**Comments to Proposed Borrower Defense Applications**
**Docket ID ED–2020–SCC–0043**
**(85 Fed. Reg. 53,350 (August 28, 2020))**

This comment is submitted on behalf of the National Consumer Law Center,[1] Legal Aid Foundation of Los Angeles,[2] and the New York Legal Assistance Group.[3] As organizations that represent low-income student loan borrowers, we thank you for the opportunity to comment on the Department of Education's (Department) proposed new Borrower Defense to Repayment application. Ensuring that the Borrower Defense form is accessible and comprehensible to all borrowers is essential to ensuring that borrowers do not needlessly struggle for decades under the weight of a debt that was created by a school's deceptive or illegal conduct. We welcome the opportunity to suggest ways to improve how this form serves the interests of harmed borrowers.

Our organizations represent low-income student loan borrowers whose federal student loan dollars were taken by unscrupulous schools that violate federal regulations, state consumer protection laws, or otherwise misrepresent their services in order to lure students for profit while providing substandard educations. These schools exploit students' academic aspirations and take their federal student aid dollars but provide them with little more than financial and emotional harm. Our comments reflect our experience working directly with low-income borrowers applying for borrower defense and other federal student loan discharges.

While we are grateful that the Department adopted some recommendations from our prior comment (ED-2020-SCC-0043-007, attached to this comment), the proposed form still needs substantial improvement to ensure that unrepresented borrowers have a fair shot at proving that

[1] 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, as well as community groups and organizations that represent low-income and older individuals on consumer issues. In addition, NCLC publishes and annually supplements practice treatises which describe the law currently applicable to all types of consumer transactions, including Student Loan Law (6th ed. 2019). NCLC's Student Loan Borrower Assistance Project provides information about student loan rights and responsibilities for 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. See the Project's web site at http://www.studentloanborrowerassistance.org.

[2] The Legal Aid Foundation of Los Angeles (LAFLA) is a nonprofit legal aid organization serving low-income clients in Los Angeles, California. LAFLA is a public interest leader on student loan work, having developed student loan and for-profit school expertise over the last thirty years. LAFLA provides outreach and education, self-help clinics, and direct legal assistance to financially distressed student loan borrowers. LAFLA assists hundreds of borrowers who wish to complete borrower defenses or apply for other forms of relief. LAFLA serves as a resource for and often consults with other legal services organizations carrying out this work throughout the country. See LAFLA's website at https://lafla.org/get-help/student-loan-issues/.

[3] The New York Legal Assistance Group (NYLAG) is a nonprofit legal aid organization that provides a variety of free services to low-income clients in New York City. NYLAG helps hundreds of student loan borrowers seeking relief from their debt, including assisting borrowers apply for borrower defense and other forms of statutory or regulatory relief. NYLAG has written a guide to assist borrowers who are navigating the Borrower Defense process pro se. NYLAG also operates a hotline for students seeking information and assistance related to for-profit schools and has a dedicated email address for students who attend or attended such schools and believe they were misled or defrauded. See NYLAG's website at https://www.nylag.org/consumer-rights/.

they are eligible for relief. Given that the vast majority of borrowers will request relief without the assistance of an attorney, it is of the utmost importance that this form be clear, understandable, accurate, accessible, concise, and fair. A form like this, aimed at people who lack legal expertise, must be worded and formatted in a way that average for-profit school students understand, since it is primarily for-profit school students who submit these claims. It must be clear about the level of detail each borrower should provide in their testimonial evidence and provide clarity around when documentary evidence is required to establish relief eligibility. The form should not be so long or so difficult to understand that it dissuades borrowers from applying for relief.

Below, we provide comments on the formatting and substance of the form generally, and then provide comments on each section of the borrower defense form. We urge the Department to consider revise this form once more before putting it into circulation.

## I. General Comments

### A. The Form Should Inform Borrowers of What Information They Must Provide to Show They Are Eligible Under 34 C.F.R. §§ 685.206(c), (e), and 685.222(b)-(d).

The proposed form is intended for all borrowers, regardless of what regulations their loans are subject to, but fails to sufficiently explain what borrowers must do under each of the different regulations to show they are eligible for relief. The Department rejected our recommendation to clearly explain in the form's introductory text "what conduct may qualify for a borrower defense to repayment rather than, or at a minimum before, listing what conduct does not qualify for relief." Instead, the form notes that there are three regulations that could apply to a borrower's loans, provides a cursory and generalized summary of what school conduct might be eligible for relief under any of the regulations, and tells the borrower that they will only be eligible for relief if they suffer financial harm beyond the act of borrowing a loan. Throughout the form, the Department includes language stating, "This section only applies to borrowers who receive a Direct Loan, including a Direct Consolidation Loan, on or after [time]." The instructions fail to tell borrowers who received a loan during a different period of time whether they should complete that section, or if there is specific information that they must include to demonstrate they are eligible for a loan discharge or other form of relief.

We ask that the Department revise the form so that borrowers clearly understand what they must do to show they are eligible for relief under each borrower defense standard.

Without clearer instructions, borrowers won't understand what information or level of detail they must provide to demonstrate they are eligible for relief. Borrowers often apply without the assistance of a lawyer and would have no way of deciphering which regulations apply to them or how to determine what they must show under those regulations. Moreover, unscrupulous schools often target vulnerable borrowers—such as those with low literacy levels, cognitive disabilities, or learning disabilities—who may struggle to complete a form that provides ambiguous instructions or

uses overly complex language. They will not be able to intuit what information they should provide without clear and straightforward instructions and examples. The Department should add a paragraph in the introduction clearly explaining how borrowers should complete the form. Borrowers should be told that they should complete all applicable sections of the form and be provided with examples of the level of specificity that they must provide to substantiate each allegation.

Additionally, the Department must clearly communicate the requirements of each regulation instead of providing an overly generalized description of what a borrower defense is. The Department should tell borrowers what they must show to demonstrate they are eligible for relief. Under the current regulatory scheme, the grounds for eligibility under each regulation differ significantly in ways unrepresented borrowers would not be aware of. For example,

- A borrower subject to the state-law eligibility standard should be put on notice of how the Department determines which state laws apply to their school's conduct and what those state laws are. They should also be put on notice that they should research whether their school has already been held accountable in court for violating those state laws.

- A borrower subject to the 2016 standard should know that they are eligible for relief if 1) they—as an individual or member of a class—or a government agency obtained a non-default, favorable contested judgment against their school, 2) their school breached its contract with the student, or 3) "the school or any of its representatives, or any institution, organization, or person with whom the school has an agreement to provide educational programs, or to provide marketing, advertising, recruiting, or admissions services, made a substantial misrepresentation […] that the borrower reasonably relied on to the borrower's detriment when the borrower decided to attend, or to continue attending, the school or decided to take out a Direct Loan." 34 C.F.R. § 685.222(b)-(d). The Department should put a borrower subject to the 2016 standard on notice that they must show that a misrepresentation was "substantial," that they "reasonably relied" on the school's statement, and that they must show that their reliance was to their detriment. The Department should further instruct them to provide enough detail in their testimony to substantiate those elements. Additionally, the Department should put borrowers on notice that they should research whether their school is subject to any contested judgments. Borrowers subject to this standard should also be instructed that documentation is encouraged, but not required, to demonstrate eligibility for relief. *See* 34 C.F.R. § 685.222(e)(3)(1)(i)(A), (C).

- A borrower applying under the 2019 standard should be put on notice that they must show that 1) their school made a misrepresentation that "directly and clearly relates

to enrollment or continuing enrollment" that was "false, misleading, or deceptive," that 2) the statement was made with "knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth" and 3) the borrower can provide documentation to prove they were "financially harmed" by the misrepresentation in ways beyond borrowing their loans. These borrowers should be put on notice that they *must* provide documentation to be eligible for relief, that testimonial evidence is insufficient, and that they will need to provide job application records to satisfy the financial harm requirement.

Each of these standards requires that the borrower satisfies different elements, but under the current form, borrowers are not given any targeted instructions whatsoever. As a result, they will not understand what they must disclose to prove their eligibility.

