IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK LEGAL ASSISTANCE GROUP, Plaintiff, v. ELISABETH DeVOS, in her official capacity as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION, Defendants.	Case No. 1:20-cv-01414 (LGS)

BRIEF OF THE NATIONAL CONSUMER LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF NEW YORK LEGAL ASSISTANCE'S MOTION FOR SUMMARY JUDGMENT

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This brief is submitted by the National Consumer Law Center ("NCLC"). NCLC is a nonprofit organization specializing in consumer issues on behalf of low-income people. NCLC publishes a widely-used treatise on student loan law, Student Loan Law (6th ed. 2019), *updated at* www.nclc.org/library. NCLC's Student Loan Borrower Assistance Project has nationally recognized expertise in student loan law and provides information about student borrowers' rights, increases public understanding of student lending issues, and identifies policy solutions to promote access to education and lessen student debt burdens. The Project's attorneys provide direct representation to low-income student loan borrowers, many of whom enrolled in predatory schools that induced them to enroll using unfair recruiting tactics. NCLC also consults with civil legal services organizations across the country that represent borrowers harmed by predatory schools. *Amicus* participated in the 2016 and 2018 negotiated rulemaking process on borrower defense where it educated the Department of Education about students' experiences with predatory schools and barriers to accessing relief. NCLC's unique position as subject matter expert and consultant to legal service organizations allows it to provide insight into how the 2019 Rules will heighten burdens on borrowers and legal aid organizations alike.

INTRODUCTION AND SUMMARY

The Department of Education's (ED) regulations discharging student loan debt after a school commits misconduct are many students' only hope at recovery after a school scams them. For decades, low-income college students' aspirations have been exploited by predatory postsecondary schools. These predatory schools target students who have limited exposure to higher education, first-generation college students, disabled students, veterans, and students of color, and use their hopes of a better future against them. They lie to students about the quality of education offered and the career opportunities available after graduation, often charging exorbitant tuition to take students' federal student loan dollars, and then provide little more than a worthless degree. After taking out tens thousands of dollars in unaffordable debt, students discover that they are in a worse position than if they had not enrolled at all; often a student's association with a predatory school is a black eye in the job market. Students struggle with the debt for years, only reaching out to legal aid organizations at the point when it finally becomes too much—threatening their ability to provide housing and basic necessities for their family, or after

ED garnishes their wages, or seizes their tax refund and social security benefits. Even then few legal aid organizations provide student loan assistance; and these organizations are stretched to capacity and cannot fully respond to this overwhelming need.

Congress directed ED to intervene and help students recover from these predatory schools. In 1994, after it became evident that federal student loan dollars were being used to defraud those students and leave them mired in debt, Congress intervened and amended the Higher Education Act (HEA) to give borrowers the right to assert defenses to repayment ("a borrower defense") to discharge their federal student loans. In 2016, after the collapse of Corinthian Colleges made it clear that hundreds of thousands of defrauded students had been drowning in federal student loan debt for years, ED established a process for students to exercise their right to assert a borrower defense. ED recognized that students should not be expected to know student loan discharge regulations. So, it also created processes to extend relief to unaware borrowers and means to expose the predatory schools' practices.

When ED promulgated the rules currently at issue—the Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019) ("2019 Rules")—it ignored Congressional intent, its own prior justification for heightened student protections, and the experiences of the students Congress intended the HEA to help. Instead of reducing burdens for borrowers and increasing school oversight ED rescinded virtually all of the student protections it added in 2016.

The 2019 Rules establish relief eligibility criteria that will be nearly impossible for most defrauded borrowers to satisfy, even with the assistance of a lawyer—a resource low-income borrowers will not have. They rescind safeguards that protected defrauded students' access to justice and ensured borrowers would get relief if they could not finish their program because their school closed. Ultimately, the 2019 Rules leave students more vulnerable to predatory school practices while simultaneously making it more difficult for them to cast off the debt their schools left them ill-equipped to repay. They are a marked departure from ED's efforts to responsibly steward the federal student aid program.

Based on our extensive experience advocating for debt relief on behalf of low-income students harmed by abusive schools and consulting with legal aid attorneys across the country, *amicus* writes to

explain how the 2019 Rules arbitrarily and capriciously ignore the needs of borrowers, harm defrauded low-income students, and impose an enormous burden on legal aid organizations representing those borrowers. The Court should grant Plaintiff's Motion for Summary Judgment and stop the 2019 Rules from harming low-income borrowers and legal aid organizations alike.

ARGUMENT

I. The borrower defense rule is vital to ensuring borrowers can obtain relief from federal student loan debt after a school deceives them.

A. Predatory schools have a longstanding history of exploiting low-income students' dreams of improving their lives through education.

For decades, legal aid organizations have helped students cheated by schools seeking to profit off of federal student aid dollars.[1] Congress passed the HEA to create federal student aid and open the door to college for low-income students and students of color.[2] Predatory schools took students' federal aid and offered little in return. In 1991, Senator Sam Nunn led extensive hearings and published a report about fraud in the for-profit college industry and its terrible consequences for student loan borrowers.[3] Shortly thereafter, Congress amended the HEA to give students the right to assert a borrower defense to federal loan repayment.[4]

A 2012 report by the Senate Health, Education, Labor and Pensions Committee (the "HELP Report") documented the continued and widespread use of predatory practices at thirty different for-profit college chains.[5] The HELP Report detailed the deceptive recruitment practices about virtually

[1] Congress has long been concerned that federal student aid dollars not be used to students' detriment. *See* The Century Found., The Cycle of Scandal at For-Profit Colleges (2017), https://bit.ly/3er3DZX (several reports describing Congressional action from first GI Bill onward).

[2] *See* President Lyndon B. Johnson, Remarks Signing the Higher Education Act Into Law (Nov. 8, 1965), https://perma.cc/6GKJ-MNGE ("[The Higher Education Act] means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.").

[3] Abuses in Federal Student Aid Programs, S. Rep. No. 58 102d Cong., 1st Sess. (1991) (hereinafter "Nunn Report"). "The Subcommittee investigation uncovered [that]… unscrupulous, inept, and dishonest elements among [schools] have flourished…[They] have done so by exploiting both the ready availability of billions of dollars of guaranteed student loans and the weak and inattentive system responsible for them, leaving hundreds of thousands of students with little or no training, no jobs, and significant debts that they cannot possibly repay." *Id.* at 6. "[School] [f]raud and abuse [has had] perhaps the most profound and disastrous effect on the intended beneficiaries of Federal student financial aid—the students." *Id.* at 14.

[4] *See* Student Loan Reform Act of 1993, Pub. L. No. 103-66, Title IV, § 4021, 107 Stat. 340, 351 (codified as amended at 20 U.S.C. § 1087e(h) (2018); David Whitman, The Century Found., When President George H. W. Bush "Cracked Down" on Abuses at For-Profit Colleges (March 9, 2017), https://bit.ly/2ZvAjgU (the Nunn Report led Representative Maxine Waters to introduce "borrower defense" rules shortly before Congress added borrower defense to the HEA).

