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Ms. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave., SW., Room 6W232B
Washington, DC 20202

Re: Proposed Group Process for Borrower Defense Claims

Dear Ms. Gaina,

Thank you for the opportunity to comment on the Department of Education’s proposed amendments to its regulations governing student borrower defenses to repayment of Direct Loans based on acts or omissions of an institution of higher education.¹ We write with respect to the Department’s group process for borrower defense claims pursuant to 34 C.F.R. 685.222(f)-(h).

By way of background, we have written extensively on the use of aggregation by courts and federal agencies.² Most recently, we completed a major study for the Administrative Conference of the United States (ACUS) surveying the range of aggregation mechanisms—including but not limited to the class action—employed by federal agencies in their adjudicatory proceedings.³ We examined the benefits, challenges, and potential of aggregation for resolving issues affecting large groups of people more efficiently, consistently, and fairly. Based on our Report, ACUS adopted a

¹ 81 Fed. Reg. 39330 (Jun. 16, 2016).

² See, e.g., Aggregate Agency Adjudication 27–65 (June 9, 2016), prepared for the Administrative Conference of the United States (ACUS); Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012).

³ See Aggregate Agency Adjudication 27–65, attached hereto. The opinions we express here are our own.

set of recommendations for federal agencies on the use of formal and informal aggregation in their administrative proceedings.⁴

In summary, we applaud the Secretary's efforts to create a more efficient, effective, and fair process for handling borrower defenses by student borrowers under the Higher Education Act of 1965. We are particularly pleased to see that the Secretary proposes to establish a process for group borrower defenses with respect to both open and closed schools that will allow claims to proceed even when individual borrowers have not filed their own applications for relief. Aggregating borrower defenses involving common facts or claims will help the Department conserve resources in repetitive adjudication, avoid inconsistent outcomes for the same kinds of claims, and provide individual student borrowers with greater access to relief than individual case-by-case adjudication. Various forms of aggregation have been used to great effect by several federal agencies that handle large numbers of similar claims.⁵

Nevertheless, there are a number of ways in which the Secretary could improve upon the proposed procedures to handle group claims more efficiently, consistently, and with greater access to the process by student borrowers. To this end, our comments below are directed at the following areas: (1) enhancing participation of student borrowers in group proceedings; (2) permitting informal aggregation of similar cases outside of the proposed Group Process; (3) establishing the necessary information infrastructure to facilitate and learn from aggregation; and (4) obtaining experienced adjudicators to handle group proceedings.

Enhancing Participation of Student Borrowers in Group Proceedings

The proposed amendments would permit the Secretary to initiate a group proceeding regarding borrower defense claims that involve common facts and claims. The Department indicates that it is ready to receive and make use of evidence and input from outside parties, including interested stake holders, and proposes the creation of a point of contact for State Attorney Generals. However, the proposed amendments do not provide any formal process for student borrowers and their legal representatives to petition for, or participate in, the group proceeding. Student borrowers are a rich source of information regarding misrepresentations or omissions of educational institutions and their impact on borrowers. Moreover, the proposed amendments permit educational institutions to fully participate in group proceedings. The handling of group claims will be perceived as more legitimate if individual student borrowers are able to participate in the proceedings on an equal footing with schools. Accordingly, we urge the Secretary to:

⁴ Administrative Conference Recommendation 2016-2: Aggregation of Similar Claims in Agency Adjudication (June 10, 2016), published at 81 Fed. Reg. 40,259 and attached hereto.

⁵ See Aggregate Agency Adjudication 27–65, Parts I.C and II.

- (1) Establish a procedure by which individual student borrowers and their legal representatives may petition the Department for the initiation of a group proceeding to handle common questions of fact or law.⁶ At a minimum, student borrowers and their representatives need a point of contact to notify of potential candidates for group claims. Moreover, the Department should respond to such petitions to improve the transparency and perceived legitimacy of the process. Such responses need not be elaborate. The Department might explain, for example, that it is not pursuing a group proceeding because there are too many individual factual issues, the Department is seeking other prospective remedies or actions by an open school, or the number of claims are not sufficiently numerous to justify a group proceeding. *See* ACUS Recommendation No. 6.⁷
- (2) Permit student borrowers to formally participate through legal counsel in group proceedings involving both open and closed schools. In order to avoid creating diseconomies of scale, we suggest the Department utilize steering committees of private lawyers to organize and manage the presentation of legal arguments and evidence on behalf of individuals or groups of student borrowers who seek to participate in the group proceeding. The Department should also allow student borrowers to receive separate representation to the extent necessary to avoid conflicts of interest. *See* ACUS Recommendation No. 6.
- (3) Permit student borrowers to petition the Secretary to review hearing officials' decisions in group proceedings. The proposed amendments permit only the Department itself or the school to appeal from a hearing official's decision, and only in open school cases. Student borrowers have much at stake in group proceedings as a favorable opinion will make it easier and less costly for them to obtain relief. *See* ACUS Recommendation No. 6.