On an even more basic level, the form does not clearly communicate how much detail a borrower they must provide in testimonial evidence to prove that they are eligible for relief. Many borrowers we have heard from incorrectly believe that the injustice they have been subject to does not need to be recited in their testimony if it is obvious from the face of the documentation provided that a misrepresentation occurred. Others we have heard from believe that they need not provide documentation if they clearly explained the misrepresentation in their testimony. Still others incorrectly assume that they need not provide a detailed description because they believe the Department is already aware of their school's misconduct. The form does not clearly instruct borrowers to be as thorough as possible in their testimonial evidence and it fails to communicate whether documentation is required for eligibility. The form should be more explicit regarding what borrowers must provide to demonstrate their level of eligibility.

### B. The Department Should Shorten the Form by Developing Separate Forms For Loans Subject to The Different Standards.

The paper form is 24 pages—13 pages longer than the current 9-page form. While the Department explained in its response to Congressman Bobby Scott's comments (ED-2020-SCC-0043-0008) that "[t]he online application—where the overwhelming majority of borrowers apply for a borrower defense discharge—will dynamically determine which borrower defense regulation or regulations would apply to a borrower and only presents to the borrower questions and information that are/is relevant to the borrower," many borrowers will look to the paper form first to determine whether they are eligible and to determine what documentation they must assemble prior to applying. The length of this form combined with the lack of clarity on what a borrower must do to prove eligibility may dissuade many borrowers from applying for relief. We support Congressman Scott's recommendation that the Department should develop different forms for each set of regulations to shorten the length of the form and clarify how borrowers can show they are eligible for relief.

### C. The Department Should Amend How the Form Solicits Documentary Evidence

In our comment to the proposed list of elements, we recommended that the Department make it clear that documentary evidence is not required to establish eligibility for all borrowers. We also requested that the Department allow borrowers to point to the testimony of other students, faculty, school staff, or others to establish their claim. The Department rejected both recommendations, stating it has "never approved, nor should, a borrower defense application based on testimonial evidence alone" and "cannot, and will not adjudicate BD claims based on hearsay evidence." We ask that the Department reconsider its position. Testimonial evidence may be all some students have to substantiate their claims; they should be permitted to support their claim without documentary evidence. Requiring documentation *does* have a deterrent effect for borrowers; we have heard firsthand from borrowers who were reluctant to submit certain claims because they were concerned that they would not be able to locate supporting documentation. In our experience, a documentary requirement is a clear deterrent to potentially eligible borrowers.

Additionally, the Department should consider allowing borrowers to submit testimonial evidence from individuals other than the borrower himself or herself when deciding if the borrower is eligible for relief and should request the names of other individuals who can corroborate the borrower's claims. If other individuals corroborate an applicant's testimony with their own sworn recollection of what they heard or experienced, that evidence is not hearsay; it is corroborating testimonial evidence—direct evidence—from other individuals. The Department considered testimonial evidence from borrowers establishing a pattern of conduct when it established types of borrower defense eligibility for Corinthian Colleges students. It also explicitly asks for this type of evidence in false certification discharge applications (Ability to Benefit), which states, "Provide the following about anyone who can support your statement: [] Name: [] Address (Street, City, State, Zip Code): [] Telephone Number: []"

Furthermore, hearsay evidence is commonly admissible and relied upon in administrative proceedings. This is important because the BD proceeding—like other administrative proceedings—is not a full court proceeding where a party can compel the testimony of witnesses, like school recruiters. Since borrowers will not be able to compel their school to provide evidence substantiating their claims, they should, at a minimum, be able to submit or rely on "hearsay" testimony of other students.

### D. Borrowers Should Be Put on Notice That Their School Will Respond to Their Application

Although borrowers subject to the 2019 Rules have a time-sensitive opportunity to respond to their school's answer to their borrower defense claims, the form provides the borrower with no notice that such an opportunity will exist. The form should alert borrowers that their school will

receive a copy of their borrower defense application, and that if they are subject to the 2019 Rule, they will receive a copy of their school's answer to the application and will have a time-sensitive opportunity to respond.

## II. Comments Regarding Each Section of The Form

### A. Introduction

As we requested in our comment to the proposed list of elements for the form, the beginning of the form should put forth a comprehensive list of the types of conduct that will qualify for a borrower defense. Further, the Department has retained much of the language we previously identified as confusing and misleading. We ask that the Department reconsider our prior recommendations. Further, we ask that the Department not assume the literacy skills of borrowers completing these forms. Despite the assumption that "words have plain meanings, readily understood by college students" (expressed by the Department in response to our prior comment), many borrower defense applicants are not college students or do not have college-level literacy proficiency. Parent PLUS borrowers completing this form may not be "college students" and many borrowers have compromised literacy skills or had cognitive or learning disabilities—conditions that cause them to be targeted by unscrupulous schools.

In addition to the issues raised in our prior comment submitted in response to the proposed elements of the form, some of the language in the introduction is misleading or inaccurate. The introduction states, "It is also important to understand that to be eligible for full or partial federal student loan relief through borrower defense to repayment, you must also have suffered financial harm. The act of taking a loan or holding student debt is not, by itself, considered to be financial harm." This is inaccurate. Only the eligibility standard issued under the 2019 rules, 34 C.F.R. § 685.206(e), requires that a borrower show financial harm in this way to demonstrate eligibility. This standard is only applicable to borrowers whose Direct Loans are disbursed on or after July 1, 2020. This language should be removed from the form.

The introduction then goes on to describe the Department's partial relief methodology, stating,

> Instead, the Department compares earnings of prior graduates of your program to graduates of other similar programs and makes a determination of financial harm, if the earnings of graduates of your program are below the range of normal variation of earnings among graduates of other similar programs. The data used to calculate earnings for purposes of determining financial harm are based on data provided by a Federal agency, such as the Internal Revenue Service or in some instances, the Social Security Administration.

This description omits critical information and should also be deleted. The form fails to alert borrowers that this relief methodology is sub-regulatory, is being challenged in litigation, and that it

may change. This description leaves borrowers with the false impression that the partial relief methodology is permanent and unalterable.

Even if the sub-regulatory relief methodology continues, the form is still missing critical information. The Department noted in its response to Congressman Scott's comment that "the partial relief methodology that is applied to a borrower is a rebuttable presumption about the discharge a borrower should receive," but the form does not tell the borrower that he or she can rebut the Department's determination or provide instructions on what information the borrower should include in his or her rebuttal. All of the language in the above block quote regarding the Department's method for calculating partial relief should be removed from the introduction of the form because it is misleading and incomplete. Instead, the Department should focus on what evidence of financial harm the borrower should include to demonstrate the amount of relief they should receive.

### B. Section 2: School Information

As raised in our comment to the list of proposed elements, it is redundant to ask both if the borrower is still enrolled in the school and what their current enrollment status is. We ask that the Department reconsider its decision to include both questions. Additionally, the form asks all borrowers to provide the states they lived in during the enrollment period that is the subject of the claim. This question is only relevant to borrowers subject to the state-law eligibility standard and could be burdensome for students subject to the 2016 or 2019 borrower defense rules, particularly those who are affiliated with the military or suffer from housing insecurity.

### C. Section 3: Other Refunds, Remedies, Loan Reduction or Tuition Recovery Requests

This section asks borrowers to provide "relevant documents related to the arbitration" and then lists documents that likely would be disclosed in discovery, such as transcripts, enrollment agreements, student manuals, course catalogues, and "legal documents." Borrowers are not required to provide arbitration documentation to the Department pursuant to the borrower defense regulations. While the Department should ask whether the borrower is in arbitration with their school and may ask for the arbitral documents, the request as formulated is unnecessary and unduly burdensome on borrowers.

### D. Section 4: Conduct That Results in Eligibility for Borrower Defense to Repayment Relief

#### 1. Throughout; Reliance on Misrepresentation

In response to our comments on the proposed list of elements for the form, the Department has amended how it asks the borrower to disclose whether they relied on the misrepresentation

alleged. Now, each question asks, "Was the alleged misrepresentation the basis of or pivotal to your decision to attend the school?" Unfortunately, the way this question is framed prevents borrowers from pointing to the cumulative effect of multiple misrepresentations. We reiterate our recommendation in our prior comment and ask that the question be phrased as it is on the current form, "Did you choose to enroll, remain enrolled, or take out loans based in part on the issues described above" so that the borrower can respond by checking "Yes" and "No."

In addition, using the words "alleged" and "pivotal" may make the question difficult for many borrowers to understand.

