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SLBA
Student Loan Borrower Assistance

February 15, 2019

The Honorable Doug Jones
326 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Elizabeth Warren
317 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Kamala D. Harris
112 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Catherine Cortez Masto
204 Russell Senate Office Building
Washington, D.C. 20510

VIA ELECTRONIC MAIL to rebecca_howard@jones.senate.gov

Dear Senator Jones, Senator Warren, Senator Harris, and Senator Cortez Masto:

We write in response to your call for thoughts and ideas on how to address racial disparities in student debt and the broader challenges faced by students of color in college and career training. Your January 3rd letter identifies critical issues that can impede the educational, financial, and life trajectories of students and borrowers of color.

We advocate on behalf of low-income consumers and represent individual student loan borrowers, a significant majority of whom are people of color. Their experiences and our work have shown us that our system of higher education finance is broken and causes disproportionate harm to the people who rely on it most—but whom it was intended to serve.

When we meet with new clients, they are generally seeking assistance to prevent or stop the punishing consequences of student loan delinquency and default. Since students of color are more likely to default on their student loans, we urge you and your colleagues to reduce the risk of default and to tailor the consequences of default to achieve the goals of the federal student aid program while supporting student loan borrowers in achieving their goals.

Default prevention begins with providing robust grant aid instead of loans to students who need help paying for college. As we discuss in the enclosed February 23, 2018 comments submitted to the Senate Committee on Health Education, Labor and Pensions, default prevention also includes taking proactive steps to assist student loan borrowers who start to fall behind on payments, as well as ensuring that predatory for-profit schools no longer receive taxpayer dollars when they fail to serve students.

Tailoring the consequences of student loan default so that they are not unreasonably punitive would also protect people of color. Administrative wage garnishments, tax refund offsets, and federal benefits offsets hamstring the budgets of low-income people who are already struggling to make ends meet. As we wrote in the enclosed August 17, 2016 coalition letter to the Secretary of the U.S. Department of Education, we need more data about the extent to which student loan borrowers of different races bear these consequences of default—and how they fare when they seek to cure default and get back on track. Too many of our clients are borrowers of color who face debt collection tactics they cannot endure. More data is slowly becoming available, and we applaud your insight and instinct to request more outcomes information that is disaggregated by race.

When their schools and loan servicers fail to serve them, it is important for students and borrowers of color to have meaningful pathways to seek relief and be made whole. Congress has given the Department of Education considerable oversight responsibilities and also powerful tools, including administrative processes like loan discharges, to address concerns. However, when students have been harmed and are unable to vindicate their rights through administrative channels, those students should be able to seek help through the courts.

As we discuss in our February 23rd comments, schools should not be able to force their students to waive the right to have their day in court. Neither should the Department of Education be able to assert preemption to shield loan servicers or others from the legal claims of injured borrowers. Congress can and must protect students and borrowers of color, so that they have clear pathways to the relief to which they are entitled. This will free them to pay the loans they owe while still paying for the basic necessities of life.

Thank you for your keen attention to the issues facing students and borrowers of color. We appreciate the invitation to provide input, and submit this letter on behalf of our low-income clients. Please contact Joanna Darcus at jdarcus@nclc.org or (617) 542-8010 with any questions or comments.

Sincerely,

The National Consumer Law Center's Student Loan Borrower Assistance Project

Enclosures:

(1) February 23, 2018 Comments on HEA Reauthorization to the Senate Committee on Health, Education, Labor and Pensions.
(2) August 17, 2016 Coalition Letter to Secretary of Education John B. King Jr. (on racial disparities in student loan outcomes and the issue of default).

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SLBA
Student Loan Borrower Assistance

Comments on Reauthorization of the Higher Education Act of 1965
to the Senate Committee on Health, Education, Labor and Pensions

submitted by the
National Consumer Law Center
(on behalf of its low-income clients)

February 23, 2018

We thank the Committee on Health, Education, Labor, and Pensions for the opportunity to submit these comments on the reauthorization of the Higher Education Act (HEA). HEA reauthorization presents a prime opportunity to repair the federal student aid system and ensure that it helps low-income students to succeed.

Introduction

Established in 1969, the National Consumer Law Center (NCLC) is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys and their clients, as well as community groups and organizations that represent low-income and older individuals on consumer issues. NCLC's Student Loan Borrower Assistance Project provides information about rights and responsibilities for student borrowers and advocates. We also seek to increase public understanding of student lending issues and to identify policy solutions to promote access to education, lessen student debt burdens and make loan repayment more manageable.

Our clients are among those for whom a college education would be out of reach but for the federal financial aid program. Title IV of the Higher Education Act (HEA) is intended to promote access to higher education and the many benefits such an education can offer to student and society. Grants are an important component of the financial aid program, but increases in the cost of education have far-outpaced the value of grants. Therefore, many families must rely on loans to cover a significant proportion of their educational expenses. Low-income students and students of color—the populations the HEA was designed to help—are more likely to take on student loan debt than their wealthier and white peers.[1]

Unfortunately, our experience with borrowers has taught us that current federal aid policies cause financial devastation for many low-income students. A recent analysis of U.S. Department of Education (the "Department" or "Department of Education") data found that, on average, more than 3000 borrowers default on their federal student loans each day.[2] Still more have fallen behind and are at risk of defaulting.[3] Current policies impose harsh penalties on defaulted borrowers that can trap them in poverty and prevent them returning to school and succeeding.

Additionally, student loan debt has not resulted in closure of the achievement gap. Rather, low-income students and students of color are often targeted by for-profit institutions that line their pockets with taxpayer dollars at the student's expense. These students are less likely to complete school and more likely to default.[4] Current federal aid collection policies hammer these students instead of helping them. Surely, these outcomes are not what President Lyndon B. Johnson intended when he signed the HEA in 1965.

Too many low-income students struggle to repay their loans. Too many suffer harm at the hands of predatory schools. Their struggles and suffering are preventable and unnecessary. We recommend that the next HEA reauthorization do the following:

I. Make student loan repayment affordable and easy;
II. Ensure that falling behind does not threaten the financial security of borrowers and their families;
III. Hold institutions accountable and provide relief to harmed students; and
IV. Empower students and borrowers to enforce their rights under the HEA.

Below, we discuss how Congress can accomplish each of these objectives.

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[1] *See, e.g.*, Ben Miller, Center for American Progress, *New Federal Data Show a Student Loan Crisis for African American Borrowers* (Oct. 16, 2017), *available at* https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/; Marshall Steinbaum & Kavya Vaghul, Washington Center for Equitable Growth, *How the student debt crisis affects African Americans and Latinos* (Feb. 17, 2016), *available at* http://equitablegrowth.org/research-analysis/how-the-student-debt-crisis-affects-african-americans-and-latinos/. *See also* Letter from NCLC et al, to U.S. Secretary of Education, John B. King, Jr. (Aug. 17, 2016), http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ltr-sec-king-race-student-debt.pdf.

[2] Consumer Federation of America, *Press Release: New Data: More Than 1.1 Million Federal Student Loan Defaults in 2016* (Mar. 17, 2017), *available at* https://consumerfed.org/press_release/new-data-1-1-million-federal-student-loan-defaults-2016/.

[3] U.S. Dep't of Education, Federal Student Aid Data Center, Chart: Portfolio by Delinquency Status, *available at* https://studentaid.ed.gov/sa/about/data-center/student/portfolio.

[4] *See id.*

I. Make Student Loan Repayment Affordable and Easy

Grants and student loans make higher education accessible to low-income students who cannot otherwise afford to attend. When they leave school, however, affordability concerns are still paramount. Low-income student loan borrowers need a sustainably affordable pathway through repayment. Student loan borrowers should never have to choose between making a student loan payment and paying their rent, buying medication, or providing for their children's basic needs. Without strong mechanisms for making loan payments affordable, the HEA will fall short of fulfilling its mission.

Income-driven repayment (IDR) is at the heart of affordable loan repayment since it requires borrowers to pay only a set percentage of their income toward their student loan bills. The reauthorization of HEA plan must:

- Make repayment affordable for low-income borrowers;
- Allow for easy, ongoing enrollment in IDR; and
- Make IDR readily available to all borrowers.

Borrowers who commit to repaying their loans on an IDR plan should neither be penalized for their limited financial means nor should they be expected to take their loan debt to the grave. IDR must always give them a light at the end of the tunnel. Congress should continue to ensure that any remaining loans are forgiven after borrowers spend a certain number of years in repayment. Congress should go further and ensure that loan forgiveness does not trigger tax liability or jeopardize eligibility for means-tested public benefits. Student loan borrowers should not have to trade one type of federal debt for another.

A. Make Repayment Affordable for Low-Income Borrowers

Congress should adjust how payments are calculated under IDR to ease the burden of student loan repayment on low-income borrowers. Although existing income-driven repayment plans are more affordable for our clients than the standard ten-year repayment plan, many of our clients still struggle to afford these reduced payments. Congress should acknowledge the real costs of living, and the private student loan payments that many borrowers must make, by changing the way it calculates "discretionary income." Borrowers are expected to pay a set percentage of their discretionary income toward their federal loans, but many borrowers have less discretionary income than the current calculation reflects.

The current IDR plans are based on a formula that mistakenly assumes that borrowers can cover all of their basic life expenses on income that equals 150 percent of the federal poverty guideline. Research suggests that families in much of the United States need an income of at least two to three-times the current federal poverty guideline to afford basic living expenses.[5]

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[5] *See, e.g.*, Insight Center for Community Economic Development, *2011 California Family Economic Self-Sufficiency Standard* (2011), *available at* www.insightcced.org (finding a family of four in California would need nearly triple the federal poverty guideline to cover basic needs); Kinsey Dinan, Nat'l Center For Children in Poverty, *Budgeting for Basic Needs: A Struggle for Working Families* (2009), *available at*

One study determined that a single parent with two children living in a moderate-cost Midwestern city must make about 233 percent of the federal poverty level each year to pay for basic living expenses.[6] Diverting funds from this family's monthly budget would leave them short on money for basic necessities, such as food and rent. To make matters worse, many of our clients also have private student loans, which are ineligible for income-driven repayment. These private loan payments stretch already thin budgets even further.