⁶ Although our comments focus on enhancing the participation of student borrowers and their legal representatives, we also encourage the Department to hear petitions for group proceedings by public agencies such as state attorney generals, who are also a robust source of information concerning the practices of educational institutions. *See, e.g.*, Letter to the Honorable John King from the Office of the Attorney General, Commonwealth of Massachusetts, July 26, 2016, *available at* <http://www.mass.gov/ago/docs/press/2016/aci-group-discharge-application.pdf> (seeking group discharge of student loans involving the American Career Institute based on a series of misrepresentations and violations of the Massachusetts Consumer Protection Act).

⁷ All reference to "ACUS Recommendations" are to Administrative Conference Recommendation 2016-2: Aggregation of Similar Claims in Agency Adjudication (June 10, 2016), published at 81 Fed. Reg. 40,259 and attached hereto.

Permitting Informal Aggregation Outside of Group Claims

The proposed amendments provide for formal aggregation of group claims before a single hearing official. However, agencies can also informally aggregate separate, but related cases. In informal aggregation, different claimants with very similar claims each advance a separate case with their own counsel, but in front of the same adjudicator or on the same docket. Informal aggregation expedites the resolution of similar claims, conserves resources, and assures consistent outcomes. Accordingly, we encourage the Secretary to:

- (4) Allow student borrowers to petition to centralize their separate, but related cases—for example, involving the same school or same type of misrepresentation or omission—before the same hearing official to avoid duplicative discovery, repeat motion practice, and coordinate similar claims. Hearing officials themselves might also propose informal aggregation when they believe it will help to resolve similar claims. *See* ACUS Recommendation No. 5.

Establishing the Information Infrastructure Needed for Aggregation

The Secretary, hearing officials, and student borrowers need to be able to identify and track cases that are good candidates for group proceedings or more informal aggregation. In addition, all interested stakeholders need to be able to review and learn from the Department's decisionmaking in prior cases involving similar issues using published decisions. Accordingly, we urge the Secretary to:

- (5) Develop the information infrastructure, such as a centralized docketing system and database, necessary to identify and track borrower defense cases with common issues of fact or law. The docket should be publically accessible to the maximum extent permitted under federal privacy laws, and allow users to search for specific schools, the alleged misrepresentation or omissions, the hearing official's decision on the claim, and any decision on appeal. *See* ACUS Recommendation No. 3(a).
- (6) Encourage the hearing officials who adjudicate borrower defense claims and student borrowers themselves to identify cases that are likely to be attractive candidates for a group process. Experienced adjudicators have a wealth of knowledge concerning the issues that repeatedly appear on their dockets. They can use a centralized docketing system to determine whether other hearing officials have received similar claims and notify the Secretary of candidates for group proceedings. In addition, student borrowers can use such a database to determine whether they are part of a group of borrowers injured by the same types of misrepresentations or omissions. This will assist them in deciding whether and how to file their claims. *See* ACUS Recommendation No. 3(b).

- (7) Make all decisions in group proceedings publicly available in order to obtain the maximum benefit from aggregate proceedings and help hearing officials handle subsequent cases involving similar issues more expeditiously, provide guidance to future parties, avoid inconsistent outcomes, and increase the transparency and openness of the proceedings. *See* ACUS Recommendation No. 10.

Using Experienced Hearing Officials To Handle Group Proceedings

The Department should ensure that hearing officials who handle aggregate proceedings are appropriately trained in such cases. Administrative decisionmakers vary dramatically in their roles and responsibilities. Because group proceedings may impact tens of thousands of student borrowers, they should be handled with care. Accordingly, we encourage the Secretary to:

- (8) Obtain experienced and independent hearing officials to handle complex disputes, including from other agencies if necessary. *See* ACUS Recommendation No. 8.

Conclusion

We are extremely pleased the Secretary has decided to create a process to adjudicate group claims by student borrowers with respect to open and closed schools. The use of aggregation has helped federal agencies adjudicate tens of thousands of cases involving common questions of fact or law more efficiently, consistently, and fairly. The establishment of a group claims process will similarly benefit the Department and the thousands of student borrowers who depend on it for relief. We encourage the Department to make the most of its group process by creating greater opportunities for participation by student borrowers, utilizing informal aggregation outside the group claims process, establishing the information infrastructure needed to facilitate and learn from aggregation, and using experienced and independent hearing officials to handle group proceedings.

We are happy to provide you with additional information or assistance regarding any of the issues raised in these comments as the Department finalizes its procedures for handling group claims.

Sincerely yours,



Michael Sant' Ambrogio



Adam S. Zimmerman