[5] U.S. Gov't Accountability Off., GAO-10-948T, For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices (2010); For-Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, S. Rep. No. 112-37 112th Cong., at 32 (2012) (hereinafter "HELP Report"), https://bit.ly/2OSjMgZ. The Department had possession of the HELP Report when it engaged in the 2016 and 2019 borrower defense rulemaking processes and referred to it as the "Harkins Report." *See* Ex. 4, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-3 at 1 (N.D. Cal. Dec. 23, 2019) (Memo to Under Secretary Ted Mitchell from Borrower Defense Unit (Oct. 24, 2016)); Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. Times (July 29, 2012) (discussing Senator Tom Harkin's role in the publication of the 2012 HELP Report).

every aspect of a postsecondary program to increase enrollment and revenues: the cost of degree programs, the likelihood of obtaining employment, the salaries graduates earned, program length, graduation rates, and the transferability of credits received from the school.[6] Schools told recruiters to do whatever was necessary to persuade as many students as possible to enroll, without regard to whether the educational program offered would benefit the student or position them to repay their loans.[7]

Disturbingly, the HELP Report also confirmed that predatory schools continued to target the most vulnerable students with enrollment lies and pressure campaigns. One for-profit school explicitly instructed recruiters to target "Welfare Mom w/Kids. Pregnant Ladies. Recent Divorce. Low Self-Esteem. Low Income Jobs. Experience a Recent Death. Physically/Mentally Abused. Recent Incarceration. Drug Rehabilitation. Dead-End Jobs-No Future."[8] Other schools instructed recruiters to exploit students' vulnerabilities and "poke the pain" to get them to enroll in their schools.[9] The schools targeted students underserved by traditional non-profit colleges, amplifying the efficacy of their lies.[10] Black and Latino students are over-represented in for-profit colleges at 41% of the student body.[11]

The HELP Report reflected what legal aid organizations had long witnessed on the ground.[12] For example, the Legal Aid Foundation of Los Angeles helped a group of Spanish-speaking clients with debt from a medical assistant program. Recruiters told them the program would be conducted entirely in Spanish. Instead, instruction and class materials were all in English, which they could neither speak nor read.[13] Another legal aid client who was homeless and had a severe learning disability enrolled in the for-profit school Lincoln Tech after a recruiter promised that the school would provide housing and classroom accommodations so he could learn despite his disability. But when classes began, the school did not fulfill its promises, leaving the student stuck without a degree and crushing debt.[14]

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[6] *Id.* at 53.
[7] *Id.* at 46-63. *See* Legal Aid Community, Comment Letter on the Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations, at 34-5 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018-OPE-0027-29073 (hereinafter, "Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM").
[8] HELP Report, *supra* note 5, at 58 (quoting Vatterott, March 2007, *DDC Training* (VAT-02-03904)).
[9] *Id.* at 60-63 (quoting materials from ITT and Kaplan).
[10] *Id.* at 96, n. 369, 168.
[11] Lawyers' Committee for Civil Rights Under Law, Comment Letter on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations at 4 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018- OPE-0027-26266. *See also* Peter Smith & Leslie Parrish, Ctr. for Responsible Lending, Do Students of Color Profit from For-Profit College? Poor Outcomes and High Debt Hamper Attendees' Futures (Oct. 2014), https://perma.cc/LD9C-TKFS.
[12] Legal Aid Community, Comment Letter on Borrower Defenses 2018 NPRM, *supra* note 7 at 31 (explaining instances of recruiters targeting borrowers as they left welfare offices, were living in homeless shelters, or who had serious disabilities).
[13] *See* Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7 (Attachment 6 at 98-111).
[14] *Id.* at 31.

Legal aid organizations are all too familiar with the financial loss, depression, and loss of opportunities their clients experience after falling victim to predatory school practices.[15] Students who attend for-profit colleges earn *less* on average in the 5-6 years after attendance than they did before attending.[16] Yet, they still owe significant federal student loan debt—averaging over $14,000 in 2014[17]—and often owe additional private student loan debt. With staggering debt but no improved employment prospects, nearly half of all students attending for-profit schools default on their loans within five years of repayment.[18]

Yet schools continue to use the same deceptive practices to enroll students and optimize profits at students' expense. Even though the HELP Report revealed that schools were using predatory practices, nearly all of those schools continued receiving federal student aid from ED and, along with others, continued to defraud students.[19] For example, in January 2019, the Arizona Attorney General reached a $22 million settlement with Career Education Corporation for deceptive admissions practices.[20] And, in December 2019, the University of Phoenix settled with the Federal Trade Commission for $191 million for deceptive advertising practices.[21] But enforcement lawsuits rarely provide federal student loan relief for borrowers, and state attorneys general have urged ED to use its borrower defense authority to discharge their citizens' loans.[22] As long as schools are able to receive easy access to students' federal student loan dollars, students will need strong protections against school deception and misconduct.

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[15] Predatory schools are disproportionately for-profit schools. *See* Yan Cao and Tariq Habash, The Century Found., College Fraud Claims Up 29 Percent Since August 2017 (Sept. 22, 2015), https://bit.ly/32jMUFD ("[M]ore than 98 percent of the complaints [of fraud] are regarding for-profit colleges, many which have been under law enforcement investigations[.]").

[16] Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data* at 3 (Nat'l Bureau of Econ. Research, Working Paper, No. 22287, 2018), http://www.nber.org/papers/w22287.

[17] *See* Adam Looney & Constantine Yannelis, Brookings Papers, A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributes to Rising Loan Defaults at 41 (Fall 2015), https://perma.cc/46PY-22QB.

[18] *See id* at 82.

[19] *Compare* HELP Report, *supra* n. 5, at Part II, https://bit.ly/2OtDqj8 *with* U.S. Dep't of Educ., 2013-14, 2014-15 Title IV Program Volume Rep. By Campus-Based Programs, https://bit.ly/2B4j5ha. *See* Decl. of Robyn Smith at ¶ 62 ("Robyn Smith Decl." attached as Exhibit 1) (describing a client defrauded in 2016 by Brooks Institute Technology Institute, owned by Career Education Corporation, that was investigated in the HELP Report), ¶ 76-77 (Marinello Schools of Beauty closed "in February 2016 after [ED] determined that it had engaged in a fake high school diploma scheme to obtain federal student loans on behalf of non-high school graduates [ineligible] for federal…aid").

[20] Press Release, Mark Brnovich, Ariz. Att'y Gen., AG Brnovich Announces $22 Million in Debt Relief for Arizona Students Who Attended Certain For-Profit Schools (Jan. 3, 2019), https://perma.cc/TXH6-GVL7.

[21] Press Release, Fed. Trade Comm'n, FTC Obtains Record $191 Million Settlement from University of Phoenix to Resolve FTC Charges It Used Deceptive Advertising to Attract Prospective Students (Dec. 10, 2019), https://perma.cc/M3YC-M2NZ.

[22] *See Vara v. DeVos*, No. CV 19-12175-LTS, 2020 WL 3489679 (D. Mass. June 25, 2020) (ordering ED to decide the group borrower defense application the Massachusetts attorney general submitted to ED after receiving a favorable judgment in state court against Corinthian Colleges).

B. The 2016 Rules created processes for defrauded borrowers to access loan relief and implemented other student protections.

In 2016, "the collapse of Corinthian Colleges ('Corinthian') and the flood of borrower defense claims submitted by Corinthian students"[23] catalyzed ED to begin rulemaking to create a borrower defense process and other student protections.[24] After years of deceiving students, an array of enforcement actions pursued the school.[25] Corinthian abruptly sold or closed its 105 colleges in 25 states after being held liable for $1.6 billion in default judgments.[26] In the years that followed, numerous other for-profit schools facing state and federal enforcement actions shuttered their doors as well.[27]

Corinthian's closure left hundreds of thousands of former students with substantial student loan debt and either no degree or a worthless one. ED quickly acknowledged that, under the HEA, "borrowers have the right to submit defense to repayment claims, [and] the Department [of Education] must set up a process to review and adjudicate them[.]"[28] At the time, ED was committed to limiting the obstacles placed before students seeking relief[29] because, as then-Secretary John B. King Jr. stated, "dodgy schools [were] leav[ing] students with piles of debt and taxpayers holding the bag[.]"[30]

The 2016 Rules defined a path for defrauded and misled students to access relief[31] and created a new federal standard for borrower defense eligibility for loans issued after July 1, 2017.[32] It also put protections in place to make it harder for schools to hide deceptive practices from the public, including

