decl. of Laura Smith at ¶¶ 7-9 ("Laura Smith Decl.," attached as Exhibit 3).
[65] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 16.
[66] *See* Ex. 1, Robyn Smith Decl. at ¶ 18; Ex. 2, Tyler Decl. at ¶¶ 8, 19.
[67] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 13.
[68] *See* 2019 Rules, 84 Fed. Reg. at 49,823-24.
[69] *See* 2018 NPRM, 83 Fed. Reg. at 37,244, 37,252.
[70] Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 13.
[71] In addition, unlike the 2016 Rules, the 2019 Rules do not provide a reconsideration process should the borrower discover more evidence of school misconduct. 2019 Rules, 84 Fed. Reg. at 49,830; 34 C.F.R. § 685.206(e)(13). *See* Ex. 1, Robyn Smith Decl. at ¶¶ 36-37, 62-65.
[72] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 16.
[73] *See* Nunn Report, *supra* note 3.
[74] 34 C.F.R. § 685.206(e)(3).

the Federal Trade Commission's definition of deception[75] and many state unfair and deceptive acts and practices statutes.[76] And, the 2019 Rules require borrowers to accompany their written testimony with documentary evidence of school misrepresentations. Further, the 2019 Rules rescind ED's obligation to view a borrower's application against its own records[77] and include technical exclusions for eligibility. This standard is difficult for most defrauded borrowers to meet.

As legal aid attorneys told ED in their comments to the 2018 NPRM, "Former students [...] often lack records from their schools (and rarely have school records of their own)."[78] Many defrauded borrowers live in shelters or temporary housing and have no permanent mailing address, making it difficult to receive any school-related documents.[79] Even when borrowers are represented, school records can take months to arrive or are simply unavailable.[80] In an effort to make the application process fair, the 2016 Rules required that ED official assigned to assess if an individual application was eligible for relief also consider ED records.[81]

The 2019 Rules arbitrarily require each borrower to submit documentary evidence proving the school's conduct to receive relief, but rescind the 2016 Rules' requirement that schools submit records to ED when students challenge their misconduct in arbitration or court. Unlike the 2016 Rules, ED "may" consider information it holds about a school's misrepresentation when assessing an application.[82] ED changed what information schools needed to submit because "these provisions required a significant

[75] The FTC's definition of misrepresentation only requires knowledge for individual liability, not liability for a corporate defendant. *See Fed. Trade Comm'n v. Bay Area Bus. Council, Inc.,* 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC may establish corporate liability under section 5 with evidence that a corporation made material representations likely to mislead a reasonable consumer."); *Fed. Trade Comm'n v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 319-20 (S.D.N.Y 2008); 16 C.F.R. § 254 *et. seq.*, Guides for Private Vocational And Distance Education Schools (defining types of deceptive school conduct, but not listing knowledge as a prerequisite for a violation).

[76] *See generally* Nat'l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* § 4.2.5.1 (9th Ed., 2016), updated at www.nclc.org/library (citing cases from majority of states); *see also* Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Laws* (March 2018), https://perma.cc/AVL8-E2EE (citing state-by-state survey of UDAP statutes' features).

[77] *Compare* 34 C.F.R. § 685.206(e)(9)(ii) *with* 34 C.F.R. § 685.222(e)(3)(i).

[78] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 41. *See also* Ex. 1, Robyn Smith Decl. at ¶ 40.

[79] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 41.

[80] *See id. See also* Ex. 1 Robyn Smith Decl. at ¶ 41, 51-54 ("[Legal aid staff] request[s] student records from the school under the Family Educational Rights and Privacy Act (or the school's custodian of records, the state agency, or a bankruptcy trustee if a school has closed); request[s] records related to government oversight and investigations of the school under [FOIA] and/or the California Public Records Act; research[es] and find[s] other sources of school-related records from accrediting agencies, lawsuits, state attorneys general, etc. This can take several weeks to several months, and sometimes even longer because the Department is slow to respond to FOIA requests and appeals of insufficient FOIA responses.").

[81] 34 C.F.R. § 685.222(e)(3)(i)(A) ("As part of the fact-finding process, the Department official … considers any evidence or argument presented by the borrower and also any additional information, including [] Department records"). *See* 2016 Rules, 81 Fed. Reg. at 75,962 ("§ 685.222(e)(3) provides that for individually filed borrower defense applications, the designated Department official will also consider other information as part of his or her review of the borrower's claim. […] [T]he decision maker […] would assess the value, or weight, of all of the evidence relating to the borrower's claim[.]").

[82] 34 C.F.R. § 685.206(e)(9)(ii).

amount of paperwork to be submitted[.]"[83]

Conversely, requiring each borrower to submit written evidence "to demonstrate a misrepresentation occurred" certainly creates a "significant amount of paperwork" for both borrowers and ED. ED justified adding this requirement by claiming "future students [would] bear the cost of prior students' borrower defense claims in the form of increased tuition" and the evidentiary burden guarded against "frivolous" claims. [84] But as Plaintiff argues, ED's fear of frivolous claims is unsupported.[85] Additionally, "future students" would benefit most from schools being honest and accountable.[86] Instead, the 2019 Rules' misrepresentation standard encourages schools to rely on unwritten deceptive practices or to correct verbal misrepresentations with small print in form enrollment contracts.[87] Such a standard gives schools permission to deploy many of the predatory practices exemplified in the 2012 HELP Report.[88]

In addition to the documentary evidence a borrower must provide, the 2019 Rules require borrowers to parse through a complicated definition of a qualifying misrepresentation.[89] As legal aid attorneys observe, borrowers often do not know what information is relevant to substantiate their borrower defense claim, even under the less-demanding 2016 Rules.[90] Paradoxically, the 2019 Rules state ED "need *not* liberally construe" borrowers' unrepresented claims because it will "provide instructions that are easy to understand and does not expect borrowers to provide legal arguments."[91]

Similarly, borrowers simply will not know how—or will simply be unable—to prove by a preponderance of the evidence what their school knew or didn't know when it made a misrepresentation.

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[83] 2019 Rules, 84 Fed. Reg. at 49,845; 2018 NPRM, 83 Fed. Reg. at 37,265.
[84] 2019 Rules, 84 Fed. Reg. at 49,817-18.
[85] Pl. Br. at 19-20.
[86] ED states, "Under the [2019 Rules' standard], a school engaging in misrepresentation alone will not be sufficient for a successful claim." 2019 Rules, 84 Fed. Reg. at 49,798-99.
[87] Legal aid commenters gave other examples of unfair and deceptive conduct ineligible for relief under the narrow misrepresentation standard, too. *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, at 32-36.
[88] *See* HELP Report, *supra* note 5, at 55-56 (recruiters from Kaplan College, when asked by prospective students about the graduation rate, said, "I want to say 90 percent" when nearly half of students didn't graduate). ED claims it will consider verbal misrepresentations, but then indicates that where a verbal representation contradicts what is otherwise in writing, the borrower should only make their enrollment decision "based upon written representations and documentation from the institution," 2019 Rules, 84 Fed. Reg. at 49,807, indicating the Department will not grant relief if a borrower is tricked by verbal misrepresentations.
[89] 34 C.F.R. §§ 685.206(e)(3), (5)(ii)(F).
[90] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 33-37, 50, 62-64 (describing how clients' pro se applications were "limited in facts and devoid of significant relevant information" because they were not assisted by counsel and did not know where their schools' misconduct was documented).
[91] 2019 Rules, 84 Fed. Reg. at 49,826.

As ED has acknowledged, "gathering evidence of intent [is] nearly impossible for borrowers"[92] and it is equally difficult to determine a school's knowledge.[93] As a result, borrowers harmed by their school's predatory practices will not be able to meet the 2019 Rules' heightened standards for relief.

3. The 2019 Rules arbitrarily require that borrowers show they were "financially harmed" in a way that ignores how borrowers are actually harmed by predatory schools.

The 2019 Rules require that borrowers provide evidence to prove that they suffered financial harm "incur[ed] as a consequence of a misrepresentation,"[94] but, perversely, defines harm to exclude the most obvious and relevant harm: the student loan debt incurred in reliance on the misrepresentation.[95] The 2019 Rules then erects further barriers to relief by requiring the borrower to show that no intervening factors, including "intervening local, regional, or national economic or labor market conditions,"[96] contributed to the causal relationship between the school's misrepresentation and the harm the borrower experienced.[97] Again, this standard assumes that a borrower can discern what evidence is sufficient to satisfy the standard, a task that requires an attorney's assistance or even expert testimony.[98]

ED's explicit exclusion of borrowers' acquisition of student loan debt from its definition of financial harm[99] is irrational and contrary to virtually all states' unfair and deceptive practices statutes: this is the most obvious and causally connected harm suffered by borrowers who take out loans in reliance on a misrepresentation.[100] Excluding federal student loan debt from "financial harm" ignores the damage student loan debt causes borrowers when that debt is fraudulently induced. Borrowers who attended predatory schools often tell their legal aid attorney that they would never have taken on student loans had they known the truth about their school.