Congress should target IDR relief to low-income borrowers by increasing from 150 to 250 the percentage of the federal poverty guideline reserved to meet the borrower's basic needs. Under this proposal, a single borrower earning between $18,210 and $30,350 per year would be newly relieved of the obligation to make small, but painful monthly payments. This change would provide the most significant relative reduction in payments to the low-income borrowers, providing much-needed relief to those barely earning enough to make ends meet.

B. Allow for Easy, Ongoing Enrollment in IDR

Congress should ensure that the process for confirming ongoing IDR eligibility is made easier. Rather than requiring borrowers to submit new income information every year or get bumped to a non-income-driven repayment plan, borrowers should be able to give advance permission for the Department of Education to automatically access the requisite income information from their tax forms. This process is sometimes called "multi-year consent." We recommend that borrowers be allowed to opt into this automatic consent process. They should also be allowed to revoke their permission at any time. In a recent negotiated rulemaking, the Department shared that over half of all borrowers in two of the existing income-driven repayment plans missed the deadline to update their income information, underscoring the importance of improving this process.[7] The U.S. Departments of Treasury and Education previously announced an agreement to automate this process, but have not announced a specific plan or timeline for implementation.[8] Congress should establish this as a priority to better serve borrowers.

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http://www.nccp.org/publications/pdf/text_858.pdf ("It takes an income of about 1.5 to 3.5 times the official poverty level . . . to cover the cost of a family's minimum day-to-day needs"); Mark Greenberg, Center for American Progress, *It's Time For a Better Poverty Measure* (2009), *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2009/08/pdf/better_poverty_measure.pdf ("The dollar figures used to determine if families are in poverty are low and in many ways arbitrary."); National Academy of Sciences, Panel on Poverty and Family Assistance, *Measuring Poverty: A New Approach* 1 (Nat'l Acad. Press 1995) ("Our major conclusion is that the current measure needs to be revised: it no longer provides an accurate picture of the differences in the extent of economic poverty among population groups or geographic areas of the country").

[6] *See* Kinsey Dinan, Nat'l Ctr. For Children in Poverty, *Budgeting for Basic Needs: A Struggle for Working Families* (2009), *available at* http://www.nccp.org/publications/pdf/text_858.pdf.

[7] U.S. Dep't of Education, Sample Data on IDR Recertification Rates for ED-Held Loans (Nov. 2014), *available at* https://www2.ed.gov/policy/highered/reg/hearulemaking/2015/paye2-recertification.pdf.

[8] U.S. Dep't of Education, *Treasury and Education Announce Progress Toward Multi-Year Income Certification System for Student Loan Borrowers in Income-Driven Repayment Plans* (Jan. 17, 2017), *available at* https://www.ed.gov/news/press-releases/treasury-and-education-announce-progress-toward-multi-year-income-certification-system-student-loan-borrowers-income-driven-repayment-plans.

Implementing multi-year consent for IDR plans will help ensure that struggling borrowers are able to keep their monthly loan payments manageable and avoid delinquency and default. It will also significantly reduce unnecessary administrative burdens on borrowers and servicers. Borrowers used to be able to provide multi-year consent, and they should be able to again.[9] Remaining on an IDR plan puts borrowers on track for sustainable loan repayment or eventual forgiveness. Multi-year consent would help borrowers who get on track to stay on track.

C. Make IDR Readily Available to All Borrowers

Parents who seek help from us or other legal services providers because of debts incurred for their children's education—especially Parent PLUS loans—are often in particularly dire straits. Parent PLUS loans have higher interest rates than other types of student loans, are not eligible for the income-driven repayment plans, and can rarely be discharged in bankruptcy. As a result, low-income Parent PLUS borrowers come to us with sizeable debts, but have fewer options for averting or resolving defaults. Many of these borrowers are elderly and on fixed or low-incomes. Parent PLUS borrowers also need access to affordable repayment options, so Congress should make IDR available to them as well.

II. Ensure that Falling Behind Does Not Threaten the Financial Security of Borrowers and Their Families

Current federal aid practices and policies hammer borrowers who fall behind on their loan payments. Draconian debt collection and default policies prevent individuals from getting a fresh start. These policies also impede economic productivity by preventing students whose education was interrupted from returning to complete their degree—even though the lack of a credential prevents them from securing higher-skilled, higher-paying jobs that would provide the income to support ongoing loan repayment—and benefit society more broadly.

Borrowers bear an incredible amount of risk when their educational investments do not pay the dividend of stable employment or decent wages. Through its coercive collection powers, the government often siphons thousands of dollars from these borrowers, who are typically already experiencing financial distress. Moreover, many of these borrowers would owe far less than the amounts seized from them if they were instead on an IDR plan. This unnecessarily punitive collection activity often pushes low-income households to—or over—the financial brink.

Congress has the opportunity to reconsider the notion of default. This section outlines a multifaceted approach to preventing and rethinking default. We suggest the following actions:

- Enroll delinquent borrowers in IDR automatically;
- Hold borrowers accountable only for amounts not paid;

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[9] *See* U.S. Dep't of Education, William D. Ford Federal Direct Loan Program, Income Contingent Repayment Plan & Income-Based Repayment Plan Consent to Disclosure of Tax Information (2008), OMB No. 1845-0017, *available at* https://ticas.org/sites/default/files/u159/dl_income_disclosure_consent_form_for_ibricr.pdf. Borrowers used this form to authorize the IRS to provide their income information for five years (2008-2012) until it expired on June 30, 2012.

- Ease the process of getting out of default;
- Restore the student loan safety net;
- Eliminate use of private collection agencies.

A. Enroll Delinquent Borrowers in IDR Automatically

IDR plans help many borrowers afford their payments and stay current on their loans, yet enrollment in these plans remains low. This can be attributed to lack of awareness of IDR and operational barriers. Notably, complaints to the CFPB from older consumers reveal that loan servicing issues prevent many borrowers from accessing income-driven repayment plans, causing borrowers to default.[10]

We recommend the creation of a mechanism for automatically enrolling borrowers in IDR if they enter late-stage delinquency. Automatic enrollment in IDR for borrowers struggling with their payments will help reduce defaults and protect borrowers from the harsh consequences of default. Importantly, while we recommend automatically enrolling delinquent borrowers into IDR, we are not recommending involuntary collection from delinquent borrowers.

B. Hold Borrowers Accountable Only for Amounts Not Paid

Currently, when a borrower is more than 270 days behind, the loan goes into default and the entire loan balance become due and payable in full. This is known as “acceleration” of the loan balance. This has the harsh and perverse effect of making borrowers immediately responsible for their entire loan balance—which can be tens of thousands of dollars—rather than simply the monthly payment and amounts past due, at a time when they are least able to afford it. Additionally, under current law, the government can then seize amounts up to that entire balance. This means that low-income parents relying on earned income tax credits to provide for their families can lose that essential income source entirely for one or more years.

Instead of accelerating the loan balance, Congress should only hold borrowers liable for the amounts that they would have paid on an IDR plan. Therefore, if a loan is certified for collection through the Treasury Offset Program or for administrative wage garnishment, the government should only recover amounts past due, without imposing a crushing penalty of also collecting amounts not yet due. Once the government receives the full past-due amount (through either voluntary payment or involuntary collection), those payments should count towards forgiveness under IDR. By holding borrowers responsible for only the amounts that they would have paid under an IDR plan, the government would properly balance its responsibility to collect on outstanding obligations with its responsibility to help student loan borrowers manage their debts.

C. Ease the Process of Getting Out of Default

Redefining default and eliminating the acceleration clause would also make it easier to rethink and simplify the way we allow borrowers to get out of default. Borrowers should not need to

[10] Consumer Financial Protection Bureau, *Snapshot of Older Consumers and Student Loan Debt* (Jan. 2017), *available at* https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf.

wade through complicated programs like rehabilitation and consolidation in order to be in good standing on their loans. The path should be straightforward: borrowers should be able to get out of default by either paying off past due amounts or by agreeing to repay their loans on an IDR plan. Borrowers who select the IDR route should be able to regain eligibility for additional Title IV funds after making six months of payments. These payments should all be qualifying payments towards forgiveness and there should be no limit to the number of times a borrower can get out of default. Borrowers need every chance to get back on track and succeed, especially because defaults are often a result of deficient loan servicing.

D. Restore the Student Loan Safety Net

HEA reauthorization provides an important opportunity to ensure that low-income student loan borrowers are not trapped in poverty as a result of their student loan debt. We recommend that Congress amend the HEA and revisit other statutes, such as the Debt Collection Improvement Act and the Bankruptcy Code, as needed to accomplish the reforms enumerated below.

1. **Eliminate offsets of the Earned Income Tax Credit**

We call on Congress to stop undercutting the Earned Income Tax Credit (EITC) program by exempting student borrowers' EITC payments from seizure.[11] The EITC has strong bipartisan support and is one of the most important and effective anti-poverty programs in the United States. It helps the working poor to keep working and helps lift children out of poverty. The government's current policy of seizing EITC refund checks from the working poor to repay student loans that are in default runs counter to the goals Congress set for the EITC and its student loan programs. The main victims of EITC seizures are children, since by far the largest EITC payments go to families with children, and the seizures can have a dramatic impact on children's well-being. The seizures also prevent former students from obtaining and keeping employment and pursuing further education. Rather than fulfilling the EITC's goal of lifting hard-working individuals and their families out of poverty, the seizures have the opposite effect of trapping low-income families in poverty. Congress should stop this perverse policy.

