October 12, 2022

Office of Management and Budget
Office of Information and Regulatory Affairs
New Executive Office Building
725 17th Street, NW
Washington, DC 20503

Re: RIN 1840-AD53; U.S. Department of Education's Borrower Defense to Repayment Rulemaking

Dear Sir or Madam:

This letter is in reference to the U.S. Department of Education's (the "Department") Notice of Proposed Rulemaking, 87 FR 48178, published on July 13, 2022 ("NPRM"). I write you to supplement our Executive Order 12866 Meeting with the Office of Information and Regulatory Affairs ("OIRA"). This correspondence is intended to bring your attention to wide-spread and significant issues with the NPRM as well as policy and legal developments that have arisen since the NPRM's public comment period closed, on August 12, 2022, that will have a profound impact on the Final Rule, if maintained in its proposed form.

We begin by identifying the concerns we have regarding the NPRM. First, the proposed borrower defense to repayment ("BDR") regulations lack statutory justification. Despite stating in the NPRM that the proposed discharge programs were "all authorized by Congress,"[1] the Department can only cite to limited statutory language – which does not offer the justification claimed – and general grants of authority to support its position. As recent Supreme Court jurisprudence indicates, reliance on such general provisions is no longer protected by *Chevron* deference.[2] Unless the Department can point to specific Congressional direction that authorizing the creation of an extra-judicial procedure with significant budgetary impacts, the NPRM – indeed, the entire regulatory framework of BDR – is seriously vulnerable to legal challenge.

Second, the Department's analysis of the current regulations does not satisfy the minimum statutory requirements set forth under the Administrative Procedure Act ("APA"), 5 USC § 551 *et seq.* The Department states that it conducted a "review" of the 2019 BDR Final Rule,[3] but admitted that "the Department has yet to adjudicate any claims under the 2019 regulations."[4] Such speculative rulemaking is not permitted under the APA. Rather, the APA demands that the Department "examine the relevant data" and rest its conclusions upon "factual findings" or "reasoned explanation."[5] The Department's stated process does not satisfy the statutory requirements. Because the Department offers no evidence, beyond mere speculation, for the proposed change, the Department does not provide a reasonable

[1] 87 FR 41881.
[2] *See*, *West Virginia v. EPA*, 597 US __ (2022).
[3] 84 FR 49788.
[4] 87 FR 41884.
[5] *See*, *FCC v. Fox Television Stations, Inc.,* 556 US 502 (2009).

explanation for the rule change. As a result, the Department should rescind the proposed regulations, enforce the 2019 BDR Rule, and, if necessary, propose new regulations based upon that experience.

Third, the BDR adjudication and institutional response provisions lack fundamental fairness, do not provide sufficient clarity to impacted parties, and ignore due process protections. For example, the Department's reliance upon a "bifurcated" adjudication process withholds an institution's meaningful participation in the process until after the Department has made a determination upon the merits of a BDR claim. Limiting an institution's participation in this manner is akin to allowing a criminal defendant to mount a defense only after guilt has been determined. The Department justified the "bifurcated" process by emphasizing the agency's interest in an expeditious process for BDR discharges. While we understand the reasons behind this policy, an agency's desire to quicken the pace of an adjudication cannot be relied upon as a justification for compromising the fairness of an adjudication process. Speed is not a sufficient reason to cast aside necessary opportunities for institutions to be fully heard and to be given an appropriate opportunity to rebut a borrower's claims.

Moreover, the BDR provisions are replete with instances where the Department failed to define crucial terminology, often in places that will form the basis for future institutional accountability measures. For example, in the provisions regarding the "aggressive and deceptive recruitment" basis for a BDR claim, the Department fails to explain how it defines or will determine when an institution places "unreasonable emphasis" on unfavorable consequences of delaying an enrollment decision.[6] Similarly, the Department does not explain how an institution could "take advantage of a student's…lack of knowledge about, or experience with, postsecondary institutions."[7] While we may theoretically agree with the Department's policy to address deceptive practices, the lack of clarity carries the possibility of a regulatory dragnet that will ensnare perfectly acceptable, ethical, and common practices.

Further, with the deletion of 34 CFR § 668.87 and with it the little due process protection it afforded, the Department's new institutional response process is wildly insufficient. At a minimum, the Department must be more transparent with institutions throughout the BDR process, start-to-finish. As a federal agency, the Department is required to observe the due process rights, afforded by the Fifth Amendment to the Constitution. Federal courts have found that institutions have liberty and property interests in title IV funds that they have already received.[8] In any adjudication, therefore, the Department is obligated to respect an institution's due process rights. The NPRM does not protect and secure those rights. As a result, the Department should rescind the proposed replacement for § 668.87 and add sufficient protections for institutional due process rights.