Defrauded borrowers' student loan debts are financially destabilizing, preventing them from

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[92] 2016 Rules, 81 Fed. Reg. at 75,937. "This reflects the Department's longstanding position that a misrepresentation does not require knowledge … on the part of the institution." *Id.*
[93] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM 2018, *supra* n. 7, at 24.
[94] 34 C.F.R. § 685.206(e)(4); 2019 Rules, 84 Fed. Reg. at 49,930.
[95] 34 C.F.R. § 685.206(e)(4); 2019 Rules, 84 Fed. Reg. at 49,819-20.
[96] 34 C.F.R. § 685.206(e)(4).
[97] 2019 Rules, 84 Fed. Reg. at 49,798, 49,819-20.
[98] National Student Loan Defense Network, Comment Letter on the Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations at 10 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018-OPE-0027-31574 (hereinafter, NSLDN, Comment Letter on Borrower Defense 2018 NPRM).
[99] 34 C.F.R. § 685.206(e)(4).
[100] *See generally* Nat'l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* (9th Ed., 2016), updated at www.nclc.org/library.

taking necessary life steps like returning to school, getting married, or having children.[101] One study estimated that borrowers subject to school misconduct experience a lifetime wealth loss that averages around $208,000, stopping them from investing in wealth stabilizing opportunities like retirement savings.[102] Defrauded borrowers' student loan debts also ruin their credit, which in turn limits their ability to rent or purchase a home. Worse, when federal student loans default, ED can extrajudicially garnish borrowers' wages and seize their tax refunds.[103]

The financial harm requirements also irrationally exclude borrowers who did not complete their program. For example, ED provides limited examples of financial harm that could be applied to a borrower who did not complete their program.[104] But predatory schools often have low completion rates for a variety of reasons, including poor programing and student supports, and students drop out after realizing that the school is not what it was sold as.[105] It may be difficult for a borrower who withdrew for those legitimate reasons to demonstrate that the misrepresentation and not the withdrawal from school caused subsequent financial harm.[106] More generally, requiring borrowers to prove that a school's misrepresentation was the *sole* cause of their harm will exclude people in vulnerable situations, the very people predatory schools aggressively aim to recruit, from relief.[107] Recent immigrants, borrowers with exigent health circumstances, single parents, and borrowers with criminal records, among others, will struggle to demonstrate they are entitled to relief under the 2019 Rules. Few will be able to prove that their school was the sole cause of the hardship they experienced.[108]

Any one of these borrower defense eligibility standards on their own would disqualify countless defrauded borrowers from obtaining relief. But, together, the elements required by the 2019 Rules make borrower defense an illusory remedy for borrowers who are subject to school fraud. As one student loan advocate explained, "[I]t is hard to fathom how individual unrepresented student loan borrowers could

[101] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 34, 69.
[102] R. Hilton Smith, Demos, At What Cost? How Student Debt Reduces Lifetime Wealth (Aug. 7, 2013), https://perma.cc/F38Q-ZQB8; *See also* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 27.
[103] *See* Persis Yu, Nat'l Consumer Law Ctr., Voices of Despair: Student Borrowers Trapped in Poverty When the Government Seizes Their Earned Income Tax Credit (July 2020), https://perma.cc/CVR8-NDR4 (documenting how the seizure of Earned Income Tax Credits harms low-income working families).
[104] 34 C.F.R. §§ 685.206(e)(4)(ii), (iv).
[105] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 28, 64-65.
[106] *See* 34 C.F.R. § 685.206(e)(4).
[107] HELP Report, *supra* note 5, at 58.
[108] Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 31.

possibly satisfy these requirements."[109]

C. The 2019 Rules' restrict borrowers' access to justice, further reducing the likelihood a defrauded borrower will be able to attain loan relief.

In addition to imposing heightened eligibility requirements on defrauded borrowers seeking loan relief, the 2019 Rules rescind the 2016 Rules' limits on when schools could compel borrowers to forced arbitration.[110] The 2019 Rules reverse course from ED's prior position that predatory schools were using arbitration clauses to stop students, law enforcement, and oversight agencies from catching wind of their predatory practices.[111] This regulatory change will impact many borrowers; shortly before 2016 Rules took effect, most for-profit schools used arbitration clauses.[112]

These clauses cause many students immense harm. Arbitration prevents many borrowers from accessing justice at all; legal aid organizations often do not have the capacity to represent individually defrauded borrowers in arbitration proceedings and arbitration clauses prevent wrongs from being addressed via class action or private litigation.[113] Many predatory schools use arbitration clauses to insulate themselves from liability for wrongdoing and to prevent school accreditors, ED, and law enforcement agencies from discovering students' complaints. And when students are prevented from using class actions to challenge and build an evidentiary record of predatory schools' practices, those practices often stay hidden from the public for years.[114] Indeed, the Supreme Court has repeatedly recognized that class actions are essential to provide redress for claims that are too time- and resource-intensive to assert individually.[115] ED recognized in its 2016 Rules that, "[A]busive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school[s] to continue that abuse unhindered by lawsuits from consumers [had] cost [] taxpayers [] millions of dollars in losses and [would] continue to do so."[116]

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[109] *See* NSLDN, Comment Letter on Borrower Defense NPRM 2018, *supra* note 100, at 10.
[110] 2019 Rules, 84 Fed. Reg. at 49,840-44.
[111] *See* 2016 Rules, 81 Fed. Reg. at 76,025; 2016 Proposed Rules, 81 Fed. Reg. at 39,381; Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 10, at 57-60.
[112] *See* Tariq Habash & Robert Shireman, The Century Found., How College Enrollment Contracts Limit Students' Rights (April 28, 2016), https://bit.ly/2CMlSvK. In contrast to for-profit schools, few non-profit or public schools compelled students to arbitration.
[113] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 15, 20.
[114] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 60 (ITT Tech used arbitration agreements to conceal the fact that school officials deliberately mislead students into believing their New Mexico campus's nursing programs were accredited, when in reality they were not).
[115] *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).
[116] 2016 Rules, 81 Fed. Reg. at 76,025.

Moreover, the consequences of using arbitration clauses are more severe when considered in context with the 2019 Rules' other regulatory changes. Evidence publicly filed in court is a critical source of documentation of school misconduct for borrowers to cite to when substantiating their own grounds for a borrower defense. Even if students opt to arbitrate their claims, arbitration doesn't provide the same discovery rights students are otherwise entitled to in court—and schools are reticent to produce documents related to misconduct unless they are compelled by subpoena.[117] And any evidence revealed in arbitration against predatory schools are likely to be subject to confidentiality provisions, and thus unavailable as evidence to support other students' borrower defense claims.

D. The 2019 Rules arbitrarily remove automatic closed-school loan discharges, a critical protection for low-income borrowers.

The HEA states, "If a borrower… is unable to complete the program in which [they are] enrolled due to the closure of the institution… then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees)[.]"[118] The 2016 Rules added regulations that automatically discharged the federal student loan debt of students whose school closed after November 1, 2013 if the student was not able to finish their academic program and did not re-enroll in any title IV-eligible institution within three years of the school's closure.[119] Additionally, the 2016 Rules added a requirement that a closing school notify students of the availability of a closed school discharge.[120] These regulations prevented students who attended a closed school from falling into a financial spiral simply because they were unaware they were eligible for relief. The 2019 Rules' arbitrary removal of automatic closed-school discharges for borrowers whose schools close after July 1, 2020 will create needless hardship for borrowers and increase the caseload of legal aid advocates.

ED acknowledged it needed to implement automatic closed school discharges because "[r]esearch has consistently shown that students who do not complete their programs are among the most likely to default on their loans, leaving them worse off than when they enrolled"[121] and only a fraction of the

[117] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 41, 60.
[118] 20 U.S.C. § 1087(c)(1).
[119] 34 C.F.R. § 685.214(c)(2); 2016 Rules, 81 Fed. Reg. at 76081. ED would use information already in its possession to process automatic loan discharges.
[120] 34 C.F.R. § 668.14(b)(32); 2016 Rules, 81 Fed. Reg. at 76070. Requiring schools to provide closed school notices is important because closing schools do not provide information regarding closed school discharges to students when explaining their options. *See* Ex. 1, Robyn Smith Decl. at ¶ 74.
[121] *See* 2016 Rules, 81 Fed. Reg. at 76,036.

borrowers eligible for a closed school discharge were applying for relief.[122] ED recognized that the low application numbers were likely due to borrowers' unawareness that they were eligible for a discharge.[123] This is consistent with comments from legal aid providers, who said that many of their clients seek help decades after attending their school.[124] In addition, legal aid advocates noted that borrowers are often prevented from accessing relief because they are flummoxed by the technical language and lay-out of the closed-school discharge application and fail to submit a complete form to ED.[125] The automatic closed-school loan discharges saved many borrowers from needing legal aid help.

Without analyzing the cost to borrowers and the economic impacts of requiring borrowers to repay debt they are entitled to discharge, the 2019 Rules removed automatic closed-school discharges for borrowers whose schools close after July 1, 2020[126] and removed student-facing closed-school discharge notices.[127] ED claimed that the regulation ran counter to "the goals of these final regulations, which include encouraging students at closed or closing schools to complete their educational programs, either through a teach out plan, or through the transfer of credits separate from a teach out."[128]

ED's rationale is flawed. The purpose of the HEA, which gave rise to these regulations, was to ensure that all Americans could access quality postsecondary education and create a skilled workforce, healthy economy, and access upward mobility.[129] The plain language of the HEA mandates that the Secretary discharge the debt if the borrower is unable to complete their program.[130] Indeed, Congress intended that borrowers harmed by their schools would not face financial hardship that would frustrate the aims of the Act.[131] Thus, the regulatory goal must be to remedy the harm caused by a closing school—not force the borrower to complete a potentially low-value program. As ED knows, "[I]t is not always in the borrower's best interest to continue a program through graduation [because] the value of the degree the borrower obtains may be degraded, depending on the reasons for the closure. Borrowers

[122] 2016 Proposed Rules, 81 Fed. Reg. at 39,369; 2016 Rules, 81 Fed. Reg. at 76,032.
[123] 2016 Proposed Rules, 81 Fed. Reg. at 39,369.
[124] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 84-85.
[125] *Id.* at 80.
[126] 2019 Rules, 84 Fed. Reg. 49,847-48.
[127] *Id.* at 49,854.
[128] 2019 Rules, 84 Fed. Reg. 49,847-48.
[129] *See supra* note 2; Nunn Report, *supra* note 3, at 5.
[130] 20 U.S.C. § 1087(c)(1).
[131] *See* An Act to Reauthorize the Higher Education Act of 1965, Pub. L. No. 102-325, Title IV, § 437, 106 Stat. 448 (codified as amended at 20 U.S.C. § 1087(c) (2018)); David Whitman, When President George H. W. Bush "Cracked Down" on Abuses at For-Profit Colleges, *supra* n. 4 (discussing Congressional hearings and school closures that preceded Congress's passage of amendments to the HEA that included closed school discharge).