**2. Throughout; Discovery of Misrepresentation**

Each question asks the borrower "When did you discover that the information that the school provided was inaccurate?" followed by the question "Please explain." Without more clarity around what information the Department is eliciting, "[p]lease explain," will confuse borrowers. The Department should exclude "[p]lease explain" or should ask the borrower explicitly "If it took you a year or more to discover the misrepresentation, please explain why the delay occurred."

**3. Admissions Selectivity**

We ask that the Department reconsider our recommendation that "My school misrepresented the reputation of the school or of a program offered by the school" be added to the borrower defense claim checklist. The form does not sufficiently address misrepresentations related to the standing or reputation of the school or a particular program.

Additionally, the checkbox stating "My school claimed to be an open-enrollment school, but failed to disclose that some programs are not open enrollment and instead have entrance requirements, such as minimum GPS[*sic*], test scores, or volunteer experience in the field that limit admissions to the program" has a typo. The use of the words "open-enrollment school" and "entrance requirements" will confuse borrowers. We recommend that the Department use the phrasing used in its list of proposed elements, "My school made a misrepresentation concerning its criteria for admission" instead.

**4. Representations to Third Parties**

We thank the Department for considering information that a school misrepresented information to a third party, even if the borrower is not aware of that misrepresentation. Given that the Department will consider information from accreditors or Department findings, this section should disclose so clearly to borrowers. The Department should communicate to borrowers that providing documentation to support this type of claim is optional.

### 5. Urgency to Enroll

The form asks borrowers, "Did your school tell you that you had to enroll on the same day you contacted or visited the school, or you would miss out on an enrollment opportunity or scholarship opportunity?" This phrasing makes an urgency claim overly narrow and should be rephrased according to the language the Department used in its response to the legal aid comments, "Did your school tell you that you had to enroll right away (such as the same day you contacted or visited the school) or you would miss out on an enrollment spot or scholarship opportunity?" This phrasing provides "same day" as an example but not a limit to what types of urgency assertions will count to make a borrower eligible for relief. The form should include the other basis for eligibility the Department included in its listing of elements, "My school misrepresented how quickly their classes filled up." Additionally, we ask that the Department reconsider the other grounds for urgency to enroll eligibility we previously asserted in our comment to the proposed list of elements for the form.

### 6. Educational Services

We request that the Department reconsider its rejection of the additional grounds for eligibility we proposed in our comment to the proposed list of elements. While the Department's response accounts for legitimate reasons for schools to change their practices, many unscrupulous schools knowingly misrepresent the student-to-teacher ratio or the equipment the school is providing when the student enrolls. Students should be permitted to raise those bases as a grounds for a borrower defense.

We also recommend that the form use the language it originally used in its list of proposed elements for some of the grounds for relief eligibility listed as checkboxes. In lieu of "My school misrepresented the qualifications of its faculty" used in the form, the Department should revert to its prior phrasing, "My school misrepresented the qualifications of its teachers." And, in lieu of "My school misrepresented how my course of study would be taught (for example, ground-based versus online)", the Department should revert to its prior phrasing, "My school misrepresented how my course of study would be taught (for example, in in-person lecture, online, or lab-based)." The language the Department originally proposed is more clear and accessible for borrowers. The current language on the proposed form is likely to confuse borrowers who may not know the meaning of the words "faculty" or "ground-based" teaching.

### 7. Employment Prospects

The Department excluded a basis for relief eligibility it listed in its proposed elements for the form, "My school falsified its graduation rates." We recommended that this should be added to the form as a basis for eligibility, as it is a substantial misrepresentation and could establish relief eligibility under the state-based eligibility criteria or 2016 Rules.

### 8. Program Cost and Nature of Loan

The Department rejected our recommendation that additional grounds for eligibility be added to the checkbox examples of claims, including "My school told me I would have no problem repaying my loans after I graduated;" "My school told me that I would have low monthly payments on my loan after I graduated;" and "My school told me that I would not have to repay my loans until I found a job." The Department responded to our comment by stating that the borrower should have known that these statements were false because they have "sufficient information regarding repayment, monthly payments, and when repayment begins." We request that the Department reconsider its position.

Borrowers expect their school to honestly explain the financial aid process to them and may think they are misreading complicated legal documents like the Master Promissory Note. Borrowers' reliance on their school's explanation of their projected repayment amounts is understandable; schools are in the best position to follow the evolution of federal law and Department regulations. The borrower should not be penalized when their school disseminates false information to induce them to enroll, particularly with regards to loan repayment. To allow schools to escape accountability for making substantial misrepresentations to students by pointing to other information the student received from other sources incentivizes schools to allow its representatives to negligently disseminate inaccurate information or lie.

Additionally, relevant to borrowers subject to the state-law standard, whether contradictory evidence was otherwise available is irrelevant to whether the plaintiff has a viable unfair and deceptive acts and practices claim under state law. Put simply, state laws make it illegal for schools to blatantly lie to students. The form should acknowledge that basis for eligibility.

Schools have a legal obligation to provide truthful information to students and the Department should ensure they fulfill that obligation. The Department should revise the form to make it clear that a school's substantial misrepresentation related to loan repayment constitutes grounds for relief eligibility.

### 9. Career Services

The Career Services subsection asks borrowers, "How were you financially affected by the misrepresentation?" As we noted in our comment to the proposed element of the form, borrowers may not realize all of the types of financial harm that they may be able to assert to satisfy this question. Moreover, as we previously stated in our earlier comment, this question is too narrow in that it focuses solely on this misrepresentation instead of the cumulative effect of all of the misrepresentations a school may have made to a borrower (or breach of contract/other basis for eligibility). We request that the Department remove this question from the form altogether or

provide a checklist of the ways in which a borrower could establish that they were financially harmed by a school's career services misrepresentations.

**10. Judgment**

The form states, "*Note: This section only applies to borrowers who receive a Direct Loan, including a Direct Consolidation Loan, on or after July 1, 2017 and prior to July 1, 2020*." As we noted in our comments to the proposed elements of the form, this note should be removed, as judgments may be corroborating evidence for borrowers who received loans disbursed before July 1, 2020.

The form also asks, "Did you successfully file suit and obtain one or more non-default, contested judgments against your school in a Federal or State court or from a Federal or State administrative tribunal?" By asking whether the borrower himself or herself filed suit, the question improperly excludes whether the borrower benefitted from a government enforcement action or as a class member in class action litigation. If the Department is automatically researching and considering all government enforcement actions or litigation when evaluating borrowers' applications, without requiring borrowers to explicitly cite to those judgments in their applications, this question is satisfactory. However, if the Department does not consider this information when evaluating borrowers' applications unless the borrower explicitly cites it, it should tell borrowers to include reference to those types of legal proceedings in this subsection.

**11. Breach of Contract**

Similar to our comments in the judgment section, the breach of contract section may also be relevant to the claims of borrowers subject to the state-law eligibility standard. This subsection's note, stating, "*This section only applies to borrowers who receive a Direct Loan, including a Direct Consolidation Loan, on or after July 1, 2017 and prior to July 1, 2020*" should be removed.

**E. Section 5: Financial Harm**

This section includes a note stating that the section only applies to loans disbursed after July 1, 2020. If the Department is not requiring that borrowers of loans disbursed prior to that date to demonstrate financial harm to establish their eligibility for relief or the amount of relief all borrowers should receive, this note is satisfactory. If not, as we requested in our comment to the proposed elements of the form, the Department should remove this note or provide another section so that borrowers can establish how they have been financially harmed. The Department's current partial relief methodology is a "rebuttable presumption" for the amount of relief for eligible borrowers with loans disbursed prior to July 1, 2020; if financial harm as elicited in this section is how borrowers can rebut that presumption, they should be told as much.

Additionally, this section only provides a list of what does *not* count as financial harm. As we stated in our comment to the proposed elements for this form, we request that the Department provide a clear list of what *does* constitute financial harm under the 2019 Rules. As written, borrowers will have to guess how they can establish eligibility. Moreover, borrowers completing the form without a lawyer's assistance will be unable to answer the question, "What is the total monetary loss associated with your federal student loans that you have incurred due to your school's alleged misrepresentation?" "Monetary loss" is a legal term of art. Without a list of examples or model regarding how they should calculate how much financial harm they incurred, eligible borrowers will struggle to complete this form. This question should be aligned to how the Department anticipates borrowers will be able to satisfy the financial harm requirement.