2. **Eliminate Social Security offsets**

Social Security helps give aging and disabled Americans peace of mind. Offsetting this lifeline threatens the health and security of older and disabled Americans and should be stopped.[12] A Government Accountability Office report found that for more than two-thirds of borrowers whose monthly benefit was below the poverty line, the money seized from their Social Security benefits was enough only to pay their loan fees and interest, so the principal amount of the debt was not even reduced.[13] This means that these borrowers could have their benefits seized for the rest of their lives–and without ever paying off their loans or even making a dent in the balance owed.

[11] *See* National Consumer Law Center, *Stop Taking the Earned Income Tax Credit from Struggling Student Loan Borrowers* (Oct. 2016), *available at* http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ib-stop-taking-earned-income-tax.pdf.

[12] *See* National Consumer Law Center, *Pushed Into Poverty: How Student Loan Collections Threaten the Financial Security of Older Americans* (May 2017), *available at* http://www.nclc.org/images/pdf/student_loans/student-loan-collections-threaten-fin-sec.pdf.

[13] U.S. Gov't Accountability Office, GAO-17-45, Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief (Dec 19, 2016).

The minor benefits to federal coffers do not justify the significant harm to older Americans caused by offsetting Social Security benefits.

With an increasing number of older borrowers carrying loan balances beyond retirement age, it is time to ensure that they will be able to use their Social Security benefits to meet their basic needs. Congress should act now to protect vulnerable older and disabled student loan borrowers by ending Social Security offsets to collect student loan debt. If Congress fails to bar use of these offsets to collect student loans, it should at minimum increase the exempted amount from a flat $9,000 per year to an amount that is sufficient for basic survival and indexed for inflation. This limit has not been raised since the legislation was passed in the mid-1990s, despite continuing inflation and increases in the cost of living, and is well below current poverty thresholds.

3. Limit wage garnishments to amounts owed under IDR

Borrowers who default are almost always financially distressed and struggling with the affordability of their loans. The government should not expect or require these struggling borrowers to pay *more* toward their loans than borrowers who have been able to stay current on their loans. Congress should at minimum limit the amount that can be seized from defaulted borrowers through administrative wage garnishment or federal salary offset to ensure that it does not exceed the amount the borrower would be responsible for under an IDR plan.

4. Automate discharge of loans owed by disabled borrowers

When the government knows a borrower is entitled to discharge of their student loans based on their total and permanent disability, it should automatically discharge the loans without requiring the borrower to navigate the complicated student loan system or fill out unnecessary paperwork. Borrowers whose total and permanent disability status is known to the Department through a data match program with the Social Security Administration (SSA) and Department of Veterans Affairs (VA) should have their loans automatically discharged. Additionally, Congress should align the discharge process for borrowers identified as disabled by the SSA and the VA by eliminating the post-discharge monitoring period for borrowers identified through SSA. Disabled borrowers often have particular difficulty with navigating bureaucracy, and find it difficult to complete and submit paperwork during the monitoring period, especially as they often lack long-term assistance from those who helped them initially apply for discharge. Automating the discharge process and eliminating the monitoring period for these borrowers would be more efficient, equitable, and would better protect disabled borrowers.

5. Restore bankruptcy rights

Our experience working with low-income borrowers is that bankruptcy is almost never their first choice. Most express a desire to avoid bankruptcy because it feels like a failure. They also fear the stigma and the resulting difficulties of finding employment and housing. However, for many, bankruptcy is the only way to get a fresh start in life. Bankruptcy is a pragmatic program aimed at giving a fresh start to borrowers who do not have the resources to repay their debts, and plays a critical role in a healthy economy. But for student loan debtors bankruptcy relief is currently available only through the random, unfair, and costly “undue hardship” system.

Effectively, it has become no choice at all for those who most need it. Congress should take this opportunity to restore bankruptcy rights for student loan borrowers.

6. **Restore a statute of limitations for collection of federal student loans**

Borrowers who took out loans when they were 17 to access an education that never paid off for them should not have those debts follow them to the grave. The extraordinary elimination of the statute of limitations for government student loans in 1991 placed borrowers in the unenviable company of murderers and traitors—among the rare set of Americans subject to prosecution and punishment until they die. Despite the public interest in pursuing criminals, statutes of limitations apply to nearly all other federal criminal and civil actions, and to collection of other loan products. There is no reason that student borrowers should be singled out for lifelong liability. Congress should restore a statute of limitations for student loans.

D. Eliminate Use of Private Collection Agencies

Congress should act to prohibit use of private debt collectors in the federal student loan system and create a pilot program to study the effectiveness of other debt collection techniques. Private debt collectors siphon approximately $1 billion annually from taxpayers, but bring in only a small fraction of outstanding debt and fail to foster repayment success for borrowers.[14]

Until the government identifies viable alternatives to private collection agencies, we call on Congress to at minimum end the Department of Education's use of private collection agencies to resolve borrower disputes and adjudicate borrower rights to relief. Dispute resolution is not the primary mission of debt collectors and they are not adequately trained to administer the complex borrower rights available under the HEA. Collection agency failures prevent borrowers from exercising their rights to relief and impede their ability to get back on track.

Additionally, collection charges should be limited to only those fees that are bona fide and reasonable and actually incurred. The HEA currently provides only that collection fees must be "reasonable." 20 U.S.C. § 1091a(b)(1). At a minimum, the statute should be amended to require that fees also be bona fide. Collection fees should be charged only when actual costs are incurred and in no case for government offsets or administrative wage garnishments.

III. Hold Institutions Accountable and Provide Relief to Harmed Students

Too many schools that lure students in with the promise of career success and improved earnings instead deliver an unaffordable debt burden. We and other legal services providers who represent borrowers regularly see students who have been harmed by for-profit schools that engaged in predatory recruiting or simply failed to deliver value, wasting our clients' precious time and money. These schools also squander taxpayer dollars by leaving students with federal loans they cannot afford to repay and by failing to deliver the economic boost that would benefit society at large. For too long, the risk of predatory school misconduct has fallen on individual borrowers who were not in a position to discover the misconduct or financial

[14] *See* Letter from Senator Kamala Harris et al. to Betsy DeVos, Secretary of Education (Jan. 23, 2018), *available at* https://www.harris.senate.gov/imo/media/doc/180123%20-%20PCA%20Letter%20(1).pdf.

instability before they enrolled. Future students would benefit from the development and implementation of stronger safeguards to prevent predatory abuses from occurring.

But safeguards do not provide relief for the countless borrowers who have already been harmed by fraudulent schools. By the time our clients reach us, their hopes and dreams have been shattered. Unable to secure the employment promised, they face ruined credit and devastating collection for student loans they cannot afford to repay. For this reason, we also urge Congress to target relief to the many borrowers who have had their dreams shattered by fraudulent or low-value schools and who continue to be held back by unaffordable debt as a result.

Below, we recommend institutional accountability and borrower relief measures designed to:

- Deter predatory practices and provide relief to borrowers taken advantage of for their federal aid dollars;
- Prevent federal aid dollars from flowing to Institutions that fail to deliver value to students and taxpayers and provide relief to borrowers impacted by such institutional failures; and
- Strengthen guardrails surrounding abuse of the federal student aid program.

A. Deter Predatory Practices and Provide Relief to Borrowers Taken Advantage of for their Federal Aid Dollars

According to testimony given by a former owner of a vocational training school:

> *In the proprietary school business what you sell is dreams and so ninety-nine percent of the sales were made in poor, black areas, [at] welfare offices and unemployment lines, and in housing projects. My approach was that if [a prospect] could breathe, scribble his name, had a driver's license, and was over 18 years of age, he was qualified for [our] program.*[15]

As this testimony reflects, predatory recruiters target specific communities that institutions exploit to access federal aid dollars. Among those targeted are low-income students and students of color, those who are the first in their family to pursue post-secondary education or who are unfamiliar with the intricacies of higher education and financial aid, and those who are otherwise vulnerable marks for recruiters. Training materials from one for-profit described prime targets as "Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experienced a Recent Death. Physically/Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future."[16]

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[15] S. Rep. No. 102-58, at 12–13 (1991) (testimony), quoted in Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 Geo. L.J. 753 (2001).

[16] Senate Committee on Health, Education, Labor, and Pensions, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success,* S. Prt. 112-37, 112th Cong., at 66 (July 30, 2012) [hereinafter "Senate HELP Report"], *available at* https://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf (quoting Vatterott, March 2007, *DDC Training* (VAT-02-14-03904)).

In recent years, state and federal law enforcement actions, as well as the Government Accountability Office and the Senate HELP Committee, have uncovered widespread use of predatory, unfair and deceptive recruiting tactics by for-profit schools.[17] For example, a Senate HELP Committee report found that recruiters made false guarantees that students would be placed in a job, and misrepresented key facts including "cost of the program, the availability and obligations of federal aid, the time to complete the program, the completion rates of other students, the job placement rate of other students, the transferability of the credit, and the reputation and accreditation of the school."[18]

Predatory recruitment practices lead individuals to enter—and take on debt for—programs in which they otherwise would not enroll. These practices are a tremendous source of frustration, financial loss, and loss of opportunity for students, and particularly the already vulnerable students often targeted by such schools. Many students who are convinced to enroll based on false information about the value of the credential or the cost of attendance wind up worse off than they were before enrolling, wasting both borrower and taxpayer dollars. We therefore recommend the reforms listed below to deter predatory conduct, provide relief to students harmed by such conduct, and hold institutions accountable for abusing the federal aid system.