… may incur unmanageable debt in exchange for relatively low-value degrees."[132]

Ending automatic closed-school discharges will increase the numbers of borrowers desperate for loan assistance. As ED knows, without automatic closed-school discharges, more borrowers are likely to default. Borrowers whose issues might have been addressed by an automatic discharge, before their financial plights worsened year after year, will be forced to turn to legal aid organizations. Neither borrowers nor legal aids should have to face this hardship because the change is arbitrary and capricious.

III. Under the 2019 Rules, legal aid organizations will struggle to adequately serve clients who are desperate for relief from debt stemming from predatory schools' deceptive practices.

Every state in America has its share of borrowers struggling to pay their federal loan debt and each has cohorts of borrowers whose student loan debt is in default.[133] Eighty percent of Americans cannot afford legal assistance to help them assess what relief is available.[134] Hundreds of thousands of Americans who have nowhere else to turn attempt to get student loan advice from legal aid organizations each year. Yet, few offer student loan services,[135] and of the organizations that do, demand always exceeds capacity.[136]

Even with the protections added by the 2016 Rules, legal aid organizations struggled to meet the demand for student loan help.[137] In fact, defrauded borrowers denied relief under the prior rule are returning to legal aid organizations to help them identify their options. Now, with automatic closed-school discharges rescinded, the numbers of low-income borrowers struggling to repay debt they could discharge will increase. The 2019 Rules will only make defrauded borrowers' path to relief more difficult and their chances of success more unlikely.

The 2019 Rules increase borrowers' need for legal help and leave borrowers even more vulnerable to school misconduct than they were before. Although the 2019 Rules claim school misconduct will still be deterred,[138] the lax student protections in the 2019 Rules will embolden predatory schools to

[132] 2016 Rules, 81 Fed. Reg. at 76,034.
[133] *Debt in America; an Interactive Map*, Urban Institute (last updated Dec. 17, 2019), https://urbn.is/2CcWsaQ.
[134] Leonard Willis, Am. Bar Assoc., Access to Justice: Mitigating the Justice Gap (Dec. 3, 2017), https://perma.cc/86YY-CL9S.
[135] *See Legal Resources*, Student Loan Borrower Assistance Project at the Nat'l Consumer Law Ctr., https://perma.cc/2R5H-37TU; Ex. 3, Laura Smith Decl. at ¶ 3.
[136] Ex. 1, Robyn Smith Decl. at ¶ 12; Ex. 2, Tyler Decl. at ¶ 6.
[137] *See* Ex. 1, Robyn Smith Decl. at ¶ 12; Ex. 2, Tyler Decl. at ¶¶ 9-10.
[138] 2019 Rules, 84 Fed. Reg. at 49,896.

continue targeting vulnerable populations.[139] Indeed, predatory schools will know that as long as the truth is embedded in small print in complex and confusing documents, the lies their representatives tell will go unchecked[140] if the borrower is even able to submit an application.[141] As ED's projections demonstrate, only 3% of the loan volume held by defrauded borrowers will be forgiven under this arbitrary and capricious Rule.[142]

Furthermore, the complexity of the 2019 Rules, described above, will mean that each stage of representation will take even longer, and legal aid advocates across the country will be forced to work longer hours to serve fewer clients. Ultimately, under the 2019 Rules, despite the longer hours borrowers and legal aid organizations alike will spend compiling applications, many deserving low-income borrowers will be unable to attain relief. These borrowers will experience a complete inversion of the rationale behind the HEA; instead of being given access to higher education and relief after being subject to school misconduct, they will suffer financial hardship and face economic inertia.

A. Legal aid organizations providing student loan help were already pushed to capacity under the 2016 Rules.

Legal aid organizations are already overwhelmed with the volume of low-income clients who need student loan help. Legal aid organizations serving client populations of millions of people have few dedicated, full-time student loan attorneys; for example, Legal Aid Foundation of Los Angeles (LAFLA) only has one, and Philadelphia, a city where over 25% of the population has student loan debt and 44% live at or below the poverty line, has none.[143] Even legal aid organizations that have dedicated student loan attorneys are overwhelmed by borrowers' need for help; LAFLA reports that it must periodically close its doors to borrowers just to manage their caseloads.[144]

The legal aid organizations' student loan clients generally experience decades of financial

[139] *See* Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 28, 31, 32, 35 (describing ways in which predatory schools targeted vulnerable populations).
[140] *See* 2019 Rules, 84 Fed. Reg. at 49,807 (stating borrowers should "make these important decisions based upon written representations and documentation from the institution").
[141] Indeed, ED itself "expect[s] that the changes in the final regulations that will reduce the anticipated number of borrower defense applications are related more to changes in the process, not due to changes in the type of conduct on the part of an institution that would result in a successful defense[.]" 2019 Rules, 84 Fed. Reg. at 49,897.
[142] The Institute for College Access & Success, Defrauded Students Left Holding the Bag Under Final "Borrower Defense" Rule (Sept. 3, 2019), https://perma.cc/L25A-R7QP.
[143] Ex. 1, Robyn Smith Decl. at ¶ 8 ("LAFLA presently employs one part-time Senior Attorney (three-fifths time), one full-time staff attorney, and one legal fellow to cover the entirety of its student loan work. The legal fellow's one-year fellowship will expire at the end of November in 2020."); Ex. 2, Tyler Decl. at ¶ 6; Ex. 3, Laura Smith Decl. at ¶ 3.
[144] Ex. 1, Robyn Smith Decl. at ¶ 12.

hardship due to debt that was fully dischargeable.[145] Clients often only seek help if "they are facing a financial emergency catalyzed by their student loans[.]"[146] As Johnson Tyler, an attorney at Brooklyn Legal noted, "Borrowers who suspect that their school scammed them often d[o] not think they could do anything about it until they speak with us."[147] Low-income borrowers often realize for the first time that they are eligible for a closed school discharge or borrower defense when meeting with legal aid staff.[148] Others try to attain relief on their own but don't realize how profoundly their school was breaking the law to optimize school profits at students' expense[149] or are stopped because they cannot navigate the legal system alone.[150]

Despite the Department's assertion in the 2019 Rules that "[a]rbitration does, in fact, help 'provide a path' for borrowers to acquire relief in an efficient, cost-effective, and quicker manner than traditional litigation[],"[151] most borrowers do not have the means to hold schools accountable in arbitration or in court. Legal aid organizations cannot serve the volumes of clients needing student loan help if they sink extensive resources into arbitrating students' claims.[152] Affirmative litigation only makes sense from a resource perspective if it is a class action or develops caselaw that helps others.[153]

As a result, a borrower defense discharge is many clients' only means of attaining relief. Advocates were already spending significant amounts of time helping borrowers submit borrower defense applications under the less-challenging 2016 Rules. In fact, the prior rules' process was already so complicated and time-consuming that student loan legal aid attorneys could only provide borrower defense representation for a limited number of clients and turned scores of others away.[154] Advocates report that when submitting borrower defense applications under the prior rule, they spent an average

[145] For example, one client of Community Legal Services in Philadelphia suffered with the debt stemming from "a Philadelphia trade school [she attended] for a few weeks in 1988 until it closed," including having her tax refund taken, for thirty years before realizing she qualified for loan relief. Ex. 3, Laura Smith Decl. at ¶ 7. Clients of Brooklyn Legal Services have struggled with debts for decades before realizing they were eligible to file a borrower defense. Ex. 2, Tyler Decl. at ¶ 14-15. *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 24-28, 30-31, 33-37.
[146] Ex. 2, Tyler Decl. at ¶¶ 8, 19.
[147] *Id.*
[148] *See* Ex. 1, Robyn Smith Decl, at ¶¶ 16, 25, 31, 69; Ex. 2, Tyler Decl. at ¶¶ 13-15; Ex. 3, Laura Smith Decl. at ¶ 7.
[149] Ex. 1, Robyn Smith Decl. at ¶¶ 33-37, 62-65.
[150] *See* Ex. 1, Robyn Smith Decl. at ¶ 20 (describing that often private attorneys will not represent clients in claims against schools or federal student loan matters because they will not collect attorneys' fees); Ex. 2, Tyler Decl. at ¶ 13 (describing a client who tried, and failed, to sue his school pro se).
[151] 2019 Rules, 84 Fed. Reg. at 49,841.
[152] *See* Ex. 1, Robyn Smith Decl. at ¶ 15.
[153] *See* Ex. 1, Robyn Smith Decl. at ¶ 15; Ex. 2, Tyler Decl. at ¶ 7.
[154] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 12, 43-44; Ex. 2, Tyler Decl. at ¶¶ 9-10.

of between 5 and 50 hours of work on each application.[155] And, even after receiving an attorneys' help to compile an application, borrowers with meritorious claims are receiving denials under the prior rule, forcing legal aid organizations to weigh their clients' options.[156] The 2019 Rules do nothing to alleviate the burdens preventing borrowers from attaining relief under the 2016 Rules; to the contrary, they make it even more difficult to get relief.[157] Despite legal aid organizations' valiant efforts, borrowers will certainly fare worse under the 2019 Rules.