[23] 2016 Proposed Rules, 81 Fed. Reg. 39,330, 39,331 (Proposed June 16, 2016).
[24] HELP Report, *supra* note 5, at 378-79 (Corinthian Colleges Inc., Form 424B1 at 3 (Feb. 5, 1999)).
[25] *See, e.g., Consumer Fin. Prot. Bureau v. Corinthian Colls.*, Case No. 1:14-cv- 07194, 2015 WL 10854380 (E.D. Ill. Oct. 27, 2015) (default judgment); *People v. Heald Coll.*, Case No. CGC-13-534793 (Sup. Ct. Cal. March 23, 2016) (default judgment); *People v. Corinthian Schs., Inc.*, Case No. BC374999 (Sup. Ct. Cal. July 31, 2007) (complaint and final judgment); *Commonwealth v. Corinthian Colls., Inc.*, Case No. 14-1093L (Sup. Ct. Mass. Aug. 1, 2016) (judgment); *State v. Corinthian Colls., Inc.*, Case No. 2014 CX 00006 (Wis. Cir. Ct. Oct. 27, 2014) (complaint).
[26] *See, e.g., Consumer Fin. Prot. Bureau v. Corinthian Colls.*, Case No. 1:14-cv-07194, 2015 WL 10854380 (E.D. Ill. Oct. 27, 2015) (default judgment finding Corinthian liable for $530 million)); *People v. Heald Coll.*, Case No. CGC- 13-534793 (Sup. Ct. Cal. March 23, 2016) (default judgment finding Corinthian liable for $1.1 billion); *Commonwealth v. Corinthian Colls., Inc.,* Case No. 14-1093L (Sup. Ct. Mass. Aug. 1, 2016) (default judgment finding Corinthian liable for $67 million).
[27] Michael Vasquez & Dan Bauman, *How America's College-Closure Crisis Leaves Families Devastated*, Chron. of Higher Educ. (April 4, 2019), https://bit.ly/2WnN0s1 (in last 5 years, 88% of closed college campuses were for-profit colleges).
[28] Exhibit 24, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66 (N.D. Cal. Dec. 23, 2019) (Letter from James W. Runcie, COO, Fed. Student Aid to Sharon Mar, Off. of Mgmt. & Budget (June 4, 2015)).
[29] Press Release, U.S. Dep't of Educ., Fact Sheet: Protecting Students From Abusive Career Colleges (June 8, 2015), https://perma.cc/DXL6-29FJ?type=image ("We will make this process as easy as possible [for defrauded borrowers], including by considering claims in groups wherever possible, and hold institutions accountable.").
[30] Press Release, U.S. Dep't of Educ., Education Department Proposes New Regulations to Protect Students and Taxpayers from Predatory Institutions (June 13, 2016), https://perma.cc/85DT-JRG9.
[31] 2016 Rules, 81 Fed. Reg. at 76,083-86 (Nov. 1, 2016); 34 C.F.R. § 685.222(e) (process for individual borrowers to apply for borrower defense relief); 2016 Rules, 81 Fed. Reg. at 76,083-86; 34 C.F.R. § 685.222(f)-(h) (process to discharge the debts of groups of borrowers without an application); 2016 Rules, 81 Fed. Reg. at 76,078-82; 34 C.F.R. § 685.214(c)(3)(ii) (creating an automatic closed school discharge process to discharge the debts of students who were unable to complete their program because their school closed); 2016 Rules, 81 Fed. Reg. at 76,070-73; 34 C.F.R. § 668.14(b) (requiring closing schools to inform students of the availability of a closed school discharge).
[32] 2016 Rules, 81 Fed. Reg. at 76,083; 34 C.F.R. § 685.222(a).

limits on when schools could force students into mandatory arbitration, and required schools to submit arbitral and judicial records to ED.[33]

ED illegally delayed implementation of most of the provisions within the 2016 Rules for over a year.[34] Even after a federal court ordered it to implement the rule, ED was slow to fully effectuate, or never enforced, aspects of the 2016 Rules.[35]

Such was the case with borrower defense decisionmaking. In January 2017, there were 50,000 pending borrower defense applications.[36] Instead of continuing to decide claims, by June 2018, ED stopped issuing final decisions on borrower defense applications altogether,[37] even though there were then 105,998 pending[38] and thousands of borrowers had already waited two years or longer for an adjudication.[39] From January 2017 until at least June 2019, ED stopped determining what claims would be eligible for a borrower defense discharge,[40] even though, by June 2019, 10 school chains were subject to over 1,000 borrower defense applications.[41]

II. The 2019 rules will transform borrower defense into an illusory remedy for many students defrauded by schools.

The 2016 Rules provided a necessary, minimum level of protection to save students from the burden of repaying debt borrowed for a worthless education. Faced with the backlog of 50,000 borrower

[33] 2016 Rules, 81 Fed. Reg. at 76,021-31; 34 C.F.R. §§ 685.300(b)(11)(d)-(i) (making the continued receipt of Title IV funds contingent on not compelling students to arbitrate claims that could be borrower defense claims); 2016 Rules, 81 Fed. Reg. at 76,088-89; 34 C.F.R. §§ 685.300(g), (h) (compelling schools to submit arbitral and judicial records to ED).
[34] Order and Opinion, *Bauer v. DeVos*, 325 F. Supp. 3d 74 (Sept. 12, 2018), ECF No. 87; Order and Opinion, *Bauer v. DeVos*, 332 F. Supp. 3d 181 (Sept. 17, 2018), ECF No. 91. However, the automatic closed school discharge provisions went into effect immediately. *See* Stacy Cowley, *Education Department Will Cancel $150 Million in Student Debt After Judge's Order*, N.Y. Times (Dec. 14, 2018), https://perma.cc/5P8F-VK45.
[35] For example, although at least two schools compelled students to arbitrate claims, both schools continue to receive federal student aid dollars. *See Kourembanas v. InterCoast Colls.,* 373 F. Supp. 3d 303 (D. Me. 2019); *Young v. Grand Canyon Univ.*, Case No. 1:19-cv-01707, ECF 29 (N.D. Ga. April 16, 2019); Fed. Student Aid, U.S. Dep't of Educ., AY 2019-2020 Q3 Loan Volume, Direct Loan Program Report, https://bit.ly/2B4j5ha.
[36] *See* Test. of James Manning, Transcript of U.S. Dep't of Educ. Borrower Def. and Fin. Rulemaking Comm., 8:18-9:6 (Nov. 14, 2017).
[37] *See* U.S. Dep't of Educ., Borrower Defense Reports for June 2018 until Dec. 2019, https://bit.ly/2OsJIQ4.
[38] U.S. Dep't of Educ., Borrower Defense Report for June 2018, https://bit.ly/2OsJIQ4.
[39] Statement, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 90 (N.D. Cal. Feb. 7, 2020) (ED statement that 18,884 claims had been pending for over three years and 2,828 claims had been pending for over four years).
[40] *See* U.S. Dep't of Educ., No. ED-OIG/I04R0003, Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process at 10 (2017), https://bit.ly/2CMfQeZ ("[f]rom January 20, 2017, through July 31, 2017, BDU did not complete or begin preparing any legal memoranda") (hereinafter "Borrower Defense IG Report (2017)"); Exhibit 32, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-5 (N.D. Cal. Dec. 23, 2019) (Testimony of Secretary DeVos in Response to Questions for the Record submitted by Senator Patty Murray (June 13, 2019), "Borrower Defense Applications By School Group"); Exhibit 26 at 2, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-5 (N.D. Cal. Dec. 23, 2019) (Letter from Kathleen S. Tighe, Inspector General of the Dep't of Education to Senator Richard Durbin (June 6, 2018).
[41] Exhibit 32, *Sweet v. DeVos*, Case No. C 19-03674 WHA, ECF 66-5 (N.D. Cal. Dec. 23, 2019) (Testimony of Secretary DeVos in Response to Questions for the Record submitted by Senator Patty Murray (June 13, 2019), "*Borrower Defense Applications By School Group"*). Eight of the schools with over 1,000 borrower defense claims were investigated in the HELP report. ED only adjudicated 1% of applications from ITT Tech, whereas all other applications remained pending. *Id.*

defense claims after the change in administration, ED could have promulgated regulations that allowed ED to provide an expedited and expanded relief process to more borrowers. Instead, ED did the opposite. In promulgating the 2019 Rules, it placed hurdles between deserving students and relief:

