October 14, 2022

Executive Order 12866 meeting with OIRA

RIN 1840-AD53 Borrower defense; 1840-AD59 Total and Permanent Disability, Closed School, and False Cert Discharges; 1840-AD70 Public Service Loan Forgiveness; 1840-AD71 Interest Capitalization

Thank you for allowing us the time to discuss the Department of Education's proposed borrower defense to repayment rule.

Before we get into the borrower defense to repayment rule, I do want to acknowledge and relay our appreciation on behalf of our students and graduates for the Department's work on implementing President Biden's Debt Relief Plan, including the work in this rulemaking on improving the public service loan forgiveness program and interest capitalization. We know these changes will have meaningful impacts on our students, including making their monthly payments more reasonable and affordable along with reducing their overall debt.

At Chamberlain, care is at the heart of what we do. We believe if we take extraordinary care of our students, we will graduate extraordinary nurses and healthcare professionals who can have a significant and positive impact on healthcare around the world. This starts with our first interactions with prospective students. We are committed to providing clear and accurate information so students can make an informed choice.

As we listened to the negotiations, there seemed to be an evolving perception that the interest of schools, the Department, students, and taxpayers are at odds. On the contrary, we believe that they are perfectly aligned. It is in the best interests of the entire higher education community to have reasonable and appropriate borrower defense to repayment regulations that protect student loan borrowers who are victims of predatory practices, create a process that is not overly burdensome or complicated, especially for borrowers, and ensure a just and accurate outcome.

While we are here today representing a university, as a member of the higher education community, we have a strong interest in ensuring that rules introduced can withstand judicial scrutiny and will appropriately benefit students who are harmed. We have to look no further than the various lawsuits and delays with the prior rules, including prior versions of the borrower defense to repayment rule, to see how rules that omit the necessary procedural detail can negatively impact borrowers. This is something I know we all want to avoid. While we cannot predict how future administrations will view this rule, we cannot overlook the legal and implementation challenges of the past.

Because these rules are so consequential for the higher education community, and particularly for borrowers who have been defrauded by their schools, it is essential that the Department gets them

right. For this reason, we ask for consideration of the following issues that we believe are either legally problematic, create unworkable standards for institutions, or increase the risk of unfair results or erroneous discharges. We believe that addressing these issues will not be overly burdensome and may prevent judicial challenge and delay. We also note that that is not a comprehensive list, but rather some key examples of changes that we think will create a better and fairer rule for all parties.

First, we would like to discuss the proposed group and individual claims process.

- The proposed processes do not require the Department to provide a written copy of any claims, or to identify or provide to the institution the documentation obtained by the Department or otherwise supplied by a borrower in support of a claim, or to identify or supply the records the Department official considers relevant to a claim. It seems to behoove the Department to collect all relevant information in order to come to an appropriate decision on the validity of the claim.
- Under proposed rule 685.406(f)(6), the Secretary must provide an interim update to individual borrowers, or State requestors requesting a group process, no later than one year after providing initial notice of adjudication. The interim update would indicate the Secretary's progress in adjudicating the claim(s) and provide an expected timeline for rendering a decision. The proposed rule contemplates no such update for institutions. Fairness, however, would dictate that the same processes provided to individuals or state requestors would be provided to institutions.
- The proposed processes do not guarantee the school will receive a copy of the official's written decision, much less that it will receive it at the same time as the borrower. Under proposed rule 685.406(e)(3), the Department would provide copies of the written decision to the members whose claims were adjudicated and, if applicable, the State requestor who requested the group claims process, but only to the institution, "to the extent practicable." Again, fairness would dictate that institutions receive the same decisions and correspondence as provided to individuals or state requesters.
- With regard to any group process based on prior actions by the Department (contemplated under 685.404), the institution would have no right whatsoever to participate in the adjudication process. Along with questions about fairness, the exclusion of institutions would add unnecessary complication to the Department's goal of trying to reach an equitable outcome.

We certainly understand that the Department may provide additional due process protections to institutions in practice that are not found in the regulation. But given their importance, we believe that these basic considerations should be codified in regulation.

The Department's previous rulemakings evidence its commitment to equitable due process protections for institutions. In its 1995 Notice of Interpretation, the Department observed that schools are "entitled

to due process in these proceedings."[1] In the preamble to the proposed 2016 Rule, the Department under the Obama administration acknowledged that a stated goal of the rule was to "provide due process for students and institutions."[2] Equitable standards and due process protections promote better outcomes. They ensure that the borrowers and institutions have a meaningful opportunity to understand the claim and to supply the adjudicator with relevant evidence. This increases the likelihood of a just and accurate determination. Any process that fails to utilize equitable standards and due process protections would deny the Department the opportunity to review relevant information and evidence held by the institution and, thus, increases the likelihood that the agency will reach an inaccurate result and grant an erroneous discharge. We strongly recommend that all of these procedural additions are included in the final rule. None of these appear to be overly burdensome and given the added benefits gained are a matter of good public policy.

Next, we would like to discuss a few of the proposed rule's borrower defense standards. In particular, we will be highlighting key recommended inclusions to the substantial misrepresentation, substantial omission of fact, and aggressive or deceptive recruitment tactics standards.