B. Legal aid attorneys will need to dedicate significantly more time to help borrowers complete forms and respond to schools under the 2019 Rules' borrower defense process.

The 2019 Rules will involve a lengthier application form that will take more time for the advocate to complete than it already took to assemble an application under the 2016 Rules. Advocates will need to engage in substantially more factual investigation and back-and-forth with their clients to show that the borrower satisfied the Rules' impossible standards, as discussed above.

Furthermore, the 2019 Rules will require advocates to engage in extended, time-sensitive representation. Legal aid advocates will be pressed to help borrowers assemble a complete application supported by evidence within three years of the date the borrower left school.[158] Advocates will again need to provide time-sensitive representation to borrowers to analyze and respond to a school's response to the borrower's application.[159] The process established by the 2019 Rules puts the borrower and the school in an openly adversarial process, and how the student responds to a school's submission may determine the outcome of a borrower's application.[160] The heightened back and forth between school and borrower will further limit the number of former students that legal aid attorneys are able to take on as clients.[161] The heightened workload created by the 2019 Rules will further reduce how many low-income clients legal aid organizations can represent in borrower defense proceedings.[162]

[155] Ex. 1, Robyn Smith Decl. at ¶ 88. *See also* Ex. 2, Tyler Decl. at ¶ 12 (spending an average of 12 hours just preparing an application form, excluding time spent interviewing the client).
[156] *See* Ex. 1, Robyn Smith Decl. at ¶ 65. From December 2019 until May 2020 the Department granted 10,133 applications and denied 45,228 applications. U.S. Dep't of Educ., May 2020 Borrower Defense Report, https://bit.ly/2OsJIQ4
[157] *See* Ex. 1, Robyn Smith Decl.at ¶ 87; Ex. 2, Tyler Decl. at ¶¶ 16-18, 20-22.
[158] 34 C.F.R. § 685.206(e)(6)(i).
[159] 34 C.F.R. § 685.206(e)(10)(i).
[160] *Id.*; 2019 Rules, 84 Fed. Reg. at 49,837.
[161] *See* Ex. 2, Tyler Decl. at ¶ 16.
[162] *See* Ex. 1, Smith Decl. at ¶ 87; Ex. 2, Tyler Decl. at ¶ 17.

C. The 2019 Rules require that advocates conduct extensive investigations to unearth documentary evidence necessary to substantiate their clients' borrower defense claims.

Advocates share the evidentiary burdens students face in compiling a complete application that satisfies the heightened requirements of the 2019 Rules. To zealously represent each client, the legal aid advocate will need to exhaust every avenue that might yield documentary evidence that substantiates their client's claims against their school and fully unearths the extent of the school's misconduct. Because there are numerous sources that hold relevant information about a school, those efforts will take time. As Robyn Smith, an attorney at LAFLA explained:

> [W]e often spend extensive time obtaining documents to support each client's application. We often submit a FERPA request for student records to the school if it still exists. If it does not, then we research who maintains the student records, which could be a state agency, a third-party custodian of records, or a bankruptcy trustee if the school has filed for bankruptcy. We then must spend time requesting the records from the appropriate party which can also take time. Sometimes state agencies and/or bankruptcy trustees have the records, but take time to find them because they are disorganized. We also often submit FOIA requests to the Department, California Public Records Act requests to the Bureau for Private Postsecondary Education, look for old catalogs, websites and advertisements on-line and through the "Way Back Machine," and research lawsuits by state attorneys general or private parties and request documents from them. Sometimes we obtain voluminous documents that we must then review and organize. If our client has contact information for other former students or former school staff, we will often attempt to contact these people to interview them and prepare declarations. In addition, in some cases we will find experts who will agree to submit declarations.[163]

Legal aid staff use their legal expertise to get evidence the client would not be able to attain on their own.[164] Moreover, borrowers and advocates alike will be deprived from discovering evidence that would have been exposed in court through student lawsuits because of the 2019 Rules' removal of limitations of when schools can compel students to arbitrate. As a result, representing each defrauded borrower will take more dedicated time from any advocate who agrees to represent them than is otherwise required under the 2016 Rule.

[163] Ex. 1 at ¶¶ 51-53.
[164] *See id.* at ¶¶ 36-37 (describing the extensive added evidence LAFLA attorneys added to a borrower's pro se borrower defense application).

D. The 2019 Rules will make it substantially more difficult for legal aid organizations to provide assistance to low-income borrowers submitting pro se applications.

Even under the 2016 Rules, it took advocates hours to provide advice to borrowers submitting their own application.[165] Because the 2019 Rules are so complex and difficult to satisfy, advocates will be forced to dedicate more time to explaining the ins and outs of borrower defense and decoding the legal terms[166] that govern whether relief is available for both direct representation and pro se clients. Previously, some advocates emphasized to borrowers completing application pro se that they should focus on providing affidavit testimony that present a clear picture of his or her school's misconduct and the impact their loans have had on their lives.[167] While before, advocates emphasized that a borrower provide as complete a picture as possible of their school experience, the 2019 Rules necessitate that they understand what documentary evidence will show that the school's misrepresentation "directly and clearly relates to enrollment or continuing enrollment … or the provision of educational services for which the loan was made" and what "financial harm" will make the borrower eligible for relief.[168] Further, ED hasn't consumer-tested its application forms and doesn't provide borrowers with assistance to complete the form, meaning legal aid organizations will need to guide borrowers through how to complete the form itself.[169] Borrowers already struggled to compile a complete application under the prior standards; the 2019 Rules only heighten barriers for borrowers applying for relief without a lawyer.

Additionally, because the 2019 Rules impose new drawbacks to filing a borrower defense form, advocates will be forced to help borrowers assess whether the risks are worthwhile. Under the Rules, borrowers who apply but are denied or partially granted will have their interest capitalized when the Secretary reinitiates repayment.[170] Moreover, the 2019 Rules give schools permission to withhold transcripts (if otherwise permitted by state law) if students' borrower defense application is granted.[171] Advocates will need to carefully discuss the potential consequences of filing a borrower defense application with each applicant.

[165] *Id.* at ¶¶ 43-50 (describing the process LAFLA provides when advising borrowers submitting their own applications, and noting they spent up to 5 hours on each case).
[166] Indeed, even negotiators were confused by the legalese in proposed regulatory language during negotiated rulemaking and ED acknowledged it would be confusing for schools and borrowers alike. Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 14.
[167] Ex. 1, Robyn Smith Decl. at ¶¶ 48-50.
[168] 34 C.F.R. §§ 685.206(e)(3)-(5); 2019 Rules, 84 Fed. Reg. at 49,816, 49,819-20.
[169] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM *supra* note 7, at 80-81.
[170] 2019 Rules, 84 Fed. Reg. at 49,816. While the 2016 Rules also allowed the Department to capitalize interest, it had not done so previously. *See Borrower Defense to Repayment*, U.S. Dep't of Educ. (July 4, 2020), https://bit.ly/2OPekv6.
[171] 2019 Rules, 84 Fed. Reg. at 49,837.

E. Advocates will dedicate substantially more time to educating the public about student loan laws under the 2019 Rules.

The changes in the 2019 Rules will allow ED to abrogate its responsibility to protect borrowers from misconduct and educate them about predatory schools and their federal student loan rights,[172] and as a result, legal aid advocates will be the only line of defense for many defrauded borrowers. To fill the education-gap left by ED, some legal aid advocates will dedicate more time to educate their current clients and the public about the 2019 Rules' relief eligibility standards, the importance of seeking legal advice quickly after they believe a school has defrauded them, and the need to keep all school marketing, enrollment, and loan materials for at least a few years after leaving their school. Thus, the 2019 Rules make every stage of representation more challenging and complicated for legal aid advocates and will make it difficult for legal aid organizations to continue serving the same volume of clients as they did under the prior rules.

CONCLUSION

Amicus urges this court to grant NYLAG's Motion for Summary Judgment to ensure that borrower defense is not made an illusory remedy for borrowers seriously harmed by the misrepresentations of predatory schools across the county.

Respectfully submitted,
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[172] *See* 2019 Rules, 84 Fed. Reg. at 49,823 ("[T]he Department has emphasized the need for students to be engaged and informed decisions about their education choices.[…] We believe borrowers are able to inform themselves of their options, if they have been harmed by an institution's misrepresentation."); *id.* at 49,828 ("The Department disagrees that students are largely reliant on their own testimony to file a defense to repayment claim. The Department urges students to make informed consumer decisions and treats students as empowered consumers. While students should request important information that is relevant to their enrollment decision in writing, institutional misconduct is never excusable[.]").

CERTIFICATE OF SERVICE

I certify that on this 24th day of July 2020, I electronically filed the foregoing brief using the CM/ECF system, which I understand to have caused service to the counsel for all parties.