1. **Strengthen the incentive compensation ban**

The Higher Education Act's ban on incentive compensation was enacted in 1992 with strong bipartisan support to reduce high-pressure sales tactics and curb the risk that—under financial pressure—recruiters would aggressively sign up students for federal aid who would derive little benefit from the subsidy and then be unable to repay federal loans. To better protect students and taxpayers, the ban should be strengthened by permanently closing loopholes that have allowed schools to circumvent the law by paying commissions to third party entities or by claiming that incentive compensation was for student completion.

Additionally, the Department has acknowledged that incentive compensation violations cause financial harm to it and is thus able to recover Title IV funds from schools that were funneled through students recruited by improperly compensated salespeople. But Congress should recognize that these violations first and foremost harm the students targeted as conduits of federal aid. The HEA should, therefore, provide federal student loan discharges to borrowers who were the targets of this improper recruitment. To protect taxpayers, Congress should make institutions that violate the ban liable to the Department for recovery of discharged amounts.

2. **Strengthen and enshrine borrower defense protections**

Institutions that use unfair, deceptive, abusive or otherwise illegal practices to get students to enroll and pay with federal student aid and GI Bill benefits harm borrowers and taxpayers. For example, the Department found that Corinthian Colleges systematically misrepresented its

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[17] *See* National Consumer Law Center, *Ensuring Educational Integrity: 10 Steps to Improve State Oversight of For-Profit Schools* (June 2014), *available at* https://www.nclc.org/images/pdf/pr-reports/for-profit-report.pdf; *see also* 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); Senate HELP Report, *supra* n.16, at 53-81.
[18] Senate HELP Report, *supra* n.16, at 61.

graduates' job placement rates to prospective students.[19] Based on this false information, hundreds of thousands of students enrolled and took out federal student loans and military education benefits, then found their degrees worthless. These students wasted years and took on debt that they never would have agreed to had they known the school was lying to them about graduate outcomes.

Americans overwhelmingly support providing relief for borrowers whose schools engaged in deceptive recruiting: 78% of Americans believe that students should have their federal student loan debt canceled if their college is found to have provided deceptive information about its programs or outcomes—including 87% of Democrats and 71% of Republicans.[20]

Borrowers have been eligible for discharges based on illegal school conduct since 1994, and in 2016, the Department finalized a borrower defense rule that established a process for defrauded borrowers to access the relief they are entitled to. To ensure that the schools that perpetrate fraud—rather than defrauded borrowers or taxpayers—pay the cost of the fraud, the rule includes processes to determine the school's obligation to pay the Department for cancelled loan amounts.

The 2016 borrower defense rule should be strengthened to better protect students and taxpayers, but it is currently at risk of being weakened under pressure from industry lobbyists. The Department has proposed a rewrite that would significantly weaken the rule and deprive abused borrowers of much needed relief. Additionally, the House PROSPER Act proposes to restrict access to relief for defrauded borrowers by imposing an arbitrary and unworkable time limit on students' eligibility for relief and by requiring borrowers to submit individual applications to access relief, making the process unnecessarily burdensome and time-consuming for both mistreated students and the Department.

We therefore recommend strengthening and enshrining the following borrower defense protections into law to better protect students and taxpayers from predatory school conduct:

- Establish a federal borrower defense standard that encompasses important consumer protections available under state law, including by making the federal standard for relief a floor rather than a ceiling. The standard should retain bases for relief predicated on illegal conduct and should specify that practices prohibited under state and federal law as unfair and abusive, and not just deceptive, are bases for borrower defense.
- Specify that borrowers may continue to assert borrower defenses to repayment so long as their loans remain subject to collection. The Department should not deny defrauded borrowers much-needed relief based on arbitrary time limits.
- Codify a process for assessing defenses to repayment that is fair and accessible to borrowers, provides them with reasonable procedural protections, and reflects the reality

[19] U.S. Dep't of Education, *U.S. Department of Education Announces Path for Debt Relief for Students at 91 Additional Corinthian Campuses* (March 25, 2016), https://www.ed.gov/news/press-releases/us-department-education-announces-path-debt-relief-students-91-additional-corinthian-campuses.
[20] Rachel Fishman, *A New World for Profits,* New America (Nov. 23, 2016), *available at* https://www.newamerica.org/education-policy/edcentral/new-world-for-profits/.

that borrowers who apply will not have attorneys or discovery rights and cannot be expected to provide documentary evidence to prove their claims.

- Clarify the Secretary's authority and responsibility to provide for discharges without requiring individual applications where a school is found to have engaged in a policy, pattern or practice of relevant misconduct.
- Provide for full discharges of relevant federal student loans for borrowers with meritorious claims to ensure that they get real relief and a fresh start. Borrowers should not have to shoulder the unnecessary burden, complexity, and inconsistency of outcomes that would result from proposals to provide only partial relief.

3. **Expand false certification relief**

When a school falsely certifies a borrower's eligibility for federal student aid, it defrauds the federal government and saddles the borrower with loans that the government has already determined are unlikely to pay off for the borrower. For this reason, the HEA provides for loan discharge when a school falsely certifies a borrower's eligibility for federal student aid, and allows the Department to recover discharged amounts from schools. However, the Department has interpreted the discharge provision in a narrow way that fails to address many of the ways in which schools have falsified borrower eligibility, harming borrowers and taxpayers.

We recommend the following improvements to better protect borrowers and taxpayers and to ensure that victims of false certification are not burdened by invalid loans:

- Specify that borrowers are eligible for a false certification discharge if their programs lack or lose Title IV eligibility;
- Clarify that borrowers are eligible for a false certification discharge when their schools falsely certify the most commonly abused student eligibility criteria of 20 U.S.C. § 1091, including: (a) satisfactory academic progress; and (b) high school diploma before enrollment;
- Update the law to make clear that borrowers whose schools electronically obtain loans or disbursements without borrower authorization are able to obtain discharges;
- Remove HEA language that the Department has interpreted to require borrowers whose eligibility to borrow was falsely certified as a result of identity theft to present a court judgment proving that the borrower was a victim of identity theft (the language "of a crime" should be stricken from 20 USC sec 1087(c)((1));
- Establish circumstances in which the Department must investigate and determine eligibility of groups of borrowers for discharge based on widespread false certification by an institution, including when there is evidence that a school has engaged in a practice of falsely certifying borrower eligibility.

4. **Audit job placement rate disclosures**

Many of our low-income clients attended career education programs specifically because they believed these programs would help them to secure a job in the field associated with the program. Schools know that prospective students are focused on career outcomes, and thus focus advertising and recruitment around graduate job placement rates. But in recent years law enforcement agencies have found that predatory institutions have manipulated and inflated their job placement rates advertised to potential students.[21] These law enforcement actions—often by state attorneys general—have been piecemeal depending on different states' priorities and resources, and are often initiated many years after the school began advertising false rates.

To protect federal loan borrowers and taxpayers, Congress should require audits of job placement rates by the Department of Education or independent auditors. Institutions found to have substantially misrepresented job placement rates should be required to underwrite discharges of federal student loans for borrowers who enrolled in programs for which the school misrepresented placement rates. These institutions should also be subject to heightened monitoring of placement rate representations for a period of years afterwards.

5. Provide efficient group relief to harmed borrowers

The HEA should promote efficiency, treat like borrowers alike, and provide relief to eligible borrowers without requiring them to jump through hoops. Because some types of harmful misconduct are likely to apply to many borrowers who attended the same program or institution, there should be an efficient and equitable process for determining whether groups of student borrowers should be provided relief, without requiring individual applications, based on school conduct relevant to groups of borrowers. Automatic group relief is especially critical for to ensure that students harmed by predatory and low-value schools and entitled to relief actually get it. Students targeted by such schools tend to be those newest to higher education and least familiar with the financial aid system and how to navigate it. Based on the experiences of legal aid organizations working with low-income borrowers, we believe that without group relief, the vast majority of low-income students entitled to student loan discharges based on school misconduct, closure, or other failures will never get relief simply because they do not know of their right to it or how to access it.

We recommend that the HEA specifically provide for group discharges without application when the Secretary has information in her possession demonstrating that the borrower qualifies for a student loan discharge, including based on: (i) school misconduct that gives rise to a borrower defense; (ii) school closure data; (iii) widespread violations of false certification requirements; (iv) programmatic failure to meet gainful employment affordability thresholds for specific borrower cohorts; (v) relevant violations of the incentive compensation ban; and (vi) misrepresentations of job placement rates.

6. Restore Pell eligibility to harmed students

Pell Grants are a critical source of student aid for low-income students and they have broad, bipartisan support from business, education, veterans, civil rights, and student groups, as well as from the higher education community. Pell funds are a limited resource for students to draw from—students are limited to 12 semesters of Pell Grants. Since 2016, the Department has instituted a policy of restoring Pell Grant eligibility to students harmed by school closures. While that is an important step, the Department has taken the position that it lacks authority to restore

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[21] *See* National Consumer Law Center, *Ensuring Educational Integrity: 10 Steps to Improve State Oversight of For-Profit Schools* (June 2014), *available at* https://www.nclc.org/images/pdf/pr-reports/for-profit-report.pdf.

Pell eligibility to students harmed by other school misconduct, including those with valid claims to a borrower defense to repayment or to loan discharge based on their school's false certification of their eligibility for financial aid.

We recommend that Congress restore Pell eligibility for all recipients impacted by school conduct that would qualify borrowers for discharge, whether based on false certification, misconduct that would demonstrate a borrower defense, or the new bases for discharges recommended in these comments. Eligibility should be restored both for students who also borrowed student loans and those who did not.

B. Prevent Federal Aid Dollars from Flowing to Institutions that Fail to Deliver Value to Students and Taxpayers and Provide Relief to Borrowers Impacted by Such Institutional Failures

To ensure that taxpayer dollars are not used to prop up programs that fail to deliver value to students and to society, federal aid eligibility should distinguish between effective programs that represent a reasonable investment for students, and programs that are only a good investment for their owners and shareholders. Conditioning institutional eligibility for federal student aid on appropriate value and outcome metrics is critical as a preventative measure to protect taxpayers and future students from institutions and programs that would waste their time and money.