- it rescinded group discharge processes for cheated borrowers, which allowed ED to efficiently resolve claims based on common school misconduct;
- it established new, more difficult discharge standards that put a higher evidentiary burden on borrowers applying for a borrower-defense to discharge loans issued after July 1, 2020;
- it ended automatic discharges for borrowers who didn't complete their program because their school closed, only extending relief to borrowers able to navigate the discharge process;
- it removed measures that revealed schools' predatory practices to ED and the public.[42]

These changes will prevent borrowers from recovering from their schools' deceit and misconduct.

A. Most low-income borrowers are unaware that they can seek loan relief and will not recover from school fraud without the group relief process that the 2019 Rules eliminated.

As legal aid organizations have repeatedly informed ED, many borrowers do not know how to assert a borrower defense, or know that they have any right to relief at all, unless they have access to a legal aid attorney. In their comments to the 2018 NPRM, legal aid organizations explained, "For every client we see, there are dozens more who remain unaware of their legal rights."[43] Legal aid clients receive loan discharge misinformation from closing schools, duplicitous for-profit debt relief companies, their loan servicers, and fraudulent debt collectors.[44] As a result, legal aid organizations "have a constant influx of borrowers whose schools closed as many as 30 years ago and who have no idea that they are eligible for a discharge."[45]

The 2016 group discharge provisions allowed ED to provide a safety net for borrowers who would struggle to repay their debts—or fall into default—even though they would be eligible for relief if they

[42] 2019 Rules, 84 Fed. Reg. at 49,879 (removing group discharges), 49,926-29 (new relief eligibility criteria), 49847-48 (removing automatic closed-school discharges), 49,839-41, 49,845, 49,933 (removing limits on schools' use of arbitration and imposing arbitration disclosure requirements instead, rescinding requirement that schools disclose arbitral and judicia records to ED).
[43] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 1, 45 ("[T]he vast majority of students entitled to relief will never know of the opportunity to apply for such relief."). *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 16-17, 21, 25, 28, 31; Decl. of Johnson Tyler at ¶¶ 14, 15 ("Tyler Decl.," attached as Exhibit 2).
[44] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 17, 85-86. *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 19, 74, 76-78 (describing the misinformation students receive, including from fraudulent scam relief companies placing flyers on borrowers' cars while they attended a legal aid clinic).
[45] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 85. *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 17, 21; Ex. 2, Tyler Decl. at ¶¶ 9, 18.

applied. Under the 2016 Rules, ED could initiate group loan discharges for borrowers who attended the same predatory school without requiring individual applications.[46] ED explained it would use the group process if "there [were] common facts and claims that [] affect[ed] numerous borrowers" because "including [] borrowers [who didn't submit applications] would allow for faster relief for a broader group of borrowers than if the process [was] limited to just those who file applications for relief."[47] The 2016 group discharge rules made sense because ED is in the best position to receive school misconduct information and could discharge debts shortly after discovering misconduct instead of waiting for borrowers' claims to roll in for decades.[48] The group process would also ensure that outcomes for students were not based on their awareness of regulations or ability to decode an application form.[49]

In contrast, the 2019 Rules arbitrarily rescinded the group discharge processes for borrowers who receive loans after July 1, 2020 and instead requires each borrower to submit an individual application.[50] ED claimed that the group process created "onerous administrative burdens" and that group discharges could provide relief to undeserving borrowers.[51]

These explanations fail. They ignore that the 2016 Rules provide ED with discretion to invoke a group discharge process, allowing it to avoid using the process if the risk of providing relief to undeserving borrowers was too high.[52] Moreover, ED failed to explain how eliminating the group discharge process reduced the administrative burden of adjudicating individual applications.[53] Common sense would lead to the opposite. Requiring ED to evaluate the evidence of each individual claim seems far more onerous than relying on evidence of widespread harm to grant broad relief to a large group.

And importantly, ED did not consider the cost to borrowers. It failed to calculate how many defrauded students would be forced to repay the entirety of their federal student loan debt (plus fees and

[46] 34 C.F.R. §§ 685.222(f)-(h) (borrower defense group discharge processes for open and closed schools); 34 C.F.R. § 685.215(c)(8) (automatic discharges for borrowers who attend a school that falsifies satisfactory academic progress); 2016 Rules, 81 Fed. Reg. at 76,082 (adding same).
[47] 2016 Proposed Rules, 81 Fed. Reg. at 39,347.
[48] The three-year limitation period will not prevent borrowers from attempting to file untimely applications because they will be unaware of the time limit. *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 13. Without group processes, ED will still adjudicate untimely claims from otherwise deserving borrowers.
[49] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM *supra* note 7, at 45, 80-81 (borrowers miss questions on the closed school discharge application form and are denied relief, even when it is clear that the borrowers should qualify for a closed school discharge).
[50] 2019 Rules, 84 Fed. Reg. at 49,799-800.
[51] *Id.* at 49,879; 2018 NPRM, 83 Fed. Reg. at 37,244, 37,285.
[52] *See* 2016 Rules, 81 Fed. Reg. at 75,967.
[53] The 2019 Rules eliminate the group discharge process for loans disbursed on or after July 1, 2020, requiring each borrower to submit an application, and for ED to evaluate each claim individually. *See* 2019 Rules, 84 Fed. Reg. at 49,799, 49,879.

interest) because they did not know federal student loans *could* be discharged because of school misconduct.[54] Without group discharges, countless borrowers will needlessly suffer.[55]

B. The new 2019 borrower defense standards create arbitrary barriers to attaining relief.

The 2019 Rules' borrower defense standards require borrowers to satisfy complicated requirements to be eligible for any form of relief.[56] Under the 2019 standard, for loans issued after July 1, 2020, a borrower is only eligible for a borrower defense discharge if they (1) submit their claim to ED within 3 years of leaving school;[57] (2) prove they relied upon a "statement, act, or omission by an eligible school to a borrower that is false, misleading, or deceptive" that "directly and clearly relates to enrollment or continuing enrollment at the institution or the provision of educational services for which the loan was made";[58] (3) demonstrate that the school made the misrepresentation with "knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth";[59] and (4) prove they suffered "financial harm" in the form of "monetary loss" as a result of the school's misrepresentation.[60]

Amicus agrees with Plaintiff that these standards are an arbitrary and capricious.[61] But the standards also ignore legal aid organizations' comments on the realities defrauded borrowers face, putting the 2019 Rules at odds with the Congressional intent animating the creation of borrower defense.[62] As detailed below, each of these restrictions alone makes it far less likely that defrauded borrowers will access relief. Together, they put relief out of reach for many deserving borrowers.

1. The three-year limitation period arbitrarily puts relief out of reach for defrauded borrowers.

The 2019 Rules require borrowers to file a claim within three years of attending the school whose conduct is challenged. Contrary to ED's suggestion that a three-year limitations period is necessary to ensure schools retain records to defend against students' borrower defenses,[63] this requirement will cover up school misconduct and cheat deserving borrowers of relief.