Respectfully submitted,

/s/ Andrew Pizor

EXHIBIT 1

Declaration of Robyn Smith in Support of Amicus

I, Robyn Smith, declare as follows:

1. I am a Senior Attorney at the Legal Aid Foundation of Los Angeles ("LAFLA"), where I have worked part-time for over 6 years. I am licensed to practice law in the State of California. I have personal knowledge of the matters stated herein and, if called as a witness, could and would competently testify thereto.

2. I exclusively handle student loan and higher education cases at LAFLA. I also handle student loan related work as Of Counsel for the National Consumer Law Center.

3. I have worked in the area of student loan and higher education law for over twenty years, including in my work as an attorney in the Consumer Law Section of the California Department of Justice from 2000 through 2009, and as Director of the Consumer Law Project at Public Counsel, a legal services organization in Los Angeles, from 1998 to 2000.

4. LAFLA is a public interest leader on student loan work, having developed student loan and for-profit school expertise over the last 30 years. We provide outreach and education, self-help clinics, and direct legal assistance to financially distressed student loan borrowers. We also engage in state and federal advocacy on higher education policies. We serve as a resource for and often consult with other legal services organizations carrying out this work throughout the country.

5. Our policy and advocacy efforts are grounded in our direct legal assistance work with low-income borrowers, particularly those who have been harmed by deceptive for-profit schools.

6. Currently, LAFLA is one of a handful of legal services organizations across the country that provide free legal assistance to low-income student loan borrowers. Like all of the other legal services organizations that provide student loan assistance to low-income borrowers, LAFLA lacks sufficient staff to meet the overwhelming demand for their services.

7. LAFLA is the only non-profit legal services organization in Los Angeles County that has a full-time staff attorney dedicated to representing student loan borrowers.

8. LAFLA presently employs one part-time Senior Attorney (three-fifths time), one full-time staff attorney, and one legal fellow to cover the entirety of its student loan work. The legal fellow's one-year fellowship will expire at the end of November in 2020.

9. As of July 1, 2019, the Los Angeles County had an estimated population of over 10 million, with 14.2% people in poverty.

10. The majority of LAFLA's student loan clients are non-traditional students – older students who work while they attend college, veterans, single parents, non-English speakers, and/or the first in their families to attend college. The majority of the people we assist are African American or LatinX.

11. Our federal funding from the Legal Services Corporation allows us to assist only those student loan borrowers who meet specific eligibility criteria, including that they must have not have income that exceeds 200% of the federal poverty level for their household size. In very limited circumstances we can provide services to people with slightly higher levels of income under separate grants.

12. While LAFLA strives to serve as many clients as possible, we cannot assist every person who seeks help due to the high demand for our services. Over the last five years, we have had to close our student loan intake twice for several months each time because we were unable to keep up with the demand while managing our existing case load.

13. Our level of legal services ranges from counsel and advice to administrative applications and representing borrowers in court.

14. Student loan borrowers seek our help for a wide range of matters, including: defending against private or federal student loan collection actions; getting defaulted federal loans out of default through Direct Loan Consolidation or loan rehabilitation; stopping involuntary federal debt collection, including wage garnishment, Social Security or SSDI benefits offsets, and tax refund seizures; obtaining and staying on income-driven repayment plans; applying for closed school, false certification, unpaid refund, and disability discharges; submitting borrower defense applications; resolving disputes with their colleges; resolving credit report disputes; stopping unfair debt collection practices; stopping payments to and

recovering money from fraudulent debt relief companies; and applying for relief to the California Student Tuition Recovery Fund.

15. Given the volume of clients we serve, we do not have the capacity to bring affirmative litigation against schools. Similarly, we do not have the capacity to represent borrowers in arbitration proceedings.

16. Many of these borrowers are eligible for some type of federal debt relief that will help their situation, including loan discharges based on school misconduct. Most, however, are unaware of their eligibility for debt discharges. Indeed, although many borrowers know that their schools lied to them and provided substandard educations at best, they have no idea that their schools violated any laws or that they had any rights to seek redress for the deceptive and illegal practices they experienced.

17. In most cases, from several years to as much as 30 years have passed since our clients last attended college and seek our assistance. It is very rare for clients harmed by school fraud to seek help within three years after they stopped attending.

18. Most of our clients call us when they are threatened with or experiencing some kind of involuntary federal debt collection, have been served with a debt collection lawsuit, want to go back to school but are barred from doing so due to defaulted federal debt, are unable to afford their monthly loan payments, or have been unable to obtain housing, employment, or credit because of the defaulted loans reported on their credit reports.

19. In most cases, our clients could have avoided financial disaster if they had received sufficient loan advice long before they sought our assistance. Instead, low-income borrowers often receive misinformation from a number of sources, including loan servicers and debt collectors. They very rarely advise clients about their potential eligibility for closed school discharges or borrower defense relief, even when borrowers tell loans servicers or debt collectors that their schools closed or that they had problems with their schools. Loan servicers and debt collectors typically focus on pressuring borrowers to make payments. For borrowers who cannot afford monthly payments and who have not yet defaulted, loan servicers pressure borrowers to put their loans into forbearance or apply for income-driven repayment plans. For

these reasons, many borrowers struggle to repay their federal student loan debts for years even though they were eligible for a loan discharge.

20. In addition, the private bar typically does not take on federal student loan discharge cases. There is little financial incentive to do so since our clients lack the means to pay attorneys and clients rarely receive a sufficient refund from a discharge to pay an attorney on a contingency basis. Similarly, many private attorneys refuse to represent borrowers whose schools behaved illegally when the borrower's enrollment contract includes a mandatory arbitration clause because the likelihood of success in arbitration is lower.

21. By the time some borrowers seek help from LAFLA, it has been years since the borrower attended their school. Often, they have already defaulted on their federal loans and exhausted their one shot to get out of default by consolidating their loans into either Direct or FFEL Consolidation Loans. Some of these borrowers have re-defaulted before they seek LAFLA's services.

22. Thus, the three-year statute of limitations in the 2019 Rules will likely bar most future clients harmed by school fraud from ever receiving any type of federal student loan relief.

23. For example, in April 2008, Mr. R (we use only his last initial to protect his privacy) enrolled in a bachelor's degree program in media and art animation at the Art Institute ("AI") based on, among other things, false promises that he would have no problem finding high paying employment after graduation. However, after he graduated in March 2014, he was never able to find a job in the field for which he trained and earns approximately $800 per month doing maintenance/grounds-keeping work.

24. In 2018, Mr. R. sought LAFLA's assistance when we he was served with a debt collection lawsuit for private student loans he obtained to attend AI. He also had taken out multiple federal loans totaling over $80,000. On a number of these loans, after he first entered repayment 2013, he had difficulty making the monthly payments and his loan servicer used serial forbearances to prevent his default.

25. When LAFLA discovered that Mr. R had enrolled at AI based on misrepresentations and other state law violations, we advised him that he was eligible for borrower defense relief. He had never heard of borrower defense and had no idea he was possibly eligible for any type of federal student loan relief. LAFLA therefore completed and submitted a borrower defense claim on his behalf in March 2019, which is still pending. 40 hours of attorney/staff time, including pro bono attorney time, was spent preparing and submitting the borrower defense claim.

26. As another example, in 2000, Mr. D enrolled at United Education Institute College (UEI) where he obtained $6,625 in federal student loans to attend the Network Technology program.

27. After completing the program in 2001, Mr. D struggled to find employment and repay his loans. After falling into default on his student loans in 2004, he consolidated his federal student loans to get out of default. Mr. D subsequently fell into default again in 2006. Then, in 2015 and 2016, his federal income tax refunds were seized to repay his defaulted federal student loan. In April 2019, when the Department began garnishing his wages, Mr. D sought the assistance of LAFLA to stop the garnishment.

28. Because UEI made multiple misrepresentations to Mr. D regarding its job placement rates; the quality of its program; the likelihood of obtaining a job; and the earning potential of graduates, LAFLA advised Mr. D that he was eligible for discharge of his federal student loans through a borrower defense claim. Prior to this, Mr. D had no idea that he was eligible for any type of relief based on the misconduct of UEI. After LAFLA prepared and submitted the borrower defense claim on Mr. D's behalf, the wage garnishment was stopped in June 2019.

29. Many borrowers have difficulty correctly completing the borrower defense application for the 2016 Rules without legal assistance, or even the far easier one-page Attestation form the Department developed for a specific group of Corinthian College borrowers. Because the 2019 Rules incorporates far more difficult and legalistic standards,

many more borrowers will need legal help completing and submitting the borrower defense application for loans obtained after July 1, 2020.

30. For example, Mr. C enrolled in the Automotive Technology program at Wyotech Long Beach, a Corinthian Colleges school, in 2011 and received $9500 in federal student loans for his enrollment. After completing his program in 2013, Mr. C struggled to find a job in his field of study and received none of the promised assistance from Wyotech.

31. Mr. C found out from a LAFLA clinic that he was eligible for loan relief under the Department's borrower defense findings against his campus for illegally inflating job placement rates. Using a self-help guide, Mr. C prepared and submitted an Attestation Borrower Defense Application on his own. The Department granted his borrower defense claim, but Mr. C was confused to find that only half of his Everest loans were cancelled. He contacted LAFLA for further assistance, and we determined that Mr. C's had incorrectly filled out his dates of enrollment; his estimates were short by several months. The Department's approval only provided a discharge for the loans that were disbursed during the enrollment period that Mr. C indicated in his initial application, leaving out 2 of the 4 federal student loans that he actually took out for his attendance. LAFLA assisted Mr. C to obtain further documentation to indicate his correct enrollment dates and helped him to prepare a revised Borrower Defense claim. While the first application was approved within 6 months of submission, the revised application has been pending for nearly 3 years, with no indication of when a final decision will be made.