Additionally, Congress should not abandon borrowers who have had their dreams shattered by institutional failures. When institutions fail to deliver value, borrowers should be granted relief from unaffordable federal loans so they can move forward with a fresh start on their journey to economic mobility and financial stability. To this end, we recommend the following reforms:

1. Expand relief for borrowers impacted by school and program closures

Over the past few years, thousands of schools across the country have closed. For-profit schools often close abruptly—students show up for class to find a message posted on a locked door. Students are left with shattered hopes and dreams. Often no reputable and reasonably accessible school is willing to accept their credits to complete their programs without essentially restarting.

Existing law allows some students who have been harmed by their school's closure to apply to have their loans discharged if they do not transfer credits and complete the program elsewhere. The Department has information available to it that identifies borrowers eligible for relief based on dates of attendance, dates of school closure, and lack of reenrollment to complete the program elsewhere. Yet legal services organizations see a constant influx of low-income borrowers whose schools closed long ago and who have no idea that they are eligible for a discharge. These borrowers are often facing burdensome collection actions and fees. Providing automatic discharges to students harmed by closures, rather than requiring each borrower to individually find out about and pursue the right to relief—all while picking up the pieces following an abrupt closure—would ensure efficient and equitable relief to harmed borrowers.

Although lack of information about the availability of a closed school discharge is a barrier for some, other borrowers suffer because current discharge law fails to provide relief to them. For instance, the Department has interpreted the HEA to preclude relief for borrowers if a program closes but the school does not. However, it does a student no good if her institution continues to offer a culinary program when her medical assisting program is eliminated before she can complete it. Students whose programs shut down suffer the same harms as students whose schools close: they lose time and incur debt, but receive no degree. They deserve relief, too.

We recommend that Congress expand closed school discharge relief as follows:

- Provide relief to borrowers not only if their school closes, but also if their institution ends the program the borrower is enrolled in at the relevant location (including if the institution ends an online or distance education program that the borrower is enrolled in).
- Automate discharges of federal student loans taken out to attend a closed school or program for borrowers who do not transfer their credits and re-enroll to complete their program at another school within one year after the closure.

2. Strengthen the requirement to provide gainful employment

To be eligible for federal student aid, the HEA requires all career education programs to "prepare students for gainful employment in a recognized occupation." The Department is currently revising its regulations that explain what this requirement means. The prior iteration of those regulations, finalized in 2014, is designed to ensure that career education programs do not consistently leave graduates with more debt than they can afford. Schools that fail to meet the standard must either improve their value proposition or lose access to federal funding.

The 2014 rule does not set a high bar, as the debt-to-income maximums are higher than what many economists would consider truly affordable.[22] Even so, it has already had a positive impact by weeding out or encouraging reforms of programs that offered the least value to borrowers. In response to results in the first year of application of the rule, institutions have already ended over 300 poor-performing programs and have reduced the cost or made other reforms to improve the value of many other programs.[23] Further, the Congressional Budget Office estimates that, if fully implemented, the 2014 rule would save $1.3 billion over 10 years because taxpayers' resources would not be spent on poorly performing programs.

But the rule is under threat. The new administration is considering weakening the rule and disposing with the accountability provisions entirely, leaving only disclosures to prospective students.[24] Disclosures will not protect vulnerable students or prevent federal funds from

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[22] *See generally* Sophie Nguyen, *Why the Department Shouldn't Weaken the Gainful Employment Metrics,* New America (Dec. 6, 2017), *available at* https://www.newamerica.org/education-policy/edcentral/why-department-shouldnt-weaken-gainful-employment-metrics/.

[23] Kevin Carey, *DeVos Is Discarding College Policies That New Evidence Shows Are Effective*, New York Times (June 30, 2017), *available at* https://www.nytimes.com/2017/06/30/upshot/new-evidence-shows-devos-is-discarding-college-policies-that-are-effective.html.

[24] Paul Fain, *Gainful-Employment Rule Without Sanctions?,* Inside Higher Ed (Jan. 30, 2018), *available at* https://www.insidehighered.com/quicktakes/2018/01/30/gainful-employment-rule-without-sanctions.

flowing to programs that waste student and taxpayer dollars. Indeed, studies have found that earnings disclosures influence college decisions by well-resourced students, but fail to impact decisions by students in less-affluent high schools, those with lower levels of parental education, and underserved minority groups.[25]

We recommend that Congress preserve and strengthen the accountability provisions from the 2014 gainful employment regulations and condition eligibility for federal aid dollars on delivering sufficient value to borrowers to allow them to afford their loans. We also recommend that Congress provide relief to borrowers who attended programs during periods for which the Department later determines the programs failed to prepare students for gainful employment. Because debt-to-income metrics are applied *ex post*, and federal aid is cut off only *after* a school has already been determined to have failed multiple cohorts of student borrowers, simple fairness requires that these failed borrowers be provided relief from loans taken out to attend programs that the Department itself determined failed to offer sufficient value to warrant extension of federal student loans.

3. Hold schools accountable for defaults and other negative loan outcomes

Default is devastating for borrowers, and Congress should not allow student loan dollars to flow to institutions with high default rates. Schools are—and should be—held accountable when students default at a high rate soon after entering repayment, based on cohort default rate (CDR) metrics. However, the CDR by itself is an insufficient metric for success. Many borrowers who do not promptly default still struggle with unaffordable loans borrowed to attend institutions that did not deliver sufficient value. These borrowers avoid default only by obtaining serial forbearances and deferments, making payments on income-driven repayment plans, or sacrificing basic needs and financial stability for themselves and their families. This is why the gainful employment rule, discussed above, is critical: it directly compares borrower debt to income to assess unaffordability even in the absence of default.

Additionally, we encourage Congress to work with economists to analyze Federal Student Aid data to assess repayment rate requirements that could strengthen the CDR requirements. We also ask Congress to consider carefully designing risk-sharing measures to protect students from unaffordable debt after attending institutions that profit off student enrollment but fail to deliver value. Congress should hold such institutions accountable for repaying the loans of their students if they systemically fail to deliver students a return on investment.

C. Strengthen Guardrails Surrounding Abuse of the Federal Student Aid Program

Federal financial support for higher education is premised on the economic and social benefits of education and career training for students and society at large. Institutional use of

[25] Michael Hurwitz and Jonathan Smith, *Student Responsiveness to Earnings Data in the College Scorecard,* Manuscript, SSRN (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2768157; *see also* Stephanie Riegg-Cellini et al., *Gainful Employment regulations will protect students and taxpayers. Don't change them*, Brookings Institution (Aug. 4, 2017), https://www.brookings.edu/blog/brown-center-chalkboard/2017/08/04/gainful-employment-regulations-will-protect-students-and-taxpayers-dont-change-them/.

federal funds should, therefore, be subject to oversight to ensure that they being used towards these ends and not simply as a source of corporate welfare. In addition to the accountability measures described above, the HEA should be amended in accordance with the recommendations below to ensure proper use of taxpayer funds by for-profit schools.

1. Shore up the 90-10 rule

The 90-10 rule, which prohibits for-profit schools from receiving more than 90 percent of their revenue from Title IV funds, is a bipartisan, market-driven check designed to prevent taxpayer dollars from being used to prop up for-profit colleges that do not offer sufficient value to survive in the marketplace. The rule reflects an understanding that if a school offers value, than someone other than the federal government—including students, employers, and state governments—will be willing to pay. Data shows that this metric is meaningful.

Controlling for student demographics, the Government Accountability Office found that for-profits that rely more heavily on federal financial aid have worse student outcomes, including lower completion and job placement rates and higher default rates.[26] But the rule has been weakened over time and its loopholes exploited, to the detriment of taxpayers and students. For-profits target veterans and service members, in particular, because their military-related benefits are currently not counted toward the federal funding limit.[27] In addition, predatory schools have backed "loss leader" loans (loans that the institution knows will likely fail) pursuant to special agreements with lenders to create the appearance of sufficient non-federal revenue sources to keep the federal aid spigot open.[28] Not only are the loans often unaffordable for borrowers, they also fail to demonstrate market interest in these schools. Therefore, allowing schools to call such loans "non-federal funds" is inconsistent with the purpose of the rule.

Common sense ways to strengthen the rule and close loopholes include:

- Include *all* federal funding—including funds from the Department of Defense and Department of Veterans Affairs—in the calculation of the percentage of funds from federal sources.
- Preclude schools from including loans for which the school bears a substantial portion of the credit risk from counting toward their non-federal funds minimum threshold.
- Restore the 85-15 standard and, to best target attention to low-value institutions, Congress should consider tying the required ratio to each institution's cohort default rates. For example, a default rate of over 20 percent could require an 80-20 ratio; a rate of less than 15 percent would permit an 85-15 ratio, and so on.

2. Prohibit use of federal funds for advertising, lobbying, campaign contributions

[26] U.S. Gen. Accounting Office, GAO/HEHS-97-103, Proprietary Schools: Poorer Student Outcomes at Schools That Rely More on Federal Student Aid (June 1997).
[27] U.S. Dep't of Educ., *New Analysis Finds Many For-Profits Skirt Federal Funding Limits* (Dec. 21, 2016), https://www.ed.gov/news/press-releases/new-analysis-finds-many-profits-skirt-federal-funding-limits.
[28] *See* National Consumer Law Center, *Piling It On: The Growth of Proprietary School Loans and the Consequences to Students* (Jan. 2011), *available at* http://www.studentloanborrowerassistance.org/wp-content/uploads/File/proprietary-schools-loans.pdf.