[54] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NRPM *supra* note 7, at 16-17 (Despite the publicity surrounding the Corinthian Colleges' collapse, many borrowers who attended workshops hosted by legal aid organizations were unaware that they could apply for relief.).
[55] *See* Ex. 1, Robyn Smith Decl.; Ex. 2, Tyler Decl.; Ex. 3, Laura Smith Decl.
[56] Just because a borrower is eligible for relief does not mean their debt will be extinguished. The 2019 Rules allow ED to grant partial relief (which can be a nominal percentage of relief) to an eligible borrower. 34 C.F.R. § 685.206(e)(12).
[57] 34 C.F.R. § 685.206(e)(6)(i).
[58] 34 C.F.R. § 685.206(e)(3).
[59] *Id.*
[60] 34 C.F.R. § 685.206(e)(4).
[61] Pl. Br. at 22-25.
[62] *See* Nunn Report, *supra* note 3.
[63] *See* 2019 Rules, 84 Fed. Reg. 49,823-24.

As discussed above, many legal aid organizations report that they represent defrauded students whose schools' closed decades ago.[64] The three-year limitation will mean that many defrauded students with meritorious claims will be barred from accessing relief purely because they did not learn they had the option to seek relief within the limitations period.[65] More troubling, many students seek legal advice only after their student loans are in default, which occurs years after they attended their school.[66]

As explained in the legal aid comments to the 2018 NPRM, the evidence necessary to prove a claim—like that revealed through a government enforcement investigation or action, or sought via a FOIA or state records request, for example—may simply be unavailable within three years of a student's attendance at their school.[67] Contrary to ED's suggestion that the limitations period will clearly delineate whether a misrepresentation occurred[68] or deter frivolous claims,[69] it will only "encourage[s] the filing of 'use-it-or-lose-it' claims" for borrowers who are desperate for relief but do not yet have the clearest evidence of their school's misconduct.[70] The limitation will arbitrarily exclude defrauded students from receiving relief[71] and make it harder for ED to reach a fair resolution on borrowers' claims. The time limit, therefore, has no deterrent effect, but instead "punish[es] twice-over borrowers who have been mistreated once [already]."[72] This result is contrary to the reasons Congress created a right to borrower defense; to give cheated borrowers loan relief.[73]

2. The 2019 Rules arbitrarily impose difficult thresholds for unrepresented borrowers to meet to demonstrate that their schools committed a misrepresentation.

The 2019 Rules impose multiple arbitrary hurdles for borrowers to overcome to demonstrate that they reasonably relied on a substantial misrepresentation made by their school. Unlike the 2016 Rules, the 2019 Rules prove that the "the institution's act or omission was made with knowledge of its false, misleading, or deceptive nature or with a reckless disregard for the truth,"[74] a standard more demanding than

[64] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 10, at 85; Ex. 1, Robyn Smith Decl. at ¶ 17; Ex. 2, Tyler Decl. at ¶¶ 14, 15, 19; Decl. of Laura Smith at ¶¶ 7-9 ("Laura Smith Decl.," attached as Exhibit 3).
[65] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 16.
[66] *See* Ex. 1, Robyn Smith Decl. at ¶ 18; Ex. 2, Tyler Decl. at ¶¶ 8, 19.
[67] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 13.
[68] *See* 2019 Rules, 84 Fed. Reg. at 49,823-24.
[69] *See* 2018 NPRM, 83 Fed. Reg. at 37,244, 37,252.
[70] Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 13.
[71] In addition, unlike the 2016 Rules, the 2019 Rules do not provide a reconsideration process should the borrower discover more evidence of school misconduct. 2019 Rules, 84 Fed. Reg. at 49,830; 34 C.F.R. § 685.206(e)(13). *See* Ex. 1, Robyn Smith Decl. at ¶¶ 36-37, 62-65.
[72] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 16.
[73] *See* Nunn Report, *supra* note 3.
[74] 34 C.F.R. § 685.206(e)(3).

the Federal Trade Commission's definition of deception[75] and many state unfair and deceptive acts and practices statutes.[76] And, the 2019 Rules require borrowers to accompany their written testimony with documentary evidence of school misrepresentations. Further, the 2019 Rules rescind ED's obligation to view a borrower's application against its own records[77] and include technical exclusions for eligibility. This standard is difficult for most defrauded borrowers to meet.

As legal aid attorneys told ED in their comments to the 2018 NPRM, "Former students [...] often lack records from their schools (and rarely have school records of their own)."[78] Many defrauded borrowers live in shelters or temporary housing and have no permanent mailing address, making it difficult to receive any school-related documents.[79] Even when borrowers are represented, school records can take months to arrive or are simply unavailable.[80] In an effort to make the application process fair, the 2016 Rules required that ED official assigned to assess if an individual application was eligible for relief also consider ED records.[81]

The 2019 Rules arbitrarily require each borrower to submit documentary evidence proving the school's conduct to receive relief, but rescind the 2016 Rules' requirement that schools submit records to ED when students challenge their misconduct in arbitration or court. Unlike the 2016 Rules, ED "may" consider information it holds about a school's misrepresentation when assessing an application.[82] ED changed what information schools needed to submit because "these provisions required a significant

[75] The FTC's definition of misrepresentation only requires knowledge for individual liability, not liability for a corporate defendant. *See Fed. Trade Comm'n v. Bay Area Bus. Council, Inc.,* 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC may establish corporate liability under section 5 with evidence that a corporation made material representations likely to mislead a reasonable consumer."); *Fed. Trade Comm'n v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 319-20 (S.D.N.Y 2008); 16 C.F.R. § 254 *et. seq.*, Guides for Private Vocational And Distance Education Schools (defining types of deceptive school conduct, but not listing knowledge as a prerequisite for a violation).

[76] *See generally* Nat'l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* § 4.2.5.1 (9th Ed., 2016), updated at www.nclc.org/library (citing cases from majority of states); *see also* Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Laws* (March 2018), https://perma.cc/AVL8-E2EE (citing state-by-state survey of UDAP statutes' features).

[77] *Compare* 34 C.F.R. § 685.206(e)(9)(ii) *with* 34 C.F.R. § 685.222(e)(3)(i).

[78] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 41. *See also* Ex. 1, Robyn Smith Decl. at ¶ 40.

[79] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 41.

[80] *See id. See also* Ex. 1 Robyn Smith Decl. at ¶ 41, 51-54 ("[Legal aid staff] request[s] student records from the school under the Family Educational Rights and Privacy Act (or the school's custodian of records, the state agency, or a bankruptcy trustee if a school has closed); request[s] records related to government oversight and investigations of the school under [FOIA] and/or the California Public Records Act; research[es] and find[s] other sources of school-related records from accrediting agencies, lawsuits, state attorneys general, etc. This can take several weeks to several months, and sometimes even longer because the Department is slow to respond to FOIA requests and appeals of insufficient FOIA responses.").

[81] 34 C.F.R. § 685.222(e)(3)(i)(A) ("As part of the fact-finding process, the Department official … considers any evidence or argument presented by the borrower and also any additional information, including [] Department records"). *See* 2016 Rules, 81 Fed. Reg. at 75,962 ("§ 685.222(e)(3) provides that for individually filed borrower defense applications, the designated Department official will also consider other information as part of his or her review of the borrower's claim. […] [T]he decision maker […] would assess the value, or weight, of all of the evidence relating to the borrower's claim[.]").

