

Advocates: Department of Education Plan to Redo Rule that Protects Students Harmed by Illegal School Conduct Falls Short

FOR IMMEDIATE RELEASE: January 18, 2018

CONTACTS: National Consumer Law Center: Abby Shafroth (ashafroth@nclc.org) or Jan Kruse (jkruse@nclc.org), (617) 542-8010;

Project on Predatory Student Lending: Katie Ward (kward@ctpboston.com), (603) 689-8170

Boston – Today, the Department of Education (Department) announced during its Negotiated Rulemaking session that it intends to redo its July 2018 proposal to revise the borrower defense rule, but indicated it will do so without complying with the statutory requirement to conduct a formal rulemaking proceeding and convene a committee of stakeholders. The borrower defense rule governs a student's right to loan cancellation based on the misconduct or closure of his or her school.

The July proposal was condemned by advocates for students and consumers as it would make it much harder for students who are harmed by illegal school conduct or closures to get relief from their federal student loans or to hold schools accountable for illegal conduct. It would have cut back dramatically on much more student-friendly rules that the previous administration had finalized in 2016. The Department attempted to block those rules from going into effect, but in September 2018 a federal court found that Education Secretary Betsy DeVos's attempt to block them was unlawful, and they went into effect on October 16, 2018.

While a new proposal to amend the rules is necessary in light of the intervening change in the effective rules, it is not enough. To fulfil its duty to engage in meaningful stakeholder participation and public notice and comment, prior to amending its rules, the Department must undertake a new rulemaking process and convene a new rulemaking committee. This is a far lengthier and more involved process, but it is necessary.

Abby Shafroth, a staff attorney at the National Consumer Law Center, participated in the rulemaking committee that was convened in advance of the July 2018 proposal, where she served as a representative for legal aid organizations that serve low-income student borrowers. **Shafroth explained**, "A new rulemaking committee must be convened in order to assess the merits of the currently in effect rules and whether any changes to those rules are appropriate. As a member of the prior committee, we were specifically told by the Department that we should not consider the 2016 borrower defense rules as the starting point and should not discuss what changes, if any, should be made to those rules. Instead, the Department instructed us to act as if we had time-traveled back to 2015, and the 2016 rules had never happened. With the 2016 rules now in effect, we simply cannot ignore them."

Eileen Connor, director of litigation at the Project on Predatory Student Lending, and a member of the legal team that secured the September 2018 federal court ruling that the Department's attempt to block the 2016 borrower defense rule from going into effect was unlawful. **Connor said**, "This hide-the-ball nonsense makes a mockery of the entire negotiated rulemaking process, and certainly falls short of fulfilling the intent of the Higher Education Act that the Department 'obtain public involvement' in the development of proposed regulations. Beyond that,

it's an outrageous waste of public resources and demonstrates yet again that the Department's priority is to serve the wishes of higher education profiteers, not students. It's not enough for the Department to reissue its (deeply flawed) proposed rule. It has to redo the entire process. Even better: The Department should abandon its attempts to rollback student protections and focus instead on working through the 165,000+ borrower defense claims that it has yet to touch."

Background

Students organized to assert the borrower defense right, embedded in their loan contracts, on a broad scale after the collapse of scandal-ridden Corinthian Colleges. The Department of Education, under President Obama, after receiving input from stakeholders including students, consumer advocates, the legal aid community, and state attorneys general, published a borrower defense rule that became final on November 1, 2016.

The 2016 rule had several important features. It provided for a process for determining if relief should be provided on a group basis so that the Department could effectively deliver a remedy to victims of large-scale consumer fraud. It mandated that schools wishing to receive federal taxpayer money refrain from forcing students to sign away their right to sue them in court, on their own or in a class action. It gave the Department the authority to require institutions to post letters of credit when certain red flags indicated the school was mismanaged and at risk of precipitous closure. Finally, it required the Department to automatically discharge the loans of eligible students whose school closed before they completed.

After the change in administration, and before the 2016 rule could go into effect, the Department, under Betsy DeVos, blocked it. The Department cited a legal challenge, lodged by an industry trade group, as justification to delay the 2016 rule. In the meantime, it undertook a rulemaking process with the intent of replacing the borrower defense rule.

Thanks to students and state attorneys general, in September 2018, a federal court found that the Department's attempt to delay the 2016 Borrower Defense Rule was illegal. According to the Court, the Department's actions "did not come close" to being lawful. The 2016 rule became effective in October 2018.

The Department's illegal delay of the 2016 regulation cannot be separated from the statutorily-required negotiated rulemaking process to change the regulation. Although the July 2018 proposed rule is the product of a process that, from its initiation, was designed "to develop proposed regulations to revise the regulations on borrower defenses to repayment of Federal student loans and other matters, published on November 1, 2016 (81 FR 75926)," the Department precluded the negotiated rulemaking committee, comprised of various stakeholders and the Department of Education, from parsing the 2016 regulation and discussing potential improvements to it. Rather, time and again, the Department's representative instructed the committee that "we are considering our starting point to be the 1994 regulations," and that the committee was not to focus on "amending the 2016 language per se."

One committee member pressed the Department:

I just don't understand why the official record of the prior process that led to the adoption of federal law should just be erased altogether and the clock reset to 1994. If the issues we just raised are, for example, are grounds for revisiting, I think it would be helpful as an act of good faith communication for the negotiators to know that.

It's not sufficient to say, you know, the whole thing was bad. It would be helpful to know how they were bad. Specifically, what provisions would the department find sufficiently problematic to trigger this conversation and whether the specific provision you just flagged would be the one. I think that would be helpful.

But the Department rebuffed the request. The Department even provided the committee with proposed language that marked up the 1994 regulation, not the 2016 regulation. This is exactly the opposite of what is supposed to happen in rulemaking. An agency is supposed to explain why it's making a choice that is diametrically opposed to the one that it made less than two years ago—not just pretend that it never made that choice at all.

The Department's pretense was that the 2016 rule was final, but not in effect. Of course, that was only true because the Department unlawfully delayed the rule. Regardless, the 2016 rule is now not only final, but also in effect. And the Department must make any reasoned amendments to that 2016 rule—through the rulemaking process mandated by statute.