As the Senate HELP committee previously found, many for-profit schools derive 90 percent or more of their revenues from federal subsidies and spend only a small portion of it on providing instructional services for students.[29] What do they do with the rest? Some institutions spend a shocking amount of taxpayer dollars on advertising—which is surely not the purpose of the federal student aid program, and not where taxpayers expect their money to go.[30] The Committee previously found that 4 out of the 5 most profitable schools spent more per student on marketing and recruiting than on instruction.[31] Troublingly, much of this advertising is manipulative or misleading. Taxpayers should not be subsidizing such conduct. To ensure that federal student aid dollars are being used for educational purposes consistent with the goals of the federal student aid program, common sense limits should be placed on the use of such funds by for-profit schools, including prohibiting use of such funds for advertising, lobbying, and campaign contributions.

3. Improve oversight of for-profit conversions

Under the HEA and many state regulatory regimes, for-profit schools are subject to greater regulatory supervision to account for the differences in their fiscal control and internal accountability structures, which provide less inherent protection to students and taxpayers. This enhanced supervision developed in response to a documented history of predatory conduct in the sector and recognition of the difference in control structures. In recent years, some for-profit schools have attempted to evade regulatory compliance by seeking to adopt the “nonprofit” label while allowing structuring deals so that owners continue to maintain control and conduct the school as a business interest. To ensure that predatory institutions are not able to evade appropriate oversight, Congress should improve guardrails surrounding for-profit conversions.

IV. Empower Students and Borrowers to Enforce their Rights under the HEA

Students and borrowers deserve the opportunity to protect themselves when their rights are violated by unscrupulous educational institutions or debt collection agencies. The HEA does not explicitly state that students and borrowers have the right to enforce their rights under the Act. Because the Act is silent about whether students or borrowers have a “private right of action,” many entities have argued and some courts have decided—to the detriment of students and borrowers—that the HEA provides no such right of private enforcement. Additionally, for-profit schools and student loan lenders are increasingly using forced arbitration clauses to deprive students and borrowers of the right to pursue their claims in court. This not only harms the borrowers who are victims of illegal school or lender conduct, but undermines the integrity of the federal student aid system by allowing participants that abuse the system to insulate themselves from liability and hide evidence of abuse.

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[29] Senate HELP Report, *supra* n.16, at 98-99.
[30] *Id. at* 92-94.
[31] *Id. at* 99.

Congress should explicitly authorize students and borrowers to take their claims to court when their rights have been violated by other actors involved in the federal student aid system. To that end, Congress should take two the following steps:

1. Insert a private right of action in the HEA; and
2. Prohibit the use of pre-dispute arbitration clauses and class action waivers to prevent borrowers from exercising their rights.

A. Insert a Private Right of Action in the HEA

Private enforcement is critical to providing students and borrowers with access to justice. Without a private right of action, students and borrowers lack recourse even when they are wrongly denied access to programs that they are entitled to under the HEA. Borrowers are certainly held accountable when they struggle to repay their student loans. Yet those borrowers may not be able to hold schools, loan holders, or servicers accountable when they fail to comply with the law. Congress should ensure that students and borrowers can directly enforce their rights in the federal financial aid system.

Federal agencies and state attorneys general also play important roles in protecting students and borrowers. However, a number of factors limit the impact of public oversight. Agencies have limited jurisdictions and resources. They develop and implement enforcement priorities. Additionally, in some circumstances individuals are more likely than government agencies to be aware of practices that cause borrowers harm. Issues raised and suits filed by individuals can expose bad practices and inform future government regulation and reform. Thus the enforcement system must be multifaceted, including public oversight and enforcement, a robust public and searchable complaint and escalation system, and private enforcement rights.

B. Prohibit the use of pre-dispute arbitration clauses and class action waivers

Congress should prohibit the use of pre-dispute arbitration clauses and class action waivers by participants in the federal aid programs. For-profit schools—though not public or non-profit schools—frequently include these clauses and waivers in their enrollment agreements.[32] That means that they require students—before they even know what disputes they may later have—to sign contracts that deprive them of the right to take any dispute to court. These contracts often also require students to relinquish their rights to join with others who have similar disputes to challenge systemic misconduct, and obligate students to keep their disputes (including evidence and outcomes) secret. In practice, these restrictive clauses prevent borrowers from successfully obtaining relief when their rights are violated. Empirical research confirms that forced arbitration prevents relief for consumers who have been harmed by illegal practices.[33]

[32] *See* Tariq Habash & Robert Shireman, The Century Foundation, *How College Enrollment Contracts Limit Students' Rights* (Apr. 2016), *available at* https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/.

[33] *See* Consumer Financial Protection Bureau, *Arbitration Study*, 1:11-13 (2015), *available at* https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Additionally, forced arbitration clauses and class action bans undermine the integrity of the federal student loan system by preventing the Department of Education, accreditors, and law enforcement agencies from learning about complaints and settlements against actors abusing the system. Forced arbitration silences legitimate complaints about illegal conduct, forcing claims into secretive arbitration systems or suppressing cases before they're filed. For example, the for-profit school ITT aggressively used forced arbitration clauses to stop student and government lawsuits and public scrutiny into its conduct for years before the school abruptly closed and filed for bankruptcy in September 2016. Because forced arbitration clauses allowed ITT to insulate itself from liability and scrutiny while it was open, taxpayers and student borrowers are now paying the price of millions in federal student loans that graduates are unable to afford to repay.

For this reason, the Department conditioned institutional eligibility for Title IV funding on agreement not to abuse arbitration clauses and class bans against borrowers in its 2016 borrower defense rule. However, the Department has delayed implementation of that rule and is now asserting that it no longer believes it has authority under the HEA to address abuse of arbitration clauses that undermine the integrity of the Title IV program. We therefore recommend that Congress make explicit such authority and ban the use of such clauses by all participants involved in the federal aid programs.

Conclusion

Pursuing higher education should increase opportunity, and not trap students in poverty. Yet for far too many student loan borrowers, our federal student aid system reduces and constrains opportunity on the backend. The system fails these borrowers.

We need a better federal student aid system. Congress can deliver it through a reauthorization of the HEA that makes student loan repayment affordable and easy, ensures that falling behind does not threaten the financial security of borrowers and their families, holds institutions accountable and provides relief to harmed students; and empowers students and borrowers to enforce their rights under the HEA.

Thank you for your consideration of these comments. Please feel free to contact Persis Yu, Joanna Darcus, or Abby Shafroth if you have any questions or comments. (Ph: 617-542-8010; Email: pyu@nclc.org, jdarcus@nclc.org, ashafroth@nclc.org). We would appreciate the opportunity to work with you on reauthorization to ensure that the final product serves and protects low-income student borrowers.

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August 17, 2016

The Honorable John B. King Jr.
Secretary of Education
U.S. Department of Education
400 Maryland Ave, SW
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Dear Secretary King,

We are writing on behalf of the National Consumer Law Center's low-income clients, along with a coalition of national, state and local civil legal aid, civil rights, and public interest groups and advocates, regarding the need for data to ensure that the federal student loan program is a tool that helps students of color access a meaningful education and achieve greater economic mobility, rather than holding them back. This administration has taken many important steps to acknowledge and address both the higher education student loan crisis and the problems of inequality in our education system. Under your leadership, we have seen the issue of racial justice brought to the forefront of Department of Education policy. We appreciate the tremendous value of the Civil Rights Data Collection concerning the nation's K-12 education system. And we applaud your recent policy directive stating that student loan servicing practices should be adjusted to better reflect the Department's broader policy objectives.[1] Unfortunately, the Department has yet to bring the same level of attention to the impact of the student loan crisis on student loan borrowers of color.

For nearly a decade, the Department of Education has known that student debt impacts borrowers of color differently from white borrowers. Yet in that decade, the Department has failed to take sufficient steps to ameliorate the disproportionately negative impact on borrowers of color, or even to conduct further research to discover the causes or the extent of disparities. We call on the Department to collect and release the data necessary to learn the true extent of the impact of student debt on communities of color and to work with borrower and consumer

[1] Ted Mitchell, Under Secretary, U.S. Department of Education, "Policy Direction on Federal Loan Servicing," July 20, 2016, *available at* http://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf.

advocates to ensure that student loans are a tool for economic advancement and not economic devastation for borrowers of color.