[82] 34 C.F.R. § 685.206(e)(9)(ii).

amount of paperwork to be submitted[.]"[83]

Conversely, requiring each borrower to submit written evidence "to demonstrate a misrepresentation occurred" certainly creates a "significant amount of paperwork" for both borrowers and ED. ED justified adding this requirement by claiming "future students [would] bear the cost of prior students' borrower defense claims in the form of increased tuition" and the evidentiary burden guarded against "frivolous" claims. [84] But as Plaintiff argues, ED's fear of frivolous claims is unsupported.[85] Additionally, "future students" would benefit most from schools being honest and accountable.[86] Instead, the 2019 Rules' misrepresentation standard encourages schools to rely on unwritten deceptive practices or to correct verbal misrepresentations with small print in form enrollment contracts.[87] Such a standard gives schools permission to deploy many of the predatory practices exemplified in the 2012 HELP Report.[88]

In addition to the documentary evidence a borrower must provide, the 2019 Rules require borrowers to parse through a complicated definition of a qualifying misrepresentation.[89] As legal aid attorneys observe, borrowers often do not know what information is relevant to substantiate their borrower defense claim, even under the less-demanding 2016 Rules.[90] Paradoxically, the 2019 Rules state ED "need *not* liberally construe" borrowers' unrepresented claims because it will "provide instructions that are easy to understand and does not expect borrowers to provide legal arguments."[91]

Similarly, borrowers simply will not know how—or will simply be unable—to prove by a preponderance of the evidence what their school knew or didn't know when it made a misrepresentation.

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[83] 2019 Rules, 84 Fed. Reg. at 49,845; 2018 NPRM, 83 Fed. Reg. at 37,265.
[84] 2019 Rules, 84 Fed. Reg. at 49,817-18.
[85] Pl. Br. at 19-20.
[86] ED states, "Under the [2019 Rules' standard], a school engaging in misrepresentation alone will not be sufficient for a successful claim." 2019 Rules, 84 Fed. Reg. at 49,798-99.
[87] Legal aid commenters gave other examples of unfair and deceptive conduct ineligible for relief under the narrow misrepresentation standard, too. *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, at 32-36.
[88] *See* HELP Report, *supra* note 5, at 55-56 (recruiters from Kaplan College, when asked by prospective students about the graduation rate, said, "I want to say 90 percent" when nearly half of students didn't graduate). ED claims it will consider verbal misrepresentations, but then indicates that where a verbal representation contradicts what is otherwise in writing, the borrower should only make their enrollment decision "based upon written representations and documentation from the institution," 2019 Rules, 84 Fed. Reg. at 49,807, indicating the Department will not grant relief if a borrower is tricked by verbal misrepresentations.
[89] 34 C.F.R. §§ 685.206(e)(3), (5)(ii)(F).
[90] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 33-37, 50, 62-64 (describing how clients' pro se applications were "limited in facts and devoid of significant relevant information" because they were not assisted by counsel and did not know where their schools' misconduct was documented).
[91] 2019 Rules, 84 Fed. Reg. at 49,826.

As ED has acknowledged, "gathering evidence of intent [is] nearly impossible for borrowers"[92] and it is equally difficult to determine a school's knowledge.[93] As a result, borrowers harmed by their school's predatory practices will not be able to meet the 2019 Rules' heightened standards for relief.

3. The 2019 Rules arbitrarily require that borrowers show they were "financially harmed" in a way that ignores how borrowers are actually harmed by predatory schools.

The 2019 Rules require that borrowers provide evidence to prove that they suffered financial harm "incur[ed] as a consequence of a misrepresentation,"[94] but, perversely, defines harm to exclude the most obvious and relevant harm: the student loan debt incurred in reliance on the misrepresentation.[95] The 2019 Rules then erects further barriers to relief by requiring the borrower to show that no intervening factors, including "intervening local, regional, or national economic or labor market conditions,"[96] contributed to the causal relationship between the school's misrepresentation and the harm the borrower experienced.[97] Again, this standard assumes that a borrower can discern what evidence is sufficient to satisfy the standard, a task that requires an attorney's assistance or even expert testimony.[98]

ED's explicit exclusion of borrowers' acquisition of student loan debt from its definition of financial harm[99] is irrational and contrary to virtually all states' unfair and deceptive practices statutes: this is the most obvious and causally connected harm suffered by borrowers who take out loans in reliance on a misrepresentation.[100] Excluding federal student loan debt from "financial harm" ignores the damage student loan debt causes borrowers when that debt is fraudulently induced. Borrowers who attended predatory schools often tell their legal aid attorney that they would never have taken on student loans had they known the truth about their school.

Defrauded borrowers' student loan debts are financially destabilizing, preventing them from

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[92] 2016 Rules, 81 Fed. Reg. at 75,937. "This reflects the Department's longstanding position that a misrepresentation does not require knowledge … on the part of the institution." *Id.*
[93] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM 2018, *supra* n. 7, at 24.
[94] 34 C.F.R. § 685.206(e)(4); 2019 Rules, 84 Fed. Reg. at 49,930.
[95] 34 C.F.R. § 685.206(e)(4); 2019 Rules, 84 Fed. Reg. at 49,819-20.
[96] 34 C.F.R. § 685.206(e)(4).
[97] 2019 Rules, 84 Fed. Reg. at 49,798, 49,819-20.
[98] National Student Loan Defense Network, Comment Letter on the Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations at 10 (Aug. 30, 2018), https://www.regulations.gov/document?D=ED-2018-OPE-0027-31574 (hereinafter, NSLDN, Comment Letter on Borrower Defense 2018 NPRM).
[99] 34 C.F.R. § 685.206(e)(4).
[100] *See generally* Nat'l Consumer Law Ctr., *Unfair and Deceptive Acts and Practices* (9th Ed., 2016), updated at www.nclc.org/library.

taking necessary life steps like returning to school, getting married, or having children.[101] One study estimated that borrowers subject to school misconduct experience a lifetime wealth loss that averages around $208,000, stopping them from investing in wealth stabilizing opportunities like retirement savings.[102] Defrauded borrowers' student loan debts also ruin their credit, which in turn limits their ability to rent or purchase a home. Worse, when federal student loans default, ED can extrajudicially garnish borrowers' wages and seize their tax refunds.[103]

The financial harm requirements also irrationally exclude borrowers who did not complete their program. For example, ED provides limited examples of financial harm that could be applied to a borrower who did not complete their program.[104] But predatory schools often have low completion rates for a variety of reasons, including poor programing and student supports, and students drop out after realizing that the school is not what it was sold as.[105] It may be difficult for a borrower who withdrew for those legitimate reasons to demonstrate that the misrepresentation and not the withdrawal from school caused subsequent financial harm.[106] More generally, requiring borrowers to prove that a school's misrepresentation was the *sole* cause of their harm will exclude people in vulnerable situations, the very people predatory schools aggressively aim to recruit, from relief.[107] Recent immigrants, borrowers with exigent health circumstances, single parents, and borrowers with criminal records, among others, will struggle to demonstrate they are entitled to relief under the 2019 Rules. Few will be able to prove that their school was the sole cause of the hardship they experienced.[108]

Any one of these borrower defense eligibility standards on their own would disqualify countless defrauded borrowers from obtaining relief. But, together, the elements required by the 2019 Rules make borrower defense an illusory remedy for borrowers who are subject to school fraud. As one student loan advocate explained, "[I]t is hard to fathom how individual unrepresented student loan borrowers could

[101] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 34, 69.
[102] R. Hilton Smith, Demos, At What Cost? How Student Debt Reduces Lifetime Wealth (Aug. 7, 2013), https://perma.cc/F38Q-ZQB8; *See also* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 27.
[103] *See* Persis Yu, Nat'l Consumer Law Ctr., Voices of Despair: Student Borrowers Trapped in Poverty When the Government Seizes Their Earned Income Tax Credit (July 2020), https://perma.cc/CVR8-NDR4 (documenting how the seizure of Earned Income Tax Credits harms low-income working families).
[104] 34 C.F.R. §§ 685.206(e)(4)(ii), (iv).
[105] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 28, 64-65.
[106] *See* 34 C.F.R. § 685.206(e)(4).
[107] HELP Report, *supra* note 5, at 58.
[108] Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 31.

possibly satisfy these requirements."[109]

C. The 2019 Rules' restrict borrowers' access to justice, further reducing the likelihood a defrauded borrower will be able to attain loan relief.

In addition to imposing heightened eligibility requirements on defrauded borrowers seeking loan relief, the 2019 Rules rescind the 2016 Rules' limits on when schools could compel borrowers to forced arbitration.[110] The 2019 Rules reverse course from ED's prior position that predatory schools were using arbitration clauses to stop students, law enforcement, and oversight agencies from catching wind of their predatory practices.[111] This regulatory change will impact many borrowers; shortly before 2016 Rules took effect, most for-profit schools used arbitration clauses.[112]

These clauses cause many students immense harm. Arbitration prevents many borrowers from accessing justice at all; legal aid organizations often do not have the capacity to represent individually defrauded borrowers in arbitration proceedings and arbitration clauses prevent wrongs from being addressed via class action or private litigation.[113] Many predatory schools use arbitration clauses to insulate themselves from liability for wrongdoing and to prevent school accreditors, ED, and law enforcement agencies from discovering students' complaints. And when students are prevented from using class actions to challenge and build an evidentiary record of predatory schools' practices, those practices often stay hidden from the public for years.[114] Indeed, the Supreme Court has repeatedly recognized that class actions are essential to provide redress for claims that are too time- and resource-intensive to assert individually.[115] ED recognized in its 2016 Rules that, "[A]busive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school[s] to continue that abuse unhindered by lawsuits from consumers [had] cost [] taxpayers [] millions of dollars in losses and [would] continue to do so."[116]

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[109] *See* NSLDN, Comment Letter on Borrower Defense NPRM 2018, *supra* note 100, at 10.
[110] 2019 Rules, 84 Fed. Reg. at 49,840-44.
[111] *See* 2016 Rules, 81 Fed. Reg. at 76,025; 2016 Proposed Rules, 81 Fed. Reg. at 39,381; Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 10, at 57-60.
[112] *See* Tariq Habash & Robert Shireman, The Century Found., How College Enrollment Contracts Limit Students' Rights (April 28, 2016), https://bit.ly/2CMlSvK. In contrast to for-profit schools, few non-profit or public schools compelled students to arbitration.
[113] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 15, 20.
[114] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 60 (ITT Tech used arbitration agreements to conceal the fact that school officials deliberately mislead students into believing their New Mexico campus's nursing programs were accredited, when in reality they were not).
[115] *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).
[116] 2016 Rules, 81 Fed. Reg. at 76,025.

Moreover, the consequences of using arbitration clauses are more severe when considered in context with the 2019 Rules' other regulatory changes. Evidence publicly filed in court is a critical source of documentation of school misconduct for borrowers to cite to when substantiating their own grounds for a borrower defense. Even if students opt to arbitrate their claims, arbitration doesn't provide the same discovery rights students are otherwise entitled to in court—and schools are reticent to produce documents related to misconduct unless they are compelled by subpoena.[117] And any evidence revealed in arbitration against predatory schools are likely to be subject to confidentiality provisions, and thus unavailable as evidence to support other students' borrower defense claims.

D. The 2019 Rules arbitrarily remove automatic closed-school loan discharges, a critical protection for low-income borrowers.

The HEA states, "If a borrower… is unable to complete the program in which [they are] enrolled due to the closure of the institution… then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees)[.]"[118] The 2016 Rules added regulations that automatically discharged the federal student loan debt of students whose school closed after November 1, 2013 if the student was not able to finish their academic program and did not re-enroll in any title IV-eligible institution within three years of the school's closure.[119] Additionally, the 2016 Rules added a requirement that a closing school notify students of the availability of a closed school discharge.[120] These regulations prevented students who attended a closed school from falling into a financial spiral simply because they were unaware they were eligible for relief. The 2019 Rules' arbitrary removal of automatic closed-school discharges for borrowers whose schools close after July 1, 2020 will create needless hardship for borrowers and increase the caseload of legal aid advocates.

ED acknowledged it needed to implement automatic closed school discharges because "[r]esearch has consistently shown that students who do not complete their programs are among the most likely to default on their loans, leaving them worse off than when they enrolled"[121] and only a fraction of the

[117] *See* Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 41, 60.
[118] 20 U.S.C. § 1087(c)(1).
[119] 34 C.F.R. § 685.214(c)(2); 2016 Rules, 81 Fed. Reg. at 76081. ED would use information already in its possession to process automatic loan discharges.
[120] 34 C.F.R. § 668.14(b)(32); 2016 Rules, 81 Fed. Reg. at 76070. Requiring schools to provide closed school notices is important because closing schools do not provide information regarding closed school discharges to students when explaining their options. *See* Ex. 1, Robyn Smith Decl. at ¶ 74.
[121] *See* 2016 Rules, 81 Fed. Reg. at 76,036.

borrowers eligible for a closed school discharge were applying for relief.[122] ED recognized that the low application numbers were likely due to borrowers' unawareness that they were eligible for a discharge.[123] This is consistent with comments from legal aid providers, who said that many of their clients seek help decades after attending their school.[124] In addition, legal aid advocates noted that borrowers are often prevented from accessing relief because they are flummoxed by the technical language and lay-out of the closed-school discharge application and fail to submit a complete form to ED.[125] The automatic closed-school loan discharges saved many borrowers from needing legal aid help.

Without analyzing the cost to borrowers and the economic impacts of requiring borrowers to repay debt they are entitled to discharge, the 2019 Rules removed automatic closed-school discharges for borrowers whose schools close after July 1, 2020[126] and removed student-facing closed-school discharge notices.[127] ED claimed that the regulation ran counter to "the goals of these final regulations, which include encouraging students at closed or closing schools to complete their educational programs, either through a teach out plan, or through the transfer of credits separate from a teach out."[128]

ED's rationale is flawed. The purpose of the HEA, which gave rise to these regulations, was to ensure that all Americans could access quality postsecondary education and create a skilled workforce, healthy economy, and access upward mobility.[129] The plain language of the HEA mandates that the Secretary discharge the debt if the borrower is unable to complete their program.[130] Indeed, Congress intended that borrowers harmed by their schools would not face financial hardship that would frustrate the aims of the Act.[131] Thus, the regulatory goal must be to remedy the harm caused by a closing school—not force the borrower to complete a potentially low-value program. As ED knows, "[I]t is not always in the borrower's best interest to continue a program through graduation [because] the value of the degree the borrower obtains may be degraded, depending on the reasons for the closure. Borrowers

[122] 2016 Proposed Rules, 81 Fed. Reg. at 39,369; 2016 Rules, 81 Fed. Reg. at 76,032.
[123] 2016 Proposed Rules, 81 Fed. Reg. at 39,369.
[124] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM, *supra* note 7, at 84-85.
[125] *Id.* at 80.
[126] 2019 Rules, 84 Fed. Reg. 49,847-48.
[127] *Id.* at 49,854.
[128] 2019 Rules, 84 Fed. Reg. 49,847-48.
[129] *See supra* note 2; Nunn Report, *supra* note 3, at 5.
[130] 20 U.S.C. § 1087(c)(1).
[131] *See* An Act to Reauthorize the Higher Education Act of 1965, Pub. L. No. 102-325, Title IV, § 437, 106 Stat. 448 (codified as amended at 20 U.S.C. § 1087(c) (2018)); David Whitman, When President George H. W. Bush "Cracked Down" on Abuses at For-Profit Colleges, *supra* n. 4 (discussing Congressional hearings and school closures that preceded Congress's passage of amendments to the HEA that included closed school discharge).