The current definition of substantial misrepresentation is "[a]ny misrepresentation on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person's detriment."[3] It is reasonable to assume that this concept of reliance and harm as defined in regulation would be part of the determination process. However, the proposed language only requires the Department to conclude that a "substantial misrepresentation" or "substantial omission of fact" occurred, which means there is no requirement that the Department conclude that the borrower actually and reasonably relied on the misrepresentation or that the borrower actually experienced any harm as a result. In fact, the rebuttable presumption proposed at 685.408(a) would require that the Department assume that the borrower was harmed by the misrepresentation or omission in an amount equal to their entire loan, absent "a preponderance of evidence" to the contrary. This means that a full discharge could be granted even if the misrepresentation at issue was unintentional and the borrower neither relied upon the misrepresentation nor suffered any material harm. While the Department has the option under proposed rule 685.408(b) of considering whether the misrepresentation caused the borrower harm, and as such, whether the amount discharged should be reduced, the Department is not required to exercise that option. We believe that determination of reliance and harm should be a required part of the process in order to align with the definition of substantial misrepresentation. We also believe the Department should include a materiality standard, which is consistent with the Department's stated goals of creating an efficient and effective process. The lack of a materiality standard opens the door to potentially frivolous claims. It may also open the floodgates to claims for non-material breaches that cause no or minimal harm to the borrower, which would require the

[1] 60 FR 37768 (Jul. 21, 1995).
[2] 81 Fed. Reg. 39330 (emphasis added)
[3] 34 CFR 668.71(c) "Substantial misrepresentation"

Department to expend significant administrative resources – and taxpayer dollars – addressing frivolous claims, only to potentially grant little to no relief.

We appreciate the Department's proposed standards for omission of facts and in particular aggressive and deceptive recruitment tactics or conduct. We take both of these very seriously and set high standards of ethics and conduct amongst our staff. Our concerns lie not with the addition of these standards, but with some finer points that we feel may have been unintentionally overlooked.

Regarding the omission of fact standard, it is important for the Department to take into account that many state regulators and accreditors also require educational institutions to disclose certain information. Regulatory agencies take great care in crafting disclosure obligations for regulated institutions and essentially have unlimited flexibility to establish the requirements for what information must be provided to the public, prospective students, and enrollees. However, there is no way for an institution to know what additional information would be considered an omission of fact outside of the list provided in the proposed regulation. The lack of this information will make it difficult for institutions to comply with this standard in practice, despite our best attempts. We therefore request that the proposed § 668.75 is amended to include a list of required disclosures the Department will mandate and/or incorporate by reference those disclosures imposed by state and accrediting agencies to allow 1) borrowers to understand what they should receive to be informed consumers, and 2) institutions to understand and ensure that they can meet all Department expectations.

Under proposed § 668.501(a)(5), aggressive or deceptive recruitment tactics or conduct include, "[failing] to respond to the student's or prospective student's requests for more information, including about the cost of the program and the nature of any financial aid." As drafted, institutions would be required to respond to every request for information, even if requests are relentless or harassing. It is also unclear what evidence would be required to allege or defend such claims. Providing further clarity on these definitions and terms will assist institutions to comply in good faith with these new requirements.

Next, we would like to discuss the amendments to the employability of graduate's section. We understand the importance of clarifying what would constitute misrepresentation and appreciate the detail. However, how institutions are required to calculate rates may have not been accurately captured in the proposed rule. For example, Chamberlain offers a Master of Public Health program which is accredited by The Council on Education for Public Health (CEPH). CEPH requires schools to collect and analyze data on graduates' employment. Institutions must choose methods that are explicitly designed to minimize the number of students with unknown outcomes.[4] Institutions then calculate an outcomes rate by dividing the number of students who are employed, enrolled in additional education, or not seeking employment or not seeking additional education by choice by the total number of students whose status is known in the cohort. The program must also provide data on the number of students for

[4] 2021 Accreditation Criteria Criteria & Procedures - Council on Education for Public Health (ceph.org)

whom the outcome is unknown.[5] Note, however, non-respondents are not part of this actual calculated rate.

The proposed regulations state that misrepresentation has occurred if the actual rates the institution disclosed exclude non-respondents to a survey. We are unclear how the proposed language, regulator methodologies, and the current requirement to disclose these rates on our website are intended to interact. The proposed regulations seem to imply that an institution could be at fault for simply complying with their regulator's requirements. We believe that the Department will find other regulators who similarly allow or require in field placement prior to graduation and inclusion of internships and externships in their calculations. We would ask a survey of programmatic accreditors and state agencies, or additional research be conducted to gain insight into these methodologies, presuming that conforming changes have not already been made to the final rules.

Finally, we would like to advocate for a reasonable statute of limitations to borrower defense claims. The proposed language does not place any limit on when borrowers may bring claims, permitting a borrower to bring a claim at any time, without regard to the date of the underlying conduct or the status of their loan. The absence of any meaningful limitation on when borrower defense claims may be brought is in contradiction to existing public and judicial policy, which strongly favors statutes of limitations. A reasonable statute of limitation would guard against the adjudication of stale claims, reduce the risk of an erroneous determination, encourage borrowers to bring claims promptly, and spare institutions the unfair task of defending a claim after evidence has been lost, memories have worn, and involved parties have disappeared. Both the 2016 Rule and the 2019 Rule included limitations on when claims could be brought. We also emphasize that institutions cannot be expected to (and do not) maintain the range of records that might be required to defend a claim in perpetuity. To the contrary, institutions of higher education have been encouraged by the Department and other federal and state agencies to destroy data when it is no longer needed in the interests of data security, observing that the longer data is retained, the more likely it is to be breached.

Thank you again for your time today. We appreciate the Department's work on these rules and look forward to answering any questions now or in the future.

[5] SPH and PHP Data Templates for the 2021 Accreditation Criteria (B4-1) Data Templates - Council on Education for Public Health (ceph.org)