Research on Race and Student Debt

Since 2007, the Department of Education has known that borrowers of color are more likely to default on their student loans than white borrowers. On average, students of color take out more student debt than white students. African American and Latino students also make up a disproportionately large portion of students at for-profit colleges, meaning that the issues facing this sector have a higher impact on students of color—including higher average loan balances and default rates.[2] This higher debt load—combined with disparities in education and broader societal inequalities, including the racial wealth gap and discrimination in the labor and credit markets—has contributed to higher default rates for students of color.[3] An *Education Sector* report from 2007 analyzed the default rates of borrowers who graduated in 1992-93 and found that, ten years after graduation, the default rate for African American students was more than five times higher than the default rate for white students, and the default rate for Hispanic students was more than twice the rate for white students.[4]

Recent research confirms that, for borrowers of color, things do not seem to have improved in the last ten years. Borrowers of color borrow more than white borrowers.[5] Research published in the Children and Youth Services Review found significant variation in education-debt levels by race and household income, with African American and lower-income students accumulating higher levels of education debt compared to their white and upper-income peers.[6] Even after controlling for socioeconomic status and college completion rates, African Americans incurred more student loan debt than similarly situated white borrowers.[7]

Likewise, the available research suggests that borrowers of color continue to be more likely to be in distress on their student loans. Research by the Washington Center for Equitable Growth found that, at the national level, zip codes with higher shares of African Americans or Latinos have much higher delinquency rates on their student loans.[8] Women of color are especially burdened by student loan debt.[9] This relationship suggests that communities of color disproportionately suffer from student loan delinquency and likely default.[10]

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[2] Peter Smith & Leslie Parrish, Center for Responsible Lending, Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Futures, (Oct. 2014) http://www.responsiblelending.org/student-loans/research-policy/CRL-For-Profit-Univ-FINAL.pdf.
[3] See Marshall Steinbaum & Kavya Vaghul, Washington Center for Equitable Growth, How the student debt crisis affects African Americans and Latinos, (Feb. 17, 2016) http://equitablegrowth.org/how-the-student-debt-crisis-affects-african-americans-and-latinos/.
[4] Erin Dillon, "Hidden Details: A Closer Look at Student Loan Default Rates," Education Sector (2007).
[5] Mark Huelsman, "The Debt Divide: The Racial and Class Bias Behind the "New Normal" of Student Borrowing," Demos (May 19, 2015).
[6] Michal Grinstein-Weiss, Dana C. Perantie, Samuel H. Taylor, Shenyang Guo, and Ramesh Raghavan, *Racial disparities in education debt burden among low- and moderate-income households*, Children and Youth Services Review Volume 65, June 2016, Pages 166–174
[7] Id.
[8] Steinbaum & Vaghul.
[9] Suparna Bhaskaran, Pinklining: How Wall Street's Predatory Products Pillage Women's Wealth, Opportunities, & Futures at 20 (June 2016). Available at

The full array of reasons for racial disparities in default rates is not yet known, but may include several factors within the Department's control. In particular, reducing default rates for African American and Hispanic borrowers may require improving student loan servicing, better recognizing and addressing the financial needs of students of color, addressing racial targeting by predatory proprietary schools, and breaking down barriers that students of color experience in accessing the highest-quality institutions. The Department has taken positive steps in several of these areas, by strengthening program integrity rules, improving consumer information and tools, and enabling students to apply for aid earlier. While these critical steps may help reduce disproportionate impacts by race, the Department has both the means and an obligation to examine and address disproportionate impacts explicitly.

Consequences of Student Debt

Disparities in federal student loan default rates disproportionately expose borrowers of color to government offsets and other damaging debt collection practices. There are extraordinary penalties for borrowers who go into default. When a borrower has a defaulted federal student loan (a loan that is more than 270 days past due), the government can seize certain income and assets from the borrower without a court order. Low-income borrowers are especially harmed because the government often seizes benefits, such as the Earned Income Tax Credit ("EITC"), that are aimed at promoting economic security and mobility.

Defaulting on a federal loan is also very costly. Borrowers who default on their loans will have any unpaid interest capitalized and are also assessed high collection fees, up to 25 percent of the loan balance for Stafford loans and as high as 40 percent for Perkins loans. In addition, borrowers in default are often required to pay more per month than similarly situated borrowers in good standing. For example, a single borrower making $25,000 per year with two children would have a $0 payment each month if in good standing on an income-driven repayment plan. That same borrower in default would likely have approximately $250 garnished from her wages.[11] Additionally, that borrower would likely have her tax refund intercepted, losing approximately $4000 in Earned Income Tax credits.[12] By one calculation, default increases lifetime payments on an average loan by 250% over standard repayment.[13] As a result of these collection costs and practices, borrowers of color will disproportionately pay more for their student loans than their white peers, both in the short term and over the life of the loan.

Moreover, a borrower in default is prevented from receiving further aid (including Pell grants) to return to school. This prevents borrowers from getting a second chance if college does not work out the first time around. Defaults disproportionately impact non-traditional students—including first-generation, low-income, and independent students—and block their educational

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https://d3n8a8pro7vhmx.cloudfront.net/acceinstitute/pages/100/attachments/original/1466121052/acce_pinklining_VIEW.pdf?1466121052.

[10] Steinbaum & Vaghul.

[11] NCLC calculations based upon a single taxpayer with a gross income of $25,000 claiming three allowances living in Massachusetts with a loan balance of $50,000 and an interest rate 6.8%.

[12] NCLC calculations based upon a single taxpayer with a gross income of $25,000 and two children..

[13] Consumer Reports, Costing it Out: The Way You Repay Student Loans Really Matters, (June 2016) available at http://www.consumerreports.org/student-loan-debt-crisis/student-loan-repayment/.

advancement.[14] For-profit schools, which disproportionately enroll minority students and women,[15] also produce high default rates which prevent their targeted populations from getting a fresh start after a potentially fraudulent experience. Giving borrowers another chance is critical not only in their individual lives, but also for society. The denial of student aid after student loan default impedes economic productivity by preventing many borrowers of color from returning to school and getting the training and credentials needed to realize their full economic potential in the labor force. Denial of further education may also, perversely, hinder these borrowers' ability to repay their loans.

Moreover, a defaulted student loan can put a borrower in a "Catch-22" where the default prevents the borrower from obtaining a job that could help pay the student loan, as defaulting on a federal loan will also be reported to the three major credit bureaus. Nearly half of all employers perform credit checks on some or all of their employees when hiring.[16] A study by Demos found that credit checks impact not only management positions, but also "jobs as diverse as doing maintenance work, offering telephone tech support, assisting in an office, working as a delivery driver, selling insurance, laboring as a home care aide, supervising a stockroom and serving frozen yogurt."[17]

A defaulted student loan on a credit report can also affect a borrower's ability to secure affordable housing and will likely make other necessities, such as insurance premiums, especially car insurance, more expensive. As the Department acknowledged in its credit reporting fact sheet, "Credit reports play an important role in the financial lives of Americans, affecting our ability to get a home, buy a car, get a job, or even open a bank account."[18]

The extra costs and collateral consequences of defaulting on a federal student loan are detrimental to the well-being of low-income borrowers and their families. For example, the EITC is one of the most important anti-poverty programs available to low-income workers and is specifically intended to help raise working families with children out of poverty. Government seizures of EITC payments have the inequitable and counterproductive effect of punishing these borrowers' children. Such seizures deny children critical resources specifically intended for their benefit, making it harder for these children to get out of poverty and consequently depriving them of future opportunities for advancement.[19]

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[14] Adam Looney & Constantine Yannelis, "A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults," BROOKINGS INSTITUTE (Fall 2015), available at https://www.brookings.edu/wp-content/uploads/2015/09/LooneyTextFall15BPEA.pdf; see also data at https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/.

[15] Bhaskaran at 21.

[16] Society for Human Resources Management, SHRM Survey Findings: Background Checking – The Use of Credit Background Checks in Hiring Decisions (July 19, 2012).

[17] Amy Traub, Demos, Discredited: How Employment Checks Keep Qualified Workers Out of a Job (Feb. 2013).

[18] U.S. Dep'ts of Educ. and Treasury, and Consumer Financial Protection Bureau, Fact Sheet: Modernizing Credit Reporting For Student Loans, http://www2.ed.gov/documents/press-releases/04282016-credit-reporting.doc.

[19] NCLC, Stop Taking the Earned Income Tax Credit from Struggling Student Loan Borrowers (May 2015), available at http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ib-stop-taking-earned-income-tax.pdf.

The impact of the Department's default collection tools extends beyond those borrowers' immediate families and into their surrounding communities. The collection practices used by the government, which disproportionately affect borrowers of color, have the disastrous effect of systematically removing wealth from communities of color through seizures of wages, tax refunds, and benefits to service student debts and huge collection fees. These practices strip wealth from already significantly disadvantaged neighborhoods and communities.

Defaulted Student Loan Borrowers Experience Aggressive and Illegal Collection Tactics

In addition to these powerful collection tools, both the government and guaranty agencies rely heavily on private collection agencies and other more "traditional" collection efforts in dealing with borrowers who have defaulted. According to a Department of Treasury report in 2009, the Department of Education refers every eligible defaulted debt to one of its private collection agencies.[20] Unfortunately, oversight of collection agencies has been insufficient to protect student loan borrowers. For example, in its testimony to Congress, the GAO stated that the Department's oversight provides "little assurance that borrowers are provided accurate information."[21] The GAO documented a range of errors for each of the six collection agencies visited, including providing borrowers with inaccurate or misleading information about rehabilitation program requirements and other repayment options for emerging out of default.

In early 2015, the Department cancelled the contracts of five of its private collection agencies after finding that "agents of the companies made materially inaccurate representations to borrowers about the loan rehabilitation program."[22] However, some of these companies had been top performers under the existing review process, indicating that the process failed to adequately detect or protect against conduct that harms defaulted borrowers.[23] And, despite the contracts being cancelled, the Department has now reinstated the contracts of at least two of these companies.

Current policies create two paths for student loan borrowers. For borrowers who stay in good standing, there are generous repayment plans that create affordable monthly payments and forgive outstanding balances after a number of years. Borrowers who fall off that path are relentlessly pursued by debt collectors, charged interest on interest and exorbitant collection fees, and have vital safety net resources taken until the debts and collection fees are fully paid off. Given the dramatic difference in treatment between borrowers in default and borrowers in good standing, and the knowledge that borrowers of color face default more often than white

[20] U.S. Dep't of the Treasury, U.S. Government Receivables and Debt Collection Activities of Federal Agencies: Fiscal Year 2009 Report to the Congress 15 (Mar. 2010), available at/www.fiscal.treasury.gov.
[21] Federal Student Loans: Oversight of Defaulted Loan Rehabilitation Needs Strengthening: Testimony Before the H. Subcomm. on Higher Educ. and Workforce Training, Comm. on Educ. and the Workforce, 113th Cong. 8 (2014), available at www.gao.gov (statement of Melissa Emrey-Arras, Dir., Educ., Workforce, and Income Sec., U.S. Gov't Accountability Office).
[22] Press Release, U.S. Dep't of Educ., U.S. Department of Education to End Contracts with Several Private Collection Agencies (Feb. 27, 2015), available at www.ed.gov. The five agencies with canceled contracts were: Coast Professional, Enterprise Recovery Systems, National Recoveries, Pioneer Credit Recovery, and West Asset Management.
[23] See National Consumer Law Center, Pounding Student Loan Borrowers: The Heavy Costs of the Government's Partnership with Debt Collection Agencies Appx. A (Sept. 2014), available at www.nclc.org.

borrowers, we would expect that the Department would do everything in its power to try to address this problem.

Inadequacy of the Department of Education's Response

In May 2015, NCLC, together with the ACLU, filed a Freedom of Information Act ("FOIA") request seeking data on federal student loan delinquencies, default, and collection methods, disaggregated by race.[24] NCLC and the ACLU also requested documents reflecting how the Department assesses whether its collection policies result in adverse impact on borrowers of color.[25]

We were disappointed to learn that Federal Student Aid ("FSA") has not been tracking borrower race for the federal student loan program, and thus lacks data that would help guard against or reform practices that contribute to racial disparities in the program. The Department responded to the FOIA requests by explaining that FSA "does not track race or data related to race" such that no "data, policies, procedures, or guidelines exist" that would be responsive.[26] NCLC and the ACLU have subsequently sued the Department regarding the sufficiency of its FOIA response,[27] but the fact that FSA does not track race with student loan information does not appear to be contested in the litigation.[28]

If, indeed, the Department is not tracking racial outcomes in federal student loans, it is failing in its responsibility to ensure that its debt collection practices do not disproportionately harm borrowers of color. The existing research described above on racial disparities in student loan default rates, taken together with the Department's private servicing and debt collection contractors' record of poor service, provide significant reason for concern that borrowers of color may be disproportionately harmed by student loan collection practices.

The Department Should Track and Remedy Racial Disparities in Student Loan Servicing and Collection

The Department can and should make a priority of ensuring that its student loan servicing and collection policies do not disproportionately harm borrowers of color. To do so, it must track and assess federal student loan borrower outcomes by race. Just as the collection of race-coded mortgage data through the Home Mortgage Disclosure Act (HMDA) enabled regulators and citizens to better assess whether mortgage providers were affirmatively furthering fair housing,[29]

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[24] See Complaint, ACLU et al v. U.S. Dep't of Education, Case No.16-10613-JCB (D. Mass., filed March 30, 2016), Ex. 1 (Freedom of Information Act Request by the ACLU and National Consumer Law Center to the U.S. Department of Information (May 7, 2015) at 3-4.
[25] See *supra* Complaint, Ex. 1, at 3.
[26] See *supra* Complaint, Ex. 4 (ED Second Interim Response to FOIA Request) at 6.
[27] See ACLU et al v. U.S. Dep't of Education, Case No. 16-10613-JCB (D. Mass.).
[28] See Answer, ACLU et al v. U.S. Dep't of Education, Case No. 16-10613-JCB, (D. Mass., filed June 17, 2016) paras. 51-53 (answering that the content of the Department's cited response to the FOIA request speaks for itself).
[29] See *Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearings Before the Subcomm. On Oversight and Investigations of the H. Comm. On Financial Services.,* 110th Cong. 37, 42 (2007) (statements of Sandra L. Thompson, Director of the Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation & Calvin R. Hagins, Director of Compliance Policy, Office of the Comptroller of Currency) (suggesting that HMDA data helped regulators target supervisory activities and identify

data collection is needed in the higher education context to clarify how student loan servicers and collectors can affirmatively further the Department's racial justice goals.

The Department has stated a clear policy "to promote student achievement … and ensur[e] equal access."[30] The Department's Office of Civil Rights expressly includes financial aid, including federal student loans and grants, within its regulatory mandate to investigate and prohibit "criteria or methods of administration which have the effect of subjecting individuals to discrimination."[31] The Department is authorized to collect and assess race data for federal student loan borrowers to test for disparities in the program and to identify and ameliorate servicing and collection practices giving rise to such disparities.[32] To ensure that it serves all students appropriately, the Department should exercise its authority to engage in such assessment, and should engage its Office of Civil Rights along with FSA to do so.

As described above, there are several major inflection points in the federal student loan system where social science research has indicated borrowers of color have disproportionately experienced adverse outcomes. The Department has a unique capacity to test not only the most visible inflection points—such as delinquencies and defaults—but also application of the various forced collection mechanisms that borrowers experience most acutely.

Further, because the Department uses different servicers and collection contractors, it should take advantage of the opportunity to test and compare the outcomes of borrowers of color by contractor. Studying borrower outcomes by race and by contractor may illuminate which servicer and collector practices exacerbate and which ameliorate racial disparities, and thus light a path for improvements. For example, how and what collectors communicate to borrowers in default, how decisions regarding which collection mechanisms to invoke are made, and how collection practices interact with factors that correlate with race, can result in different borrower outcomes and should be assessed. Tracking, reporting, and analyzing borrower outcome data by race is necessary to detect and properly remedy any practices that unnecessarily harm borrowers in general and that disproportionately harm borrowers of color.

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discriminatory practices); Allen Fishbein & Ren Essene, *The Home Mortgage Disclosure Act at Thirty-Five: Past History, Current Issues* 1 (Joint Ctr. for Hous. Studies, Harvard Univ., Paper No. MF10-7, 2010), *available at*http://www.jchs.harvard.edu/publications/MF10-7.pdf (noting that "HMDA has now become an accepted part of the mortgage industry and regulatory landscape . . . [and] there is general agreement that HMDA has helped to bring greater fairness and efficiency to the residential home loan market.").

[30] http://www.ed.gov/ ("*Our mission* is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.")

[31] 34 C.F.R. § 100.3.
While Title VI of the Civil Rights Act of 1964 does not apply to the Department of Education itself, the anti-discrimination principles that regulate all recipients of federal financial assistance should also shape the distribution and servicing of federal financial assistance. See Ted Mitchell, Under Secretary, U.S. Department of Education," Policy Direction on Federal Loan Servicing," July 20, 2016, *available at* http://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf.

[32] For example, although the Equal Credit Opportunity Act generally prohibits creditor inquiries about applicants' race, an exception exists to encourage creditors to request and analyze race data for the purpose of testing the extent or effectiveness of compliance with ECOA's antidiscrimination purpose. *See* 12 C.F.R. §§ 1002.5, 1002.15. ECOA incentivizes creditors to self-test for racial disparities by privileging the results in some circumstances, though given the public interest in fair administration of government programs, this privilege should not be invoked by ED.

For each of the following points where borrower outcomes diverge, we encourage the Department to collect and report data on the total number and percentage of borrowers (separately for each contractor, and in aggregate), by race, and to analyze other factors such as completion rates and type of school attended:

a) Borrowers in repayment that are in an Income Driven Repayment ("IDR") plan

b) Borrowers who failed to recertify for an IDR plan

c) Borrowers who have missed payments and are delinquent

d) Borrowers who default

e) Borrowers who are charged collection fees

f) Borrowers subject to each of the following collection methods (and, for collection methods that provide a hearing right, the number of borrowers who requested a hearing and data on the outcomes):

    i) Tax refund offsets

    ii) Administrative wage garnishments

    iii) Other administrative offsets, including social security offsets

    iv) Removal from default via consolidation

    v) Removal from default via rehabilitation

    vi) Discharge of loan that was in default status

    vii) Collection lawsuits, including (by race) how many such suits result in default judgments, how many are settled, how many are dismissed, how many result in contested judgments for borrowers, how many result in contested judgments against borrowers, how many result in actual collection following the judgment, and how many defendants are insolvent and have nothing from which to collect.

Conclusion

For at least a decade, the Department of Education has known that racial disparities exist in the outcomes of student loan borrowers. Unfortunately, as the response to the ACLU and NCLC's FOIA demonstrates, the Department has not studied the source of these disparities or the extent to which they occur despite the harmful consequences of default. Moreover, it has allowed abusive practices by collection agencies to occur which are more likely to disproportionately harm student loan borrowers of color.

It is time for the Department to leverage its tremendous resources and ensure that student loan policies work for all borrowers. For all these reasons, we call on the Department to collect and release the data necessary to learn the true extent of the impact of student loan debt on communities of color and to work with borrower and consumer advocates to ensure that student loans are a tool for economic advancement and not economic devastation for borrowers of color.

If you need additional information regarding this letter, please contact Abby Shafroth at ashafroth@nclc.org or Persis Yu at pyu@nclc.org.

Thank you for your consideration.

Sincerely,

American Civil Liberties Union
Americans for Financial Reform
Bay Area Legal Aid
Center for Responsible Lending
Civil Justice, Inc.
Consumer Action
Consumers Union
CT Citizen Action Group (CCAG)
Demos
EMPath
Empire Justice Center
Equal Justice Works
Faculty Forward Network
Generation Progress
Heather Jarvis, Attorney and Advocate
Housing and Economic Rights Advocates
Higher Ed, Not Debt
The Institute for College Access and Success (TICAS)
Legal Services of New Jersey
Legal Services NYC
Maryland Consumer Rights Coalition (MCRC)
MFY Legal Services, Inc.
Mississippi Center for Justice
National Consumer Law Center (on behalf of its low-income clients)
National Council of La Raza (NCLR)
National Education Association
New York Legal Assistance Group
North Carolina Justice Center
Public Higher Education Network of Massachusetts (PHENOM)
Public Justice Center
Public Law Center
Project on Predatory Student Lending of the Legal Services Center of Harvard Law School
Service Employees International Union (SEIU)
Student Debt Crisis
U.S. Public Interest Research Group
Veterans Education Success

Watsonville Law Center
William Kennedy, Faculty, Racial Justice Training Institute, The Law Office of William Kennedy
Woodstock Institute
Young Invincibles