Moreover, this section does not make it clear that borrowers must include written documentation of their efforts to secure employment to demonstrate financial harm with respect to applications under the 2019 Rule, as is required under 34 C.F.R. 685.206(e)(8)(v). The Department should make the documentation requirement explicit in this section.

### F. Section 6: Forbearance and Stopped Collections

This section improperly asks borrowers with defaulted loans in involuntary collections to opt-in to stopped-collections status. This section is not aligned to 34 C.F.R. § 685.222(e)(2)(ii), which requires the Department to automatically "suspend collection activity on the loan until the Secretary issues a decision on the borrower's claim[.]" Moreover, defaulted borrowers may not understand "stopped collections status" and may mistakenly check the wrong box, even though they would undeniably benefit from stopping the Department from garnishing their wages, seizing their Social Security benefits, or seizing their tax refund. The Department should also omit, "Are you in default on any Federal student loans?", as the Department already possesses information regarding the repayment status of the borrower's loans. In our experience, many borrowers do not know if their loans are in defaulted status or what "default" even means. Additionally, that question is missing boxes to check yes or no.

### G. Section 7: Certification

This section has a number of inaccurate or misleading statements. For example, it asks borrowers to certify that, "I have not received a refund, tuition recovery, settlement, or other financial restitute[*sic*] to repay the loans that are the subject of this borrower defense to repayment claim." This statement does not align with regulatory requirements. A borrower could still apply for relief if he or she received a partial settlement or partial refund of the loans borrowed. Similarly, the form asks the borrower to "certify that [he or she] ha[s] accurately reported other efforts I have made to receive loan relief, including by […] participating in a class action suit […]" even though the form fails to ask whether the applicant was a class member in litigation against their school

elsewhere on the form. These statements should be excluded from this certification or aligned to what is otherwise requested in this form.

In addition, borrowers may inadvertently answer these questions incorrectly. Sometimes class actions result in very little or no relief for borrowers. They may receive opt-out notices, not understand them, or not respond at all and may not later understand that they were members of a class action lawsuit. Thus, the form should ask whether the borrower was a member of the class action lawsuit, to the best of his/her knowledge and should include "I don't know" as an optional answer. This is how similar questions are asked on the false certification form.

## III. Conclusion

We appreciate your consideration of our comments. Please contact Kyra Taylor, Staff Attorney, National Consumer Law Center, or Robyn Smith, Legal Aid Foundation of Los Angeles, if you have any questions.

# EXHIBIT 1

## Comments from the Legal Aid Community to the Department of Education re:

## Proposed 2020 Universal Borrower Defense to Loan Repayment (BD) Form Listing of Elements

## Docket ID ED-2020-SCC-0043
## (85 Fed. Reg. 12777 (March 4, 2020))

## May 4, 2020

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**Comments submitted on behalf of:**

East Bay Community Law Center
Housing and Economic Rights
Advocates
Legal Aid Foundation of Los Angeles

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

Project on Predatory Student Lending of the Legal Services Center of Harvard Law School
Public Counsel

## Introduction

As organizations that represent low-income student loan borrowers, we thank you for the opportunity to comment on the Department of Education's proposed listing of elements for the borrower defense to loan repayment (BD) form.

Our organizations assist low-income student loan borrowers who have experienced first-hand the financial and emotional harm caused by unscrupulous schools that violate federal regulations, state consumer protection laws, or otherwise misrepresent their services in order to lure students for profit. Our comments are grounded in our experience working directly with low-income borrowers applying for borrower defense and other federal student loan discharges, and are intended to help ensure that the proposed BD form is clear, accessible, and fair to all potentially eligible borrowers. As the proposed list of elements for a universal borrower defense form, it is crucial for the Department to consider the most expansive interpretation of borrower defense eligibility according to the varying standards so that no borrower who may be eligible for relief is excluded or discouraged from applying.

**Below, we provide comments first on specific aspects of the proposed listing of elements for the BD form, and then make general recommendations to improve the accessibility of the form for student loan borrowers.**

## I. Comments on Specific Aspects of the Proposed Listing of Elements for the BD Form

### A. Instructions Section

The proposed BD listing of elements has revised the "Instructions" section with language that is likely to mislead and confuse borrowers on the BD eligibility requirements and may discourage borrowers from applying. The proposed language indicates that the first page of the proposed BD form will be a list of types of conduct that do **not** qualify for BD relief. We recommend the Department not use this list, but instead continue to use the shorter and simpler instruction language from the current Universal BD Form 1845-0146 ("current BD form"), which states "If your school misled you or engaged in other misconduct, you may be eligible for 'borrower defense to repayment,' which is the forgiveness of some or all of your federal student loan debt."

In addition, we recommend that Department put forth what conduct may qualify for a borrower defense to repayment **rather than, or at minimum before,** listing what conduct does not qualify for relief. By introducing the BD form with a bullet list of conduct that does not qualify, the Department would essentially shift the burden of evaluating whether facts described in an application meet complex regulatory requirements to unsophisticated borrowers who are not trained in the law. It has provided no justification for doing so and other discharge forms do not begin this way. If this bullet list is used, borrowers would feel compelled to make this legal evaluation on their own and it would discourage many who should be eligible from applying for BD relief.

*ED Response: The Department disagrees with this assertion. Given the number of applications that the Department has received from borrowers who are making a claim not covered under borrower defense, we have determined that it is appropriate to provide borrowers with more information about the types of conduct that do not satisfy the requirements for borrower defense so that we can focus on applications from borrowers making eligible claims. In addition, because the form is a live form, which would be used by students who took loans prior to July 1, 2017, we would need to include state law standards from every state – an inclusion that would make the form completely unworkable – if we were to attempt to list all of the types of conduct or misrepresentations that would potentially make a borrower eligible for BD relief.*

Further, specific items on the list are misleading and confusing. First, some of the suggested types of conduct are misleading because they are narrowly stated in a way that could mislead a borrower, who is not well-versed in understanding legalese or terms like "directly and clearly relate to." For example, it is misleading to state that "[c]onduct that does not directly and clearly relate to the educational services your school provided" or "conduct that does not directly and clearly relate to enrollment or continuing enrollment" … "**cannot** lead to a borrower defense discharge." Borrowers might read this to exclude misrepresentations regarding financial aid that are often material to a student's decision to enroll or continue enrollment, even though such misrepresentations can be a basis for borrower defense discharge.

*ED Response: The Department does not agree with this assessment. Instead, in designing the form, we felt it was necessary to include language from the regulations to create continuity among multiple sources of information, including ED websites, forms, and the regulations. We disagree as well that "directly and clearly relate to" requires a borrower to be well-versed in understanding legalese; instead, the Department believes that each of those words have plain meanings, readily understood by college students.*

In addition, other listed exclusions could be a valid basis for a borrower defense claim. For example, "[a] violation of the legal requirements a school is bound to follow under its agreement with the U.S. Department of Education" may serve as a legitimate ground for a borrower defense claim, depending on the facts. In California, for example, such a violation may constitute a violation of Cal. Bus. & Prof. Code section 17200. At a minimum, such a claim would be eligible for BD relief under the regulation applicable to loans made prior to July 1, 2017.[1]

*ED Response: The Department appreciates the examples you provide. Because ED will use an active form, the types of conduct that do not qualify for BD relief will be based on the year(s) in which the borrower took their student loan(s), including a consolidation loan.*

Finally, two of the proposed types of conduct could serve as the basis for a borrower defense claim for borrowers with Direct Loans made prior to July 1, 2020. Depending on the level of misconduct, conduct relating to the quality of education or the reasonableness of faculty could rise to the level of a breach of contract, could be the basis for a state law cause of action, or could be the basis of a material misrepresentation that a student relied upon in deciding to enroll. Only the regulations in effect on or after July 1, 2020 explicitly exclude these two grounds for relief.[2]

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[1] 34 C.F.R. § 685.206(c)(1) ("the borrower may assert a borrower defense" based on "any act or omission . . . that relates to the making of the loan for enrollment at the school or the provision of educational services . . .." [2] 34 C.F.R. § 685.206(e)(5)(2).