… may incur unmanageable debt in exchange for relatively low-value degrees."[132]

Ending automatic closed-school discharges will increase the numbers of borrowers desperate for loan assistance. As ED knows, without automatic closed-school discharges, more borrowers are likely to default. Borrowers whose issues might have been addressed by an automatic discharge, before their financial plights worsened year after year, will be forced to turn to legal aid organizations. Neither borrowers nor legal aids should have to face this hardship because the change is arbitrary and capricious.

III. Under the 2019 Rules, legal aid organizations will struggle to adequately serve clients who are desperate for relief from debt stemming from predatory schools' deceptive practices.

Every state in America has its share of borrowers struggling to pay their federal loan debt and each has cohorts of borrowers whose student loan debt is in default.[133] Eighty percent of Americans cannot afford legal assistance to help them assess what relief is available.[134] Hundreds of thousands of Americans who have nowhere else to turn attempt to get student loan advice from legal aid organizations each year. Yet, few offer student loan services,[135] and of the organizations that do, demand always exceeds capacity.[136]

Even with the protections added by the 2016 Rules, legal aid organizations struggled to meet the demand for student loan help.[137] In fact, defrauded borrowers denied relief under the prior rule are returning to legal aid organizations to help them identify their options. Now, with automatic closed-school discharges rescinded, the numbers of low-income borrowers struggling to repay debt they could discharge will increase. The 2019 Rules will only make defrauded borrowers' path to relief more difficult and their chances of success more unlikely.

The 2019 Rules increase borrowers' need for legal help and leave borrowers even more vulnerable to school misconduct than they were before. Although the 2019 Rules claim school misconduct will still be deterred,[138] the lax student protections in the 2019 Rules will embolden predatory schools to

[132] 2016 Rules, 81 Fed. Reg. at 76,034.
[133] *Debt in America; an Interactive Map*, Urban Institute (last updated Dec. 17, 2019), https://urbn.is/2CcWsaQ.
[134] Leonard Willis, Am. Bar Assoc., Access to Justice: Mitigating the Justice Gap (Dec. 3, 2017), https://perma.cc/86YY-CL9S.
[135] *See Legal Resources*, Student Loan Borrower Assistance Project at the Nat'l Consumer Law Ctr., https://perma.cc/2R5H-37TU; Ex. 3, Laura Smith Decl. at ¶ 3.
[136] Ex. 1, Robyn Smith Decl. at ¶ 12; Ex. 2, Tyler Decl. at ¶ 6.
[137] *See* Ex. 1, Robyn Smith Decl. at ¶ 12; Ex. 2, Tyler Decl. at ¶¶ 9-10.
[138] 2019 Rules, 84 Fed. Reg. at 49,896.

continue targeting vulnerable populations.[139] Indeed, predatory schools will know that as long as the truth is embedded in small print in complex and confusing documents, the lies their representatives tell will go unchecked[140] if the borrower is even able to submit an application.[141] As ED's projections demonstrate, only 3% of the loan volume held by defrauded borrowers will be forgiven under this arbitrary and capricious Rule.[142]

Furthermore, the complexity of the 2019 Rules, described above, will mean that each stage of representation will take even longer, and legal aid advocates across the country will be forced to work longer hours to serve fewer clients. Ultimately, under the 2019 Rules, despite the longer hours borrowers and legal aid organizations alike will spend compiling applications, many deserving low-income borrowers will be unable to attain relief. These borrowers will experience a complete inversion of the rationale behind the HEA; instead of being given access to higher education and relief after being subject to school misconduct, they will suffer financial hardship and face economic inertia.

A. Legal aid organizations providing student loan help were already pushed to capacity under the 2016 Rules.

Legal aid organizations are already overwhelmed with the volume of low-income clients who need student loan help. Legal aid organizations serving client populations of millions of people have few dedicated, full-time student loan attorneys; for example, Legal Aid Foundation of Los Angeles (LAFLA) only has one, and Philadelphia, a city where over 25% of the population has student loan debt and 44% live at or below the poverty line, has none.[143] Even legal aid organizations that have dedicated student loan attorneys are overwhelmed by borrowers' need for help; LAFLA reports that it must periodically close its doors to borrowers just to manage their caseloads.[144]

The legal aid organizations' student loan clients generally experience decades of financial

[139] *See* Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 28, 31, 32, 35 (describing ways in which predatory schools targeted vulnerable populations).
[140] *See* 2019 Rules, 84 Fed. Reg. at 49,807 (stating borrowers should "make these important decisions based upon written representations and documentation from the institution").
[141] Indeed, ED itself "expect[s] that the changes in the final regulations that will reduce the anticipated number of borrower defense applications are related more to changes in the process, not due to changes in the type of conduct on the part of an institution that would result in a successful defense[.]" 2019 Rules, 84 Fed. Reg. at 49,897.
[142] The Institute for College Access & Success, Defrauded Students Left Holding the Bag Under Final "Borrower Defense" Rule (Sept. 3, 2019), https://perma.cc/L25A-R7QP.
[143] Ex. 1, Robyn Smith Decl. at ¶ 8 ("LAFLA presently employs one part-time Senior Attorney (three-fifths time), one full-time staff attorney, and one legal fellow to cover the entirety of its student loan work. The legal fellow's one-year fellowship will expire at the end of November in 2020."); Ex. 2, Tyler Decl. at ¶ 6; Ex. 3, Laura Smith Decl. at ¶ 3.
[144] Ex. 1, Robyn Smith Decl. at ¶ 12.

hardship due to debt that was fully dischargeable.[145] Clients often only seek help if "they are facing a financial emergency catalyzed by their student loans[.]"[146] As Johnson Tyler, an attorney at Brooklyn Legal noted, "Borrowers who suspect that their school scammed them often d[o] not think they could do anything about it until they speak with us."[147] Low-income borrowers often realize for the first time that they are eligible for a closed school discharge or borrower defense when meeting with legal aid staff.[148] Others try to attain relief on their own but don't realize how profoundly their school was breaking the law to optimize school profits at students' expense[149] or are stopped because they cannot navigate the legal system alone.[150]

Despite the Department's assertion in the 2019 Rules that "[a]rbitration does, in fact, help 'provide a path' for borrowers to acquire relief in an efficient, cost-effective, and quicker manner than traditional litigation[],"[151] most borrowers do not have the means to hold schools accountable in arbitration or in court. Legal aid organizations cannot serve the volumes of clients needing student loan help if they sink extensive resources into arbitrating students' claims.[152] Affirmative litigation only makes sense from a resource perspective if it is a class action or develops caselaw that helps others.[153]

As a result, a borrower defense discharge is many clients' only means of attaining relief. Advocates were already spending significant amounts of time helping borrowers submit borrower defense applications under the less-challenging 2016 Rules. In fact, the prior rules' process was already so complicated and time-consuming that student loan legal aid attorneys could only provide borrower defense representation for a limited number of clients and turned scores of others away.[154] Advocates report that when submitting borrower defense applications under the prior rule, they spent an average

[145] For example, one client of Community Legal Services in Philadelphia suffered with the debt stemming from "a Philadelphia trade school [she attended] for a few weeks in 1988 until it closed," including having her tax refund taken, for thirty years before realizing she qualified for loan relief. Ex. 3, Laura Smith Decl. at ¶ 7. Clients of Brooklyn Legal Services have struggled with debts for decades before realizing they were eligible to file a borrower defense. Ex. 2, Tyler Decl. at ¶ 14-15. *See also* Ex. 1, Robyn Smith Decl. at ¶¶ 24-28, 30-31, 33-37.
[146] Ex. 2, Tyler Decl. at ¶¶ 8, 19.
[147] *Id.*
[148] *See* Ex. 1, Robyn Smith Decl, at ¶¶ 16, 25, 31, 69; Ex. 2, Tyler Decl. