May 22, 2018

Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202

Re: Agency/Docket Number: **Docket ID ED-2017-OPE-0085;** Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings

Dear Secretary DeVos,

As organizations that represent students, consumers, education advocates, civil rights advocates, workers, and low-income student loan borrowers, we are grateful for the opportunity to respond to the Department of Education's request for information on evaluating undue hardship claims in bankruptcy.

The Department's prior attempt at offering guidance, in "Dear Colleague Letter Gen.-15-13" issued in 2015, inappropriately stressed the use of the long-term income-based plans and administrative disability discharges as a means to restrict undue hardship discharges and encouraged student loan holders to consider inappropriate factors, such as the relative size of student loan debt. This guidance failed to direct borrowers and student loan holders towards settlement and failed to address pervasive aggressive litigation tactics that raise costs to tax payers and prevent eligible borrowers from obtaining student loan discharges.

We urge the Department to develop new guidance on the appropriate factors to consider in deciding not to oppose a debtor's request for an undue hardship discharge.

Intrusive discovery is rarely necessary or appropriate when investigating a debtor's financial circumstances.

A debtor's ability to repay student loans while affording basic necessities is core to the undue hardship standard. Investigating this financial ability can be accomplished by simply looking to the income and expenses reported by a debtor to the bankruptcy court and whether those figures demonstrate the ability to afford reasonable living expenses. Instead, the Department's current practice includes pursuing expensive discovery to obtain these facts and arguing that some expenses, such as cable television or restaurant meals, can reveal a debtor to be financially irresponsible.

Rather than hunting for justifications to argue that low-income debtors should better manage their money, if a debtor's household income is below the median family income and the bankruptcy disclosures show a lack of disposable income, the Department should treat those disclosures as sufficient, should not conduct pre-trial discovery, and should stipulate that the debtor is maintaining a minimal standard of living.

The Department should end the consideration of irrelevant factors to enable borrowers to access the fresh start to which they are entitled.

The Department should direct student loan holders to no longer consider: (1) eligibility for a zero dollar payment under an income-driven repayment ("IDR") program; (2) a longer-than ten year window in considering the persistence of hardship; (3) the presence of facts to indicate a "certainty of hopelessness" or "total incapacity" when reviewing settlement; (4) all backwards-looking factors when assessing the continuation of hardship; or (5) debtor's decision-making and life-style choices within the good faith inquiry.

Opposing the student loan discharge for a borrower who is eligible to make no payments for twenty to twenty-five years burdens the borrower and the federal government: the government bears the administrative costs of re-certifications and collection costs if the debtor defaults, while the borrower carries that still-growing debt for decades and can face tax liability for the eventual loan forgiveness, which a bankruptcy discharge avoids. Worse, borrowers who do default while in an IDR program can lose their eligibility. This is the opposite of a "fresh start" and not what Congress intended when it drafted the undue hardship statute in 1978.

The Department should end all backwards-looking considerations when evaluating whether a debtor's current hardship will continue. A debtor should not be denied the discharge of her student loans based on past career choices, an evaluation of her reasons for obtaining the student loans, or her age when she obtained the loans.

Finally, a debtor's past decisions and life-style choices should be out of bounds of the inquiry into whether the debtor has made a good faith attempt to repay the student loans. Loan holders should not be empowered to conduct a morality test or probe personal choices, such as the number of children a borrower had after obtaining student loans, taking prescription drugs, or becoming a caretaker for family members. Good faith should not provide the means for the Department or loan holders to impose their own values on a debtor's decisions and life choices. Instead, good faith should focus on whether the debtor made efforts to obtain employment or maximize income, and whether the debtor willfully or negligently caused the default.

The Department should direct loan holders to appropriately review undue hardship discharges by heavily weighing lack of school completion.

Until now, the Department has failed to acknowledge the clear relevance of a debtor's lack of school completion to whether student loans should be discharged, or the relevance of whether a debtor has benefited from the educational program or incurred student loans for ineffective educational and vocational programs. The lack of school completion is a significant risk factor for loan default, and students who do not complete are more likely to come from low-income backgrounds. Borrowers who fail to complete also have higher unemployment rates and lower incomes. The Department should advise loan holders to treat a debtor's lack of school completion and related factors in favor of an undue hardship discharge.

The Department should proactively reduce costs and streamline access to undue hardship discharges by establishing presumptive qualifications for cases where loan holders will not oppose undue hardship claims and by initiating separate request for information docket regarding the cost assessment for loan holders consenting to an undue hardship claim.

We urge the Department to designate qualifications for categories of cases where loan holders will not oppose an undue hardship discharge. Loan holders could consider repayment of a student loan debt to be an undue hardship if, for example, the debtor were receiving Social Security disability benefits, was low-income and receiving that income solely from social security or other retirement income, had been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability, or was low-income and caring for an elderly, ill, or disabled household member. The government and borrowers would avoid the costs and stress of expensive discovery and litigation, provided the debtor offers documentation that she falls within such a category.

The Department can further streamline the process of loan holders consenting to a debtor's request for an undue hardship discharge by issuing clear guidance about how loan holders should conduct the required cost assessment. The Department's current regulations provide that if the loan holder determines that repayment will not impose an undue hardship, it must then conduct a cost assessment of opposing the discharge. However, before the Department can provide guidance on how to conduct this assessment, it should first provide sufficient information and data on expected costs to allow interested parties to provide meaningful comments.

Thank you for your consideration of these comments.

Sincerely,

Allied Progress
Americans for Financial Reform Education Fund
Center for Law and Social Policy (CLASP)
Community Legal Services of Philadelphia
Consumer Action
Equal Justice Works
Florida Legal Services, Inc.
Higher Ed Not Debt
Housing and Economic Rights Advocates
LAF Chicago
Lakeshore Legal Aid
Maryland Consumer Rights Coalition
Mobilization for Justice, Inc.
Montana Organizing Project
NAACP
National Association of Consumer Advocates - Ohio State Chair
National Consumer Law Center (on behalf of its low-income clients)
New Yorkers for Responsible Lending
NYLAG

PHENOM (Public Higher Education Network of Massachusetts)
Public Counsel
Public Law Center
SC Appleseed Legal Justice Center
Tennessee Citizen Action
Tzedek DC