*ED Response: The Department appreciates the examples you provide. Because ED will use an active form, the types of conduct that do not qualify for BD relief will be based on the year(s) in which the borrower took their student loan(s), including a consolidation loan.*

For example, a school may promise that it will provide faculty who are experts in their field and up-to-date on the most recent technical developments in a given field, but then provide faculty who do not have any expertise, do not know how to use the most up-to-date equipment necessary for employment (for example, the use of technical equipment), provide answers to exams before students take the exams, read straight from a book for class instruction, or come to class but provide no instruction. This alone, or combined with other facts, may constitute the basis for a breach of contract, a violation of a state statute, or a misrepresentation that could be the basis for a valid BD claim. Similarly, conduct "relating to academic disputes and disciplinary matters" could also be the basis for a breach of contract. For example, we have represented students whose schools terminated their enrollment, locked them out the school computer networks, or made it impossible for them to complete a required externship in retaliation for complaining about misrepresentations, absent faculty, failure to provide books, equipment or externships, or other problems. We have also seen teachers retaliate against students who complain about them by failing them when in fact the students passed their classes. Such conduct may constitute the basis for a breach of contract, a violation of a state statute, or a misrepresentation that could be the basis for a valid BD claim.

*ED Response: The Department appreciates the examples you provide. Because ED will use an active form, the types of conduct that do not qualify for BD relief will be based on the year(s) in which the borrower took their student loan(s), including a consolidation loan.*

Should the Department choose to keep a list of conduct that does not qualify for BD relief, we recommend that it substantially narrow down the list according to our suggestions and move the list to a supplemental instruction section that comes after the borrower's signature line.
*ED Response: The Department does not adopt this proposal. Because ED will use an active form, the types of conduct that do not qualify for BD relief will be based on the year(s) in which the borrower took their student loan(s), including a consolidation loan. This information must be presented at the beginning of the application to make sure that borrowers who are ineligible for BD relief do not waste their time completing a form and do not submit a form that will take the Department's attention away from eligible borrowers.*

**B. Section 2: School Information**

The proposed BD form listing of elements asks borrowers for the "Current Enrollment Status at school listed above" and "Are you still enrolled at this school." It is redundant to ask both these questions. We recommend that the Departments maintain the language in the current BD form, which asks for the "current enrollment status at school listed above" and provides check boxes of responses: withdrawn, graduated, transferred out, or attending.

*ED Response: The document that entered clearance was a list of data elements, not a form. The actual form will retain this form of the question. Please note: The online application is being enhanced so a borrower will be presented with school and program information associated to them from the National Student Loan Data System (NSLDS). That information will be appended to the borrower's case, eliminating the need for the borrower to answer specific questions about their enrollment. In addition, borrowers will have the ability to modify the*

*information retrieved from NSLDS if they disagree with, for example, their program of study or enrollment status. Finally, borrowers who do not wish to use information from NSLDS in their application can "manually enter" all of the necessary information about their school.*

## C. Section 4 – Basis for Borrower Defense

### i. Comments Applicable to All Subsections Under Section 4: Basis for Borrower Defense

*a. Examples of School Misconduct*

We strongly support the Department's decision to provide examples of qualifying misrepresentation or misconduct as boxed options while also providing an "other" option to provide further information so that applicants need only select all that apply and can add other details if applicable.

*b. School Communication Method*

We also support the Department's proposal to provide examples of communication methods so that borrowers can select all that apply. For clarity, we recommend that the Department specify that "online" communication includes email and website statements.

*c. Requests for Evidence*

Each subsection asks: "Please describe your communication with the school below. Please describe in detail what the school told you, or failed to tell you, and why you believe it was misleading. Additionally, please attach any emails or other communications regarding the misleading behavior and any other documents that may support your claim." While we support this question, we are concerned that repeating the list of potentially relevant documents in each subsection makes the form too long. In order to streamline the form, we suggest putting this request for documentation re. the school's communication at the beginning of the application with a general recommendation that the borrower should submit relevant documents that support the BD claim. However, to the extent a borrower is submitting the application form online, we recommend that the Department provide this request for documentation re. the school's communication with every question, to the extent possible.

*ED Response: We understand this concern and have taken steps to ensure that, in the online application – where the overwhelming majority of borrowers apply –borrowers only see questions that are relevant to them. Therefore, if a borrower wants to make an allegation related to transferability of credits, but not one related to job prospects, the borrower will only see questions related to transferability of credits. Similarly, to the extent that the borrower is making multiple allegations, and the borrower has already uploaded a piece of evidence related to the first allegation, but the*

*borrower believes that it also supports the second allegation, the borrower will not be asked to upload the same document to support the second allegation. All evidence submitted will be associated to the borrower's application, not individual allegations. It is the responsibility of a borrower defense adjudicator to determine whether the submitted evidence is relevant to any borrower defense allegation or allegations, and if so, which. We believe that the design for online users has struck the appropriate balance, and that no changes to the paper application are necessary. However, we can add a note to the paper application indicating that a piece of evidence only needs to be submitted once and that a piece of evidence can support multiple allegations.*

Further, the request for "documents" in each subsection could lead borrowers to think they must have access to documents to receive relief, even though their own testimony may be sufficient and, in our experience, is all most will have access to. We therefore recommend that the Department add a statement that borrowers may still be eligible for relief even if no supporting documentation is included.

*ED Response: The need for documentary evidence, beyond mere testimony, is a bedrock principle of due process and the proper and fair adjudication of claims of harm, inside and outside of a courtroom. The Department has never approved, nor should, a borrower defense application based on testimonial evidence alone. Moreover, we do not believe that requesting that a borrower submit evidence to support their allegations will be a deterrent to eligible borrowers seeking a borrower defense discharge—as the current volume of borrower defense applications demonstrates.*

Additionally, some borrowers may know of former classmates or others who can provide corroborating testimony, but a question about this is not included in the list of potentially supporting evidence. Such evidence is important and relevant and can aid in Department investigation and evaluation of BD applications. Thus, we recommend that the Department add a question asking students to list the names of borrowers, faculty, school staff, or others that may have relevant information.

*ED Response: The Department cannot, and will not, adjudicate BD claims based on hearsay evidence. Each borrower who feels that he or she has been a victim of misrepresentation has the right and opportunity to submit his or her own BD claim. The borrower is already asked to provide the names of individuals who he or she believe made a misrepresentation, so no additional questions asking that information are required.*

*d. Financial Effect*

On all subsections, the proposed BD asks: "How were you financially affected by the misleading information or lack of information relating to _____. Please include any difficulties you have had getting a job in your field of study as a result of your school's misrepresentations regarding _____."

This method of eliciting information regarding financial harm is far too narrow. While the Department has amended the regulation to limit what constitutes financial harm for loans disbursed on or after July 1, 2020, for loans disbursed prior to that date financial harm can include, for example, the taking out of student loans and grants, giving up jobs to attend school full-time, loss of income or opportunities,

additional schooling/training/materials borrower needed to pay for outside of the school, paying more for the program than they would have otherwise, or earning less than they believed or were told that they would, etc.. We therefore suggest that either the Department generally ask the borrower to describe how he/she was financially harmed or provide a more extensive checklist (including "other") and a request for further description. More examples should be provided to establish a fuller picture of the financial harm that a borrower could suffer as a result of the school's misconduct.

*ED Response: The Department does not adopt this suggestion. The only type of financial harm that may be considered when adjudicating a borrower defense claim is financial harm related to the student loan. Therefore, the other categories suggested by the commenter are irrelevant. We note as well that the online application—where the overwhelming majority of borrowers apply for a borrower defense discharge—will dynamically determine which borrower defense regulation or regulations would apply to a borrower and only presents to the borrower questions and information that are/is relevant to the borrower.*

We also recommend that the financial harm question be removed from each subsection and inserted as a separate section after Section 4. The financial harm cannot be always be traced to one misrepresentation. For example, if a student enrolls based in part of promises of credit transferability, but then does not enroll in another college because it will not accept transfer of the credits, what is the financial harm exactly? This should include post-graduate earnings lower than promised if the student cannot get the type of job for which she trained without further education. In this case, this misrepresentation combined with others leads to financial harm.