Additionally, there are a number of proposed provisions in the NPRM that we reviewed and found lacking. First, while it is understandable for the Department to attempt to leverage existing processes, those processes were not designed for BDR-purposes. For example, Final Program Review Determinations were not intended – nor is it sufficient – for use as a method for resolving BDR claims. At the very least, the timeframes involved in responding to program reviews is entirely too short to provide a meaningful opportunity for institutions to respond to thousands of BDR claims submitted to the institution at one time, let alone group claims that could include even higher numbers of individual claimants. Next, the proposal to base BDR claims on prior Secretarial actions inappropriately creates the potential for a BDR

[6] *See*, proposed 34 CFR § 668.501(a)(2).
[7] *See*, proposed 34 CFR § 668.501(a)(3).
[8] *See*, *e.g., Cont'l Training Servs., Inc. v. Cavazos,* 893 F.2d 877, 893 (7th Cir. 1990).

process without a borrower claiming an injury. The NPRM also does not clarify the time period for prior Secretarial actions and, as a result, would appear to cover actions in the distant past – long before the effective date of any final rule. Third, the tolling of the limitations period needs to be based upon final actions, not non-final, intermediate steps that would result, if the Department's NPRM is enacted, in permanent liability.

Numerous other BDR provisions of the NPRM are also deficient. The return of the group BDR claims process lacks any Congressional authorization and unreasonably limits an institution's participation. Simply stated, the HEA does not provide any statutory authority for a group BDR process. Period.

Abandoning the "loans first disbursed" language of the first two BDR rules needlessly confuses the issue and will lead to the proposed rule applying to loans disbursed long before the effective date of these regulations.

The proposal to employ "State requestors" to gather BDR claims is unlawful and should be rescinded. The stated reason for the introduction of "State requestors" – bureaucratic efficiency – is insufficient under the APA to justify the creation of an entirely new BDR claims process that lack statutory authority and will prove very costly to taxpayers.

The new adjudicated claim reconsideration process is unnecessary, unjustified, and will interfere with the timely disposition of BDR claims.

The removal of *any* statute of limitations is never justified in the proposal and raises a serious issue for institutions: will the Department ever consider a BDR claim *truly* closed? The answer, apparently, is "no."

Indeed, the "rebuttable presumption of full relief" is wholly inconsistent with the Higher Education Act, as amended, and wrongfully shifts the burden of proof to the institution to *disprove harm*, entirely upending the appropriate placement of that burden. Similarly, the presumption of borrower reliance on an institution's alleged misrepresentation or omission has no basis in law, fact, or equity.

Outside of the BDR provisions, the NPRM is similarly defective. The Department's prohibition on arbitration agreements and class action waivers lacks statutory authority, is not appropriately justified, and relies upon conjecture rather than legal or data-driven conclusions.

The Department fails to sufficiently explain why the major shift in policy regarding these agreements is necessary and does not identify what information and/or data the Department relied upon that necessitated a 180 degree turn a little more than two years after the current regulations were put in place.

The new closed school loan discharge provisions also lack statutory justification – especially the allowance of automatic discharges – and are not sufficiently clarified. The NPRM does not explain how it could propose to grant closed school loan discharges at schools that are largely *still open*.[9]

In addition to the above-identified deficiencies, events and developments since the close of the public comment period demand that the Department review the NPRM and revise accordingly. Firstly, the NPRM does not account for the current administration's loan forgiveness plan. The amount of this loan

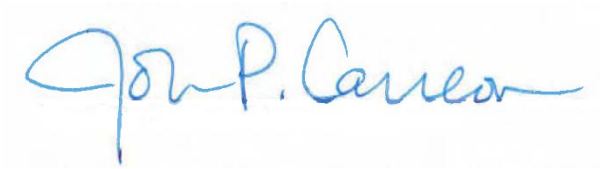
[9] *See*, proposed changes to 34 CFR § 685.214.

forgiveness – by some estimates more than $400 billion and potentially more[10] – necessitates a reassessment of the proposal and a recalculation of the included costs.

Second, as you are aware, the Northern District of California recently granted preliminary approval of the proposed settlement in *Sweet, et al. v. Cardona, et al.*[11] The final approval, if granted, will result in a significant number of BDR claims being summarily approved, impacting at least 268,000 borrowers. The NPRM does not take into account the impact of the proposed settlement in *Sweet* and the economic and budgetary analysis presented in the NPRM. The Department should withhold the Final Rule until the *Sweet* settlement has been finalized and, prior to future publication, modify the regulations accordingly.

In conclusion, we appreciate your consideration of our concerns. We ask that you give careful scrutiny to the above referenced issues to avoid regulatory confusion and administrative overreach as well as unnecessarily rushing to publish a rule that is exceedingly vulnerable to litigation challenges.

Sincerely,



John P. Carreon
General Counsel & Chief Compliance Officer

cc: Jami Frazier, CEO, Concorde Career Colleges, Inc.
Jonathan Helwink, Duane, Morris

[10] *See*, Junlei Chen, "The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact," University of Pennsylvania, Wharton Budget Model, August 26, 2022, https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness.
[11] 495 F.Supp. 3d 835 (N.D. Cal. 2019).