32. In addition, most borrowers cannot obtain documentary evidence necessary to prove their borrower defense claims on their own. As a result, the 2019 Rules' new requirement that borrowers' testimony is not enough to substantiate a school's misrepresentation will bar thousands of borrowers from obtaining relief.

33. For example, in 2006, Ms. S enrolled in the Criminal Justice Program at ITT Technical Institute (ITT Tech). While enrolling, ITT Tech made misrepresentations to Ms. S regarding its graduate employment rates and their average salaries; the quality of instruction, including teacher credentials; and the career services assistance available to graduates.

34. Ms. S obtained over $51,000 in federal student loans to earn her ITT Tech degree. After completing her program in 2010, Ms. S. could not find employment in the criminal justice field. Employers would not hire her based on her ITT Tech degree and ITT Tech did not provide any careers services to help Ms. S find employment as promised. She eventually gave up on her dream of working in the criminal justice field.

35. As a result, Ms. S suffered severe financial hardship as she not only struggled to support herself, but she struggled to support her children. In 2016, Ms. S defaulted on her federal student loan.

36. In 2016, Ms. S consolidated her loans out of default and submitted a pro se borrower defense claim to the Department. However, because she was not assisted by legal counsel, her application was limited in facts and devoid of significant relevant information. After waiting over 2 years for a response to her borrower defense claim, in September 2019 Ms. S contacted LAFLA seeking assistance with discharging her federal student loans.

37. LAFLA reviewed the borrower defense application submitted by Ms. S and prepared and submitted a revised borrower defense claim with the Department. The new application included extensive details and information regarding the misrepresentations made by ITT Tech, as well as the subsequent financial hardship Ms. S suffered as a result of her attendance at ITT Tech. LAFLA also submitted nearly 250 pages of supporting evidence for her claim, including: administrative agency memos; internal documents and memos concerning ITT Tech, which LAFLA obtained through a FOIA request to the Department; correspondence between Ms. S. and federal/state/and administrative agencies, including the Office of then Senator for the State of California Dianne Feinstein and California Attorney General Kamala Harris, whereby Ms. S. made multiple requests for these agencies to intervene on payment of her federal student loans; and newspaper articles. Ms. S's application is still pending.

38. Due to the complex nature of higher education financing, our student loan clients require legal assistance in order to identify and access the relief options for which they are eligible.

39. When clients first seek our services, they are often unaware of what kind of financial aid they received. They typically have little or no documentation regarding their student loans, many do not even have an Federal Student Aid ("FSA") ID. The FSA ID allows borrowers to download all their federal student loan information and history, which we must review in order to evaluate each client's options.

40. Our clients also do not typically have any documents from their school, such as enrollment agreements, other agreements they signed, disclosures provided, loan documents, records of funds paid to the school, etc.

41. Thus, to evaluate their case, we must gather documentation. This includes helping our clients obtain an FSA ID and download their federal student loan information from the Department's website; requesting their student records from the school under the Family Educational Rights and Privacy Act (or the school's custodian of records, the state agency, or a bankruptcy trustee if a school has closed); requesting records related to government oversight and investigations of the school under the Freedom of Information Act ("FOIA") and/or the California Public Records Act; researching and finding other sources of school-related records from accrediting agencies, lawsuits, state attorneys general, etc. This can take several weeks to several months, and sometimes even longer because the Department is slow to respond to FOIA requests and appeals of insufficient FOIA responses.

42. In the meantime, we often conduct triage to stabilize the client's financial situation, including getting the clients on an affordable repayment plan or out of default to stop involuntary collection such as wage garnishment or Social Security benefit offsets.

43. In 2019, we provided counsel and advice or limited service in 154 student loan cases.

44. Of these 154 cases, we advised—but could not fully represent—approximately 60 borrowers that they were eligible to seek a loan discharge by filing a borrower defense claim. We did not have the capacity to provide any further assistance to these 60 borrowers, even when they had meritorious borrower defense claims.

45. Even though we did not fully represent these 60 clients, we spent up to 5 hours on each case performing an intake/reviewing eligibility, interviewing the client regarding the facts of his/her case, sometimes helping the client to set up an FSA ID, obtaining information regarding the client's student loans, reviewing that information and other available documents, sometimes doing legal research, and providing advice about the options available to the client.

46. Because the 2016 borrower defense process is already complex, we attempt to provide simple instructions and advice that our clients can understand. We communicate primarily by letter because, based on our caseloads, we cannot spend time coaching and assisting our clients through the borrower defense process.

47. The main evidence available to students in borrower defense cases is their testimony because postsecondary school misrepresentations are typically verbal.

48. To the extent that documents are helpful to prove school misconduct, very few borrowers have copies of any of the disclosures provided to them, enrollment agreements, advertisements, loan agreements, documents showing all funds paid to the school and charged to the student, instructional materials, faculty qualifications, school career services leads, etc.

49. Most students also have no idea whether their schools were subject to state or federal investigations, accreditor actions, or lawsuits of any kind, nor do they know how to make FOIA requests, state Public Records Act requests, or how to research if any such documents are otherwise publicly available. While all of this is important evidence of school misconduct, we typically do not advise borrowers to seek these documents because doing so is complicated and, if added to our counsel and advice letters, likely to deter borrowers from applying for relief.

50. For these reasons, in our counsel and advice letters we try to provide simple advice we think borrowers can follow. We advise borrowers to provide detailed descriptions of the misrepresentations that were made to them and any other illegal conduct, as well as the financial harm they suffered, including how the student loans have impacted their lives. Without this advice, in my experience most borrowers with meritorious claims tend to provide very short answers to most questions on the borrower defense application for the 2016 Rules.

51. Preparing and submitting borrower defense applications under the 2016 Rules are time-consuming. After initial intake, as noted above, we often spend extensive time obtaining documents to support each client's application. We often submit a FERPA request for student records to the school if it still exists. If it does not, then we research who maintains the student records, which could be a state agency, a third-party custodian of records, or a bankruptcy trustee if the school has filed for bankruptcy. We then must spend time requesting the records from the appropriate party which can also take time. Sometimes state agencies and/or bankruptcy trustees have the records, but take time to find them because they are disorganized.

52. We also often submit FOIA requests to the Department, California Public Records Act requests to the Bureau for Private Postsecondary Education, look for old catalogs, websites and advertisements on-line and through the "Way Back Machine," and research lawsuits by state attorneys general or private parties and request documents from them. Sometimes we obtain voluminous documents that we must then review and organize.

53. If our client has contact information for other former students or former school staff, we will often attempt to contact these people to interview them and prepare declarations. In addition, in some cases we will find experts who will agree to submit declarations.

54. After a student loan discharge is submitted, our legal services do not end. We must confirm the application's receipt with the federal loan servicer and monitor the application's processing.

55. In 2019, we provided extensive services to approximately 45 borrowers. This level of service means that we did extensive research, prepared complex legal documents, had extensive interactions with third parties, or provided extensive ongoing assistance.

56. Of these 45 cases, we prepared borrower defense applications for 14 clients. We closed the 14 borrower defense cases as extensive service because we either helped the clients submit their applications pro se, or the clients did not keep in touch with us. LAFLA staff and attorneys spent an average of 22 hours on each of the borrower defense cases.

57. After a student loan discharge is submitted, our legal services do not end. We must confirm the application's receipt with the federal loan servicer and monitor the application's processing.

58. For clients who first sought our services in 2019, we submitted 23 borrower defense applications which were still pending as of Dec. 31, 2019.

59. Though LAFLA's resources are already stretched thin, we anticipate an increased demand for our legal services for a number of reasons. We continue to receive calls from new clients who enrolled at for-profit colleges over the last 15 years and are eligible for borrower defense. We are also receiving an increasing number of calls from current and new clients who want assistance appealing Department denials of their borrower defense applications.

60. Indeed, we are likely to stop accepting new student loan cases starting in November 2020, or even earlier, because our legal fellow's one-year fellowship terminates at the end of November. We do not have sufficient funding at this time to hire him as a staff attorney at the end of his fellowship.

61. When a loan discharge is denied, we evaluate the case for administrative or district court appeal as these appeals take up considerable resources. In the last few months, both current and new clients are starting to receive letters either denying their borrower defense claims or granting partial discharges. We are evaluating each case on whether there is any merit to submitting additional evidence and requesting reconsideration or appealing to district court. Because there are a large number of legal questions and potential pitfalls for each approach, and each case is fact-intensive, we are doing both legal and factual research before we decide how to handle each of these cases.

62. For example, in 2016 Mr. W obtained both federal and private loans, totaling over $200,000 to earn his bachelor degree in fine arts (photography) at the Brooks Institute of Technology ("Brooks"), a for-profit school which was owned by Career Education Corporation. He enrolled based on Brooks' representations that it had high graduate placement rates, offered a highly competitive and well-respected photography program, and that Mr. W

would be placed in an elite class of working professionals. Based on these representations, Mr. W borrowed this large sum of loans and invested in the Brooks education believing that a Brooks degree would lead to a high-paying, successful career in photography. Although Mr. W graduated and earned a degree, he was never able to find a job as a photographer. It was only after graduating and making this significant life investment that Mr. W discovered that Brooks had inflated its placement rates and lied about its reputation and the employability of its graduates.

63. Before Mr. W attended, California's Bureau for Private Postsecondary Vocational Education and Brooks' accreditor had both taken action against Brooks for inflating its placement rates and making other misrepresentations in order enroll students. Brooks was also embroiled in a class action involving former students which it eventually settled for over $12 million. Brooks did not disclose this information to Mr. W before he enrolled.

64. Mr. W owes over $80,000 for federal student loans from his attendance at Brooks. He submitted a borrower defense claim pro se to the Department, seeking a discharge of his federal loans based on his school's misconduct, but only included limited details and information regarding the misrepresentations on which he relied in enrolling. He did not know about and therefore did not submit the extensive evidence from the accreditation agency, the California oversight agency, or the class action to support his claim.

65. The Department recently denied Mr. W's BD claim. We are now assessing whether to request reconsideration and submit this additional evidence of Brooks' illegal practices or appeal to federal district court.

66. The 2019 Rules will have other consequences for the clients we assist. For example, clients who have to consolidate out of default after July 1, 2020—which will create a new Direct Consolidation Loan that may be subject to the 2019 Rules' borrower defense standard-- will likely be unable to obtain a borrower defense discharge under the 2019 Rules, even though they would have been eligible for a borrower defense discharge under the 2016 Rules.

67. For example, a former Corinthian student sought help from LAFLA for her defaulted federal student loans from Everest College. Sometime in 2008, Ms. J had enrolled in the Criminal Justice Program based on the school's misrepresentations regarding job placement rates, expected salary after graduation, transferability of credit, and career services after she graduated.

68. After graduating in 2014 and taking on over $30,000 in federal student loans, however, Ms. J realized that Everest had lied to her. Unfamiliar with any options for how to obtain relief and unable to find a job in her field of study, Ms. J struggled with her debt, which fell into default in February 2019.

69. When she sought to purchase a home in early 2020, she was unable to qualify for loans due to her defaulted student debt, which was the only negative account on her credit. She searched for help and contacted LAFLA, where she learned for the first time of her eligibility for borrower defense relief. However, in order to get her loans out of default so she could buy a home, Ms. J had to make the difficult decision to consolidate her loans out of default, foreclosing her eligibility for a borrower defense claim.

70. By the time the consolidation is finalized, Ms. J's Direct Consolidation Loan will be subject to the more draconian 2019 Rules; under the new regulation's three year limitation period, Ms. J will not be able to submit a borrower defense claim as three years have already passed since she completed her program.

71. Similarly, the 2019 Rules' removal of automatic closed school discharge will mean more students will struggle to repay debt that should have been discharged.

72. I have seen firsthand the misinformation and confusion that plagues students in the wake of a school's closure.

73. Typically, when a school closes, students panic and have no idea where to turn for help.

74. In the midst of their panic, students are bombarded with confusing or misleading information from multiple sources. Prior to the enactment of the closed school disclosure provisions in the 2016 Rules, these included (1) the closing school itself, which

often does not provide any information on closed school discharges but instead focuses on providing transcripts and encouraging students to transfer their credits so that the school is not liable for the closed school discharges; (2) competitor for-profit schools, who pressure students to enroll in their programs, promising that they will accept transfers of credits when in fact they may accept few, and calling themselves "teach-outs" when in fact they are not providing free teach-outs approved by accreditors or the state oversight agency; and (3) debt relief companies, which physically hand out, e-mail and mail students misleading advertisements guaranteeing loan forgiveness, when in fact these companies illegally charge students up-front fees, then file loan consolidation applications or perform no services at all.

75. The closed school disclosure requirements in the 2016 Rules covering the program participation agreements would have helped to alleviate much of the above confusion by requiring closing schools to provide discharge information to its students.

76. As an example, the for-profit school chain, Marinello Schools of Beauty, closed in February 2016 after the Department of Education determined that it had engaged in a fake high school diploma scheme to obtain federal student loans on behalf of non-high school graduates who were not in fact eligible for federal financial aid.

77. LAFLA hosted a legal clinic to inform Marinello students of their rights and loan discharge options. For many attendees, LAFLA's legal clinic was the first time that they heard about their eligibility for a closed school discharge and other loan cancellation options.

78. Our attendees and attorneys left the clinic to find a Marinello debt relief flyer posted on their cars' windshields. The flyer was for a scam debt relief company bearing Marinello's logo and claiming to have "loan forgiveness experts who get you the most out of forgiveness." A true and correct copy of this debt relief flyer is attached hereto as Exhibit A.

79. Even though the Department is required by the discharge regulation to cease collection and notify students about their closed school discharge eligibility after a school closes, the Department often notifies students several months to a year after a school closes. By that time, students also receive multiple deceptive offers of loan forgiveness from

fraudulent debt relief companies. They often do not trust or understand the closed school discharge notices from the Department and therefore do not always apply.

80. For these reasons, at least several clients a year call us for help with their student loans, and LAFLA discovers that they are eligible for a closed school discharge even though the school closed decades ago. The vast majority of these clients never again attempted to go to college or obtain federal financial aid to do so.

81. For example, when she was just 18-years-old in 1991, Ms. D saw flyers posted in her Central Los Angeles neighborhood offering security guard training. Ms. D visited the school, the for-profit college Brookline Technical Institute. Based on its promises of a high-equality education and a job placement program that would lead to a lucrative career in private security, Ms. D enrolled in its security guard program.

82. Ms. D received $4,625 in federal student loans to finance her tuition at Brookline.

83. A few months after she enrolled, Ms. D and other students arrived at the school building and found themselves locked out; the school unexpectedly closed. In the weeks that followed, an instructor organized picket lines outside of Brookline's corporate offices. She attended several such protests, but eventually gave up on receiving any further services or refunded tuition.

84. Ms. D sought our assistance in 2016, after the government seized over $7,000 in federal income tax benefits to repay her defaulted federal loans. We helped her apply for a closed school discharge, but the Department denied her application on the grounds that she had no evidence to show that she was attending Brookline when it closed – it had established a closed school date that was later than the date of the school lockout.

85. We issued FOIA requests and searched for documents with this information. We finally obtained an old document, from the now-defunct California agency that had guaranteed her student loans, with the dates of her attendance. After we submitted an appeal to the Department with this new evidence, Ms. D's closed school discharge application was granted. The Department discharged approximately $19,000 in student loan debt in May 2018

and refunded Ms. D $7800 in September 2018. Total LAFLA staff and attorney time on this matter was 84 hours.

86. If an automatic discharge regulation like the one included within 2016 Rules had covered Ms. D, it would have prevented her decades-long struggle with debt that should have been discharged. The 2019 Rules' removal of that regulatory provision guarantees that there will be more students with experiences like Ms. D.

87. Overall, the 2019 Rules will increase the number of low-income borrowers who need legal assistance to (a) evaluate whether they are even eligible for borrower defense relief under the impossibly high standards and (b) find and prepare the extensive documentary evidence that will be necessary to submit applications. Even worse, it will force LAFLA to turn away more borrowers harmed by for-profit school fraud because of the increased amount of labor it will take to prepare borrower relief applications and prepare responses and possibly additional evidence to counter school opposition to the applications.

88. Given that LAFLA now spends between 5 and 50 hours on each borrower defense application it prepares, exclusive of the time LAFLA will have to spend appealing negative decisions, there is no possible way that LAFLA will be able to provide assistance or representation to many borrowers under the new 2019 Rules.

89. I declare under penalty of perjury under the laws of the State of California that the statements contained in his declaration are true and correct.

Executed on this 17th day of July, 2020, at Los Angeles, California.

Robyn Smith

Digitally signed by Robyn Smith
DN: cn=Robyn Smith, o=Legal Aid Foundation of Los Angeles, ou=ESWG, email=rsmith@lafla.org, c=US
Date: 2020.07.17 07:42:31 -07'00'

ROBYN SMITH
Senior Attorney
Legal Aid Foundation of Los Angele

Exhibit A

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EXHIBIT 2

Declaration of Johnson M. Tyler in Support of Amicus

I, Johnson M. Tyler, declare as follows:

1. I am an attorney at the Brooklyn office of Legal Services NYC, where I have worked for over 31 years. I am licensed to practice law in the State of New York and the Federal Courts for the Eastern and Southern Districts of New York. I have personal knowledge of the matters stated herein and, if called as a witness, I could and would competently testify thereto.

2. For the last seven years, and on a full-time basis since 2018, I have worked on student loans and higher education cases at Legal Services NYC.

3. Legal Services NYC provides free legal services to over 110,000 clients in a wide range of civil cases. I am the only attorney at Legal Services NYC dedicated full-time to student loan issues, although two other consumer attorneys occasionally defend borrowers in private student loan suits filed in state court.

4. New York City has 8.4 million people, 43% of which live at or near the poverty line. 3.6 million individuals qualify as low-income in New York City. 15% of New Yorkers have student loan debt.[1]

5. I serve low-income clients with student loan issues from all five boroughs of the city.

6. Excluding the New York Legal Assistance Group attorneys that provide legal assistance to student loan borrowers, I am only aware of one other attorney that works full-time on student loan issues in New York City. The volume of low-income people who need legal help to address student loan issues exceeds the number of student loan attorneys in the city.

7. Each year, we represent hundreds of borrowers in student loan related issues. We assist them with administrative actions and also defend them against collection actions in state court and federal court. Occasionally, we represent borrowers

[1] https://www.newyorkfed.org/medialibrary/media/outreach-and-education/community-development/credit-conditions/student-loan-borrowing-nyc-neighborhoods.pdf

in affirmative cases in federal court against servicers, debt collection agencies, the Department of Education, and others. We also provide hundreds of borrowers with assistance and advice, but do not represent them. On an average week, I will conduct six intakes for low-income borrowers seeking help with their student loan issues.

8. Clients often contact Legal Services NYC because they are facing a financial emergency catalyzed by their student loans, such as having their wages or social security benefits garnished or their tax refund seized. Borrowers who suspect that their school scammed them often did not think they could do anything about it until they speak with us. Many borrowers who contact us and attended a for-profit school are eligible for multiple types of loan relief. Because of the dire financial condition most borrowers are in when they contact us, we must help clients pursue relief that will quickly stop involuntary collections, extinguish student loan debt, or return large amounts of money.

9. Approximately 1 in 5 students seeking student loan help from Legal Services NYC in 2019 attended a for-profit school. Almost every borrower who attended a for-profit school and contacts us has a meritorious borrower defense claim. Often, they contact us years, if not decades, after they attended their school.

10. Because borrower defense applications require hours of attorney time to complete, we are often unable to provide full representation to borrowers who have a meritorious borrower defense. In 2019, we were not able to help approximately 60 people submit borrower defense claims, even though they had meritorious claims that their school deceived them and/or violated state law.

11. Since 2016, we have filed 12 borrower defenses.

12. On average, due to the high volume of cases I work on, I can't spend much more than 12 hours drafting and preparing any loan discharge application. This does not include the time spent prior to the deciding to file the borrower defense. Typically I spend at least two additional hours just interviewing the client and gathering loan information. The most time-consuming portion of compiling such applications is substantiating a borrower's experience. This involves locating similar claims via federal

and state freedom of information filings, locating and reviewing agency audits and law enforcement actions against the offending school, and making sense of earnings, debt loads, and repayment rates of borrowers who attended the offending school found on the U.S. Department of Education's public data website.

13. Borrowers struggle to get student loan relief without the assistance of an attorney. One borrower for whom I prepared a borrower defense application previously tried to sue his school in state court, twice. He was unable to find a private attorney to take his case and both cases were dismissed due to procedural errors on his part. He contacted us because he did not have any other options and received a letter warning him that his tax refund would be intercepted. He did not know he could file a borrower defense until we met.

14. Borrowers often don't know what they can do after a school has defrauded them, either. For example, a 38-year-old woman contacted us after the Department of Education seized her tax refund and garnished her wages. In 2004, she attended a "medical coding school" called the Career Institute for Health and Technology. When trying to get her to enroll, school representatives mailed her a solicitation telling her medical billing specialists—the profession the school would train her for—made between $35,000 and $65,000 a year. Remarkably, unlike most clients I serve that do not have documentation of their school's misrepresentation, she saved the mailing. Shortly after graduating, she discovered that the school lied about how much medical billing jobs paid. She was able to get a medical billing job that paid $9 an hour, or approximately $18,000 annually. She also discovered that she could have gotten the job without going to a special medical billing school. Like many other borrowers I speak with, even though she knew her school lied, she did not think she could do anything about it. She filed for bankruptcy in 2016 and was told she should seek out legal aid to help her with her student loans, which were not dischargeable. She only sought out legal help on her student loan problem 13 years after she attended the school. Legal Services staff spent 11 hours compiling and filing her borrower defense, which is still pending.

15. Another 77-year-old woman contacted Brooklyn Legal Services when her Social Security check was offset in 2018. She attended a beauty school in the late 1980s and quickly discovered that her school lied to her about the quality of their instructors and educational program. At her school, students were asked to cut each other's hair without meaningful instruction or supervision. She did not think she could do anything about the debt, even though she knew her school cheated her. She contacted Brooklyn Legal Services because she was falling behind on her bills due after she experienced a Treasury offset of her Social Security benefits to pay for her defaulted beauty school debt. Only then when she contacted us did she learn she could file a borrower defense. We spent 4.25 hours drafting and filing her borrower defense application. Her application took less time than normal because I had already collected substantial information about the school's misconduct from a criminal investigation into the school and prosecution of its employees.

16. The 2019 Borrower Defense Rules will make it even more difficult for me to represent clients filing borrower defense claims. The new standard will take more time to explain to borrowers and will confuse borrowers who have not yet filed for relief that have claims governed by the 2016 or state law standards.

17. The heightened complexity of the 2019 Rules' relief eligibility standards combined with the time-sensitive need to respond to schools' responses to my clients' borrower defenses will make it impossible for me to serve the same volume of clients and to represent borrowers in borrower defense proceedings.

18. Many low-income borrowers—my future clients—who have meritorious claims against their school will be precluded from being eligible for relief under the 2019 Rules unless they file within three years of leaving the school.

19. My experience is that borrowers do not grapple with extinguishing a loan involving a predatory for-profit until their wages are garnished, or their tax refund is intercepted, or they become disabled or retire and have their Social Security offset. These events happen many years, if not decades, after a borrower leaves an offending

school. This is because borrowers move to more legitimate schools and get in-school deferments and servicers pressure borrowers to utilize other repayment options like income driven repayment, or loan forbearance that make no payment due on the predatory-school loan, even if student discloses that their school closed or the nature of their borrower defense claim to the servicer.

20. Moreover, the 2019 rules substantially change the types of evidence my future clients will have to provide to get relief. To help these borrowers file a borrower defense, I will have to engage in an even more intensive factual investigation than before. I anticipate that gathering the necessary evidence to complete an application will take substantially more time than the time it took me to complete a borrower defense under the 2016 Borrower Defense Rules. Because records requests often take months to process, I anticipate that some borrowers will not be able to attain the best evidence to support their claim within the three-year limitations period—or at all.

21. I also anticipate that, because the 2019 Rules rescind automatic closed school loan discharges, our office will have even more clients seeking loan relief help. Like many of the clients we currently serve, those students will also experience default and involuntary collections even though they were eligible for federal loan relief.

22. Finally, because the 2019 Rules rescind the regulations limiting when schools can compel students to arbitration and the regulations requiring schools to submit arbitral and judicial records to the Department, it will be even harder to hold schools accountable in court. I anticipate that more schools will engage in predatory practices to induce students to enroll because they will know they will not get caught or exposed to law-makers and law-enforcement.

I declare under penalty of perjury under the laws of the State of New York that the statements contained in his declaration are true and correct. Executed on this 15th day of July, 2020.

By: -s- *Johnson M. Tyler*

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EXHIBIT 3

Declaration of Laura Smith in Support of Amicus

I, Laura Smith, declare as follows:

1. I am a staff attorney in the Homeownership and Consumer Rights Unit of Community Legal Services of Philadelphia ("CLS")
2. CLS provides free legal services to low-income Philadelphians.
3. According to the most recent census data, more than 24 percent of Philadelphians live in poverty.[1] In the part of North Philadelphia where one of CLS's two offices is located, at least 45 percent of people live in poverty.[2] As of 2017, 14 percent of Philadelphians lived in deep poverty (defined as having income at or less than half the poverty level).[3] Over 25 percent of Philadelphians have an active student loan.[4] One in five Philadelphians with a student loan was severely delinquent in December 2018.[5]
4. CLS receives frequent requests for help with student loan debt, including situations involving closed school discharges and borrower defenses to repayment.
5. Unfortunately, CLS does not currently have a dedicated attorney to represent people facing these problems. With limited resources and no dedicated attorney, CLS usually provides only advice or limited representation to these people.
6. CLS is not aware of any other legal help in Philadelphia for people seeking closed school discharge, borrower defense to repayment forgiveness, or other student loan relief.
7. Borrowers who seek student loan help from CLS are often facing a financial crisis. For example, one borrower, Ms. B, sought assistance from CLS when she received a notice of proposed wage garnishment for two federal student loans.

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[1] https://www.census.gov/quickfacts/philadelphiacountypennsylvania
[2] https://www.pewtrusts.org/-/media/assets/2019/05/state_of_poverty.pdf
[3] *Id.*
[4] https://philadelphiafed.org/-/media/community-development/publications/special-reports/student-loan-debt-in-philadelphia.pdf?la=en
[5] *Id.*

She attended a Philadelphia trade school for a few weeks in 1988 before it closed. Because the school closed, she didn't think she had to repay her student loan debt. She did not know about closed school loan discharges. Years later, her tax refunds were seized to repay these loans. When she received a wage garnishment notice, collection agents told her she could only enter into a repayment agreement to avoid the garnishment. When she consulted with an attorney at CLS in 2019—thirty years after she attended her school—she learned she was eligible for a closed school loan discharge. She applied for relief and received a discharge.

8. Because she did not have legal help, she spent decades with a reported delinquency, lost her tax refunds, and was threatened with wage garnishment—all for loans that were eligible for a complete discharge.

9. Another borrower, Ms. M, with limited English proficiency, borrowed federal student loans to attend a private vocational school in New York. The school closed in 2014 because the school administrators were illegally collecting federal grant money by inflating foreign students' attendance records. Ms. M did not know she was eligible for a closed school loan discharge. She made regular monthly payments until she lost her job. She attempted to apply for a closed school discharge, but did not complete the form correctly because of her limited English proficiency. Despite being eligible for relief, she was denied. With the assistance of a paralegal at CLS, she resubmitted her closed school discharge application and received a full discharge on her loan in 2017.

10. If the automatic closed school loan discharge regulations are rescinded, more borrowers like Ms. B and Ms. M will needlessly suffer decades of repaying debt that is eligible for discharge simply because they are unaware they are eligible or because they are unable to complete the Department's complicated forms.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of July, 2020, in Philadelphia, Pennsylvania.