*ED Response:*
*We do not adopt this recommendation. The Department has determined that the way it will evaluate the financial harm suffered by a borrower is based upon a comparison between the median earnings of graduates of the applicant's program and the median earnings of graduates of similar programs at other institutions. It is this comparison of program earnings that enable the Department to determine whether or not the borrower based his or her enrollment decision on the misrepresentation, and that misrepresentation encouraged the borrower to forego enrollment in a different program that would have likely led to better earnings outcomes.*

*e. Reliance on Misrepresentation*

The question "did you rely on the ____ when you chose to enroll in your school" should refer to all the conduct by the school as it does in the current BD application. For example, in the "Employment Prospects" subsection, the proposed BD form asks, "Did you rely upon the promises of employment you described above when you chose to enroll in your school?" This wording limits the reliance to only one type of statement and is too limiting in the context of the subsection that includes misrepresentations relating to employment including but NOT limited to "promises of employment". A borrower might accurately answer no to this despite having relied on misrepresentations regarding likely earnings, eligibility for certification or

licensure, or other misrepresentation types addressed in the "Employment Prospects" subsection.

We encourage the Department instead to keep the language in the current BD form, which asks "Did you choose to enroll, remain enrolled, or take out loans based in part on the issues described above" and provides a checkbox responses of "Yes" and "No" for an applicant to mark their response.

*ED Response: Thank you for this suggestion. We have modified the language to reference "the misrepresentation" generally, instead of attempting to reference the allegation type in abbreviated form.*

**ii.** Employment Prospects Subsection:

We recommend that the Department add the following to ensure these type of common misrepresentations are included as a basis for BD relief: ○ The school misrepresented or implied that the school was accredited when it was not.

- The school misrepresented or implied that my program had the accreditation necessary to qualify graduates for licensure or certification when it did not.
- The school failed to tell me that my programs did not have the accreditation necessary to qualify graduates for certification or licensure.

*ED Response: Thank you for this recommendation. With some modifications, the Department will add these examples of misrepresentations.*

**iii.** Program Cost and Nature of Loan Subsection:

We recommend that Department add the following bases for a BD claim to the checklist: ○ My school told me I would have no problem repaying my loans after I graduated. ○ My school told me that I would have low monthly payments on my loan after I graduated.

- My school told me that I would not have to repay my loans until I found a job.

*ED Response: We do not adopt this recommendation. Because students are provided with information – from non-institution sources – about monthly payment that the borrower must pay, based on a standard repayment term, the Department believes that students have sufficient access to truthful information regarding repayment, monthly payments, and when repayment begins. The borrower has the responsibility for reading documentation related to their Federal student loans and for understanding the repayment obligation that is explained in the Master Promissory Note, regardless of what their school said to them.*

**iv.** Educational Services Subsection:

We recommend that the Department add the following bases for a BD claim to the checklist: ○ My school misrepresented the quality, number, or availability of materials or equipment that would be provided for my program.

○ My school misrepresented the student to teacher ratio or classroom size. ○ My school misrepresented the skills or instructions that I would receive from my program.

*ED Response: We do not adopt this recommendation. The Department does not believe that these are forms of misrepresentation that would necessarily make a borrower eligible for borrower defense relief. For example, student-to-teacher ratios are often times dictated by accreditation requirements, and those requirements may change over time. An institution's adherence to changing accreditor requirements would not constitute a misrepresentation that would make a borrower eligible for BD relief. In addition, programs must be able to keep pace with the demands of employers, which could necessitate a change in the skills taught in the program. Accreditors have the responsibility of ensuring that the program meets quality standards, and it is beyond the authority of the Department – and would constitute a serious violation of the higher education triad – to make determinations about the academic content of postsecondary programs.*

**v.** Urgency to Enroll Subsection:

The listed bases for a BD claim in this subsection are worded in a confusing manner.

We recommend the Department revise this part: ○ My school misrepresented that I had to enroll right away or that I would lose my spot in the program.

- My school misrepresented that there were limited spots in the program. ○ My school misrepresented when new enrollments could be accepted into the program.
- My school pressured me to enroll by other means. Please explain.

*ED Response: The Department adopts this recommendation, in part. First, we change the first question to now read: "Did your school tell you that you had to enroll right away (such as the same day you contacted or visited the school) or you would miss out on an enrollment spot or scholarship opportunity?" We revised the second question in the section in accordance with the first. Second, we do not adopt "My school misrepresented that there were limited spots in the program." The question is too speculative to include in a list of examples. In truth, every program has limited spots, an*

*institution saying so would not necessarily constitute a misrepresentation. We do not adopt "My school misrepresented when new enrollments could be accepted into the program." The question is too speculative for inclusion and could lead to confusion. Finally, we do adopt: "My school pressured me to enroll by other means. Please explain."*

**vi.** Admissions Selectivity Subsection:

This section could be broadened significantly to address the common abuses among predatory schools. We recommend the Department add the following bases for a BD claim to the checklist:

- My school misrepresented the reputation of the school or of a program offered by the school.

*ED Response: We do not adopt this recommendation. ED believes that this topic is addressed sufficiently in the current BD form.*

**vii.** Representations to Third Parties Subsection:

While a school's misrepresentations to third parties may form a basis for a borrower defense claim, it is unclear how an individual pro se applicant would be aware if the school made misrepresentations to third parties such as an accreditor or a ranking organization. We urge the Department not only to seek this information from individual BD applicants, but also to affirmatively review accreditation reports and other relevant documentations or findings within its control that would evidence such misrepresentations to third parties.

*ED Response: In the event that the application includes claims that the institution misrepresented information to a third party, or in the event that the Department has knowledge that such a misrepresentation occurred, such information will be included in the Department's adjudication of the claim.*

**viii.** Judgment Subsection:

Under the proposed subsection titled "Judgment," it states that the section only applies to borrowers who received a Direct Loan, including a Direct Consolidation Loan, on or after July 1, 2017 and prior to July 1, 2020. This information sought, however, is also relevant to loans made prior to July 1, 2017. If a borrower obtained a contested judgment against a school for violations of state law, then this may be evidence the borrower should include with his/her application. While the Department may choose to make a decision different from the court, a court's determination and findings should be evidence considered by the Department. We therefore suggest removing the beginning "Note."

*ED Response: The Department will include, in the allegation sections related to evidence, information contained in a judgment that may substantiate a borrower's claim, even if the judgment*

*is not, in and of itself, the basis for a borrower defense claim. This section will continue to be limited to those who are subject to the 2016 borrower defense rule.*

The proposed revision further asks, "Do you have a judgment against your school in a Federal Court, a State Court, or Administrative Board?" The regulation applicable to loans made on or after July 1, 2017 and before July 1, 2020 has broader eligibility criteria based on judgments. It states that "The borrower has a borrower defense if the borrower, whether as an individual or as a member of a class, or a governmental agency, has obtained against the school a nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction."[2] Contrary to this regulation, however, this proposed subsection suggests that the borrower had to individually obtain the judgment against the school, which improperly limits the eligibility scope for borrowers with Direct Loans made during that period. To better align with the regulatory language and ensure that the proposed BD listing of elements can effectively be used as a universal form, we recommend that the question be revised to state: "Did you as an individual or member of a class, or did a government agency, obtain a favorable judgment against your school in a Federal Court, a State Court, or Administrative Board?"

*ED Response: The Department appreciates this proposed revision, but does not adopt it. While the 2016 regulation is quoted accurately, the interpretation presented here is not accurate. The suggestion that the student needs to obtain a judgment individually is not implied by the question.*

**ix.** Other Subsection:

This subsection asks "Did your school mislead you, or fail to tell you, important information other than what you have already alleged in this application? It then asks "Were these promises a key part of the reason you chose to enroll in your school?"

The proposed language is unduly limiting by requiring that the school's misconduct be a "key part" of the borrower's decision to enroll. We recommend that the Department keep the language in the current BD form, which asks "Did you choose to enroll in your school based in part on the issues you describe above?" and provides a checkbox responses of "Yes" and "No" for an applicant to mark their response.

*ED Response: ED disagrees with the commenter. It is important to understand whether or not the borrower relied on the misrepresentation in making the decision to attend the institution, and we believe that the question as written is appropriate.*

**D. Section 5: Financial Harm**

The Department's list of possible examples of financial harm may be found at 34 C.F.R. § 685.206(e)(4)(i) through (iv). In the September 23, 2019 Fed. Reg, the Department noted that "[c]ommenters suggested that the Department provide clear information, such as a checklist of possible examples of financial harm from those identified in the proposed rule,

[2] 34 C.F.R. § 685.222(b).

and ask borrowers to check all that apply, explaining the meaning of items in the list, and allowing borrowers to describe other examples of financial harm they have experienced."[4] We reiterate that comment and recommend the Department include a list of what counts as "financial harm," as the proposed list of elements only identifies what doesn't count.

*ED Response: The Department appreciates this comment, but does not adopt the recommendation. We are confident in the question as written.*

Further, this section states that it "*only applies to borrowers who receive a Direct Loan, including a Direct Consolidation Loan, on or after July 1, 2020."* While this language does comply with the final borrower defense regulations published in September 2019, we understand that the Department is currently requiring a financial harm showing in order for all borrower defense claimants to qualify for full relief. We believe all borrowers with meritorious claims should receive full relief. If, however, the Department is going to continue its practice to require all borrower defense applicants to show specific types of financial harm in order to obtain full relief, it must reasonably put claimants on notice and provide them an opportunity to show financial harm. For this reason, we recommend that the Department broaden this section to ask for information regarding all types of financial harm, as we state above, including through using a more extensive checklist with an "other" category and request for a description.

*ED Response: The Department does not adopt this recommendation. We do not agree on the value of the inclusion of the checklist or the other suggested changes. The inclusion of the "Note" language was intentional and, because of the nature of the live form, this section will only appear to borrowers who have eligible loans.*

This section also asks, "Have you been terminated or removed for performance reasons from a position which was in your field of study or a related field?" If the Department is seeking to determine whether a borrower was terminated or removed for performance reasons unrelated to the school's misrepresentations or breach of contract, we ask that the Department clarify the term "performance reasons" in this question such as removal or termination for misconduct such as drug use, failure to report on-time, excessive absences, etc.. The school's misrepresentations or breach of contract, for example failing to provide training in the skills or on the equipment necessary for maintaining employment, may be the cause of a borrower's performance issues and it should be made clear that the "performance issues" referred to in this question are not related to the school's misrepresentation.

*ED Response: Other relevant sections of the form provide the opportunity for borrowers to explain how the program's or institution's misrepresentations caused financial harm. This section of the form will apply to loans taken on or after July 1, 2020, and is required by the regulations applicable to those loans. To get a complete picture of the financial harm and the circumstances surrounding the borrower's claim, it is important for the Department to understand that the harm a borrower has suffered is the result of the institution's misrepresentations, rather than actions or decisions made by the borrower.*

**E. Section 6: Forbearance/Stopped Collections**

We strongly oppose the proposed BD language that states that interest may be capitalized if the borrower defense application is denied or partially approved. Nowhere in the final

borrower defense regulations is the Secretary permitted to capitalize interest for a borrower defense claim that is partially approved. While the Department noted that it *may* capitalize interest if a borrower defense claim is "not successful,"[3] it defies logic to interpret a partial discharge as a claim that is "not successful." We strongly urge the Department to remove this statement and end any such policy of capitalization for borrowers who receive partial relief, lest defrauded borrowers with approved claims end up owing more as a result of filing a borrower defense application and being subjected to interest capitalization.

*ED Response: Under the Direct Loan regulations regarding forbearance at 34 CFR 685.205, interest may be capitalized upon the cessation of a forbearance. The language in Section 6 reflects regulatory authority. The Department does not currently capitalize interest when a borrower defense forbearance ends and has no plans to begin doing so. Moreover, we would not have a regulatory basis to capitalize interest for a borrower who is in default and would not do so. However, we will not modify the language at this time, to provide flexibility in administration if policies ever change. This approach is consistent with all other loan servicing forms.*

Additionally, as the Department has done in the current BD form, we encourage the Department to include a link for an FAQ regarding the consequences of forbearance and stopped collections so that a borrower may seek further information before deciding which option is best for his/her situation.

*ED Response: The Department appreciates this proposal. The online application will have integrated into it an optional educational module that will help the borrower understand the impact of interest accrual during forbearance and stopped collections, and will provide borrowers estimates of the amount of interest that may accrue over a period of time that is customizable by the borrower.*

**F. Section 7: Certifications**

Under the certification section, we propose that the revision be revised as follows (suggested language in italics): "I understand that any rights and obligations with regard to borrower defense to repayment are subject to the provisions currently in effect under Title 34 of the CFR *that are applicable to my Direct Loans*."

The proposed BD form includes a certification that "I understand that in the event that I receive a 100 percent discharge of my loan balance for which the defense to repayment application has been submitted, the institution may, if not prohibited by other applicable law, refuse to verify or to provide an official transcript that verifies my completion of credits or a credential associated with the discharged loan." We reiterate the concerns raised in our prior comments to the proposed borrower defense regulations regarding transcript withholding, and firmly recommend that the Department remove this statement as it may dissuade eligible borrowers from seeking relief. The Department has cited no authority for its assertion that schools may withhold such documentation. To the contrary, the legal precedent indicates that while schools may have a basis for withholding official transcripts if

[3] 84 Fed. Reg. 49788, 49815 (Sept. 23, 2019).

[4] 84 Fed. Reg. 49788, 49818 (Sept. 23, 2019).

the student owes the school an unpaid debt, including a defaulted Perkins Loan or an unpaid fee or tuition debt,[4] schools may not withhold transcripts if the student does not owe a debt, including if a loan debt has been discharged.[5] For example, the Seventh Circuit concluded that a student who did not owe an enforceable debt to a school had a right to receive an official copy of her transcript.[6]

Moreover, there is no evidence that schools do in fact withhold transcripts on the basis of a loan discharged as a result of a borrower defense, even if they legally could. And in our experience, this is extremely unlikely. This language thus seems likely to primarily serve as a baseless threat that will unnecessarily deter defrauded borrowers from applying for much-needed relief.

*ED Response: The Department appreciates this comment and, at 84 FR 49837, we responded to it, in full. ED does not believe this is a baseless threat. If a borrower makes a convincing case that they received has no educational value, and the borrower received full loan discharge based on that claim, it is hard to understand why the borrower would wish to receive a transcript from the institution since such a transcript would similarly have no value.*

The proposed BD form list of elements also includes a certification stating, "I agree to allow the institution that is the subject to this defense to repayment application to provide the Department with items from my student educational record relevant to this defense to repayment application." Pursuant to the regulatory language, we recommend that the Department include a notice that should the Department receive any documentation from the school, it will provide the borrower a copy of the school's submission as well as any evidence otherwise in possession of the Secretary, which was provided to the school.[7]

*ED Response: Thank you for this comment. We agree that it would be helpful to make this information more clear to borrowers, and will add language based upon your suggestion.*

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[4] *See, e.g.*, *Ball State Univ. v. Irons*, 27 N.E.3d 717, 721 (Ind. 2015) (recognizing that school has a common law lien over transcript based on student's tuition debt and "may not be compelled to release the transcript absent payment of the unpaid tuition balance"); *Song v. Regents of Univ. of Minnesota*, No. CIV. 11-427 ADM/TNL, 2011 WL 5835087 (D. Minn. Nov. 21, 2011) (finding student unlikely to prevail on merits of claim for transcript where school declined to release transcript until student paid back funds received that she was not entitled to due to her suspension of enrollment); *see also* U.S. Dep't of Educ., Fed. Student Aid Dear Colleague Letter CB-98-13 (Sep. 1, 1998) (noting that the Department encourages institutions to withhold transcripts for defaulted Perkins Loans to encourage repayment).

[5] *In re Kuehn*, 563 F.3d 289, 294 (7th Cir. 2009).

[6] *Id.* (finding that school had no enforceable right to recover against student whose debt was discharged in bankruptcy and therefore could not withhold her transcript, and concluding "Giving weight to custom that amounts to an implicit term of the educational contract, and following the reasoning in *Hirsch*, we conclude that Kuehn has a state-law right to receive a certified copy of her transcript).

[7] 34 C.F.R. § 684.206(e)(10)(ii) (effective July 1, 2020).

## II. Other Recommendations to Improve Accessibility for All Claimants

### A. The Department should streamline the BD form and minimize the page count.

Compared to the current Universal BD Form 1845-0146, which is 8 pages long, the proposed 2020 Universal BD Form Listing of Elements has increased to 19 pages. While we understand that the final form may have a different page count than the draft listing of elements, it appears clear that the Department is proposing language that will create a significantly longer form. The current BD form is already much more extensive than other federal loan discharge applications (i.e., False Certification (ATB) Loan Discharge Application is 5 pages, Closed School Loan Discharge Application is 5 pages). Based on our experience working with borrowers who have attended predatory schools, we believe that the expanded length of the revised BD form will strongly discourage borrowers from applying for relief to which they are entitled. A lengthier BD form will also likely impose a heavy burden on the Department staff reviewing the BD applications, resulting in longer delays in processing applications and a greater risk of financial harm for borrowers awaiting their application review. We urge the Department to reduce redundant requests for information and to streamline the application where possible to minimize the page count.

*ED Response: The Department considered the burden on borrowers and its own staff when developing the draft borrower defense application, and believes that we have struck the appropriate balance. Moreover, as stated previously, borrowers will only be presented with questions that are relevant. Because most borrowers only make one or two allegations in an application, most borrowers will experience a significantly shorter application process than a paper application would suggest.*

### B. Where possible, provide boxed options for borrowers to check their response(s).

To the extent possible, the proposed BD form should provide responses that borrowers can check if applicable. This will help ensure that borrowers can more quickly and efficiently complete the BD form and will expedite the Department's review of the application.

*ED Response: As mentioned, the document submitted for comment was a list of data elements, not a form. The final form will rely on checkboxes to the maximum extent practicable.*

### C. The revised form should be made available to complete and submit online and through mobile devices.

For the low-income clients that we serve, borrowers often do not have access to a computer or a printer and rely on a mobile device for their only connection to the Internet. Therefore, the Department should ensure that the proposed BD form is accessible online and formatted for mobile devices so that borrowers can complete and submit the form through their phones. The online BD form should be formatted so that borrowers can save their place in the application and come back to it at a later time. In addition, the Department should develop an accessible and easy way for borrowers to submit documentation in support of their BD claims online.

*ED Response: This is current functionality with the online experience at borrowerdischarge.ed.gov and will be continued and significantly enhanced as part of this effort. The new borrower defense application will be available online at StudentAid.gov.*

In addition, to avoid unnecessary delay or burden in completing an online BD form, the form should be formatted so that when borrowers mark that a section is not applicable, they are given the option to be directed to the next question.

*ED Response: As previously mentioned, this will happen automatically. Borrowers will not be presented with the opportunity to "skip" questions that are irrelevant to them; instead, they will simply not be presented with them at all.*

Finally, borrowers who submit an online application should receive a copy of their signed, submitted BD form for their records, and all borrowers who submit applications should receive confirmation of receipt and a tracking number to allow them to monitor processing of their application.

*ED Response: This is current functionality associated with the online application process that will be retained.*

**D. The revised form should incorporate plain language and should be evaluated by consumer feedback.**

While we appreciate the Department's efforts to simplify the BD form by including the checked boxes, we continue to urge the Department to consider best practices in form design and learn from borrowers' experiences with existing Department forms and user interfaces. From prior experience, we know that a poorly designed form will discourage eligible applicants from seeking and accessing relief. In particular, the proposed listing of elements for the BD form does not address the following:

- The proposed listing of elements for the BD form does not appear to incorporate plain language tailored to the intended audience – students who were defrauded, primarily by unscrupulous colleges. Following best practices for form design and The Plain Writing Act of 2010, the Department should use plain language on all versions of the discharge forms.

- In addition, the Department should avoid language that requires applicants to interpret complex legal concepts (such as contract "breach", "punitive damages," etc.). As far as we are aware, the Department has not tested the forms for consumer comprehension and usability, to ensure all students who attend various institution levels and types are able to comprehend and complete the forms.

We understand that testing may take time. We encourage the Department to seek input on the forms and on this testing process from other federal agencies that have extensive testing experience, including the Federal Trade Commission and the Consumer Financial Protection Bureau.

*ED Response: We have attempted to use the plainest language possible. Moreover, the design of the online applications on StudentAid.gov that are being redesigned as part of the Department's Digital and Customer Care Contract, including the borrower defense application, have used principles of user-centered design, including user testing.*

The Department should also provide support structures for borrowers who need assistance filling out the forms, including a help line, a chat function, a search function, and a frequently asked questions section. Contractors and staff providing assistance should be trained on how to advise and assist borrowers and evaluated by consumer feedback and compliance testing.

*ED Response: This comment is outside the scope of the request for comment, which is on the content of the application itself. However, such support structures exist today and will continue.*

Additionally, any "yes" or "no" options on the form should be clearly marked as distinct and placed side-by-side. The Department should also place consequences of each option directly below the choice, rather than in the preceding text.

*ED Response: The online application process clearly distinguishes between mutually exclusive options, and have been user tested. As the paper application is developed, we will attempt to make mutual exclusivity clear, consistent with other student loan forms and applications.*

**E. The revised form should be provided in other languages.**

These forms should also be available in languages other than English, particularly in Spanish and other languages commonly used by borrowers. Many of the predatory colleges that engage in the kind of misconduct to form the basis of a BD claim have specifically targeted their deceptive practices towards Spanish speakers who are not proficient in English (Limited English Proficiency or LEP individuals). Just a few examples from California alone include Meadows College of Business, CIT College, Northern California Institute of Cosmetology, Webster Career College, Wyotech and Heald. In addition, these unscrupulous schools often target students in other languages. The BD form should be available in Spanish and other languages spoken by LEP students commonly targeted by fraudulent schools.

Translated discharge forms are critical to ensuring that LEP borrowers harmed by colleges are able to understand and exercise their federal right to apply for discharges. If the BD discharge form is not translated into Spanish and other languages, LEP borrowers will be denied the loan discharges to which they are entitled by law, which will likely result in large numbers of them defaulting on their loans, suffering from the Department's harsh involuntary debt collection tactics, and being barred from access to quality higher education. This result is contrary to the purpose of the Higher Education Act, as well as the requirements of Title VI of the Civil Rights Act, and the Department's own commitment to equal access to education.

*ED Response: Consistent with the Department's longstanding practice, the borrower defense application will be translated into Spanish.*

**F. Borrowers should not have to waive consumer protections in order to seek relief.**

A loan discharge form such as the proposed listing of elements for the BD form never include a mandatory requirement for applicants to allow prerecorded voice messages and autodialing to their cellphones, including via text messages. Unfortunately, such a provision continues to appear in the Certification section of the proposed form. Seeking any type of discharge relief should not come at the cost of waiving important consumer protections. At most, the forms should include "yes" and "no" check boxes in which applicants have the option of providing consent. If any waiver language is included, applicants should also be advised of their right to revoke consent and informed about how to do so.

*ED Response: This is inaccurate. All student loans forms have, for some time, included a consent to receive text messages and prerecorded voice messages, or the use of automated dialing equipment for cellular telephones, as required under the Telephone Consumer Protection Act (TCPA). Incorporation here merely reflects the Department's longstanding attempts to balance the needs of complying with the TCPA and communicate with borrowers in a way that they have come to expect—particularly as it related to text messaging.*

**G. The Department should rely on evidence provided from other sources and utilize the group discharge process to minimize the evidentiary burden on individual students.**

We urge the Department to focus on collection of evidence from other sources that may support a borrower's BD claim, including its own loan and education records, government investigations, audits, state attorneys general, other loan discharge applications filed by students from the same school, etc.. As advocates who have served low-income students who have been harmed by their educational institutions to navigate the loan discharge process, we have seen firsthand the tremendous burden that the borrower defense application process has put on borrowers who are unlikely to have access to counsel.

Finally, we urge the Department to exercise its authority to initiate a group discharge for borrower defense claimants whose loans were first disbursed prior to July 1, 2017.[8] We strongly support that the group relief process reasonably achieves the goals of efficiency, consistency, and provision of relief for borrowers when there is sufficient evidence of systemic wrongdoing by a school.

*ED Response: These comments are outside the scope of the request for comment on the contents of the borrower defense application.*

[8] 34 CFR 685.222 (f)-(h).

## III. Conclusion and Contact Information

Thank you again for your work to help defrauded borrowers and protect taxpayers, and for considering our prior comments. We appreciate your careful consideration of these comments. Please feel free to contact Josephine Lee, Staff Attorney, Legal Aid Foundation of Los Angeles at jslee@lafla.org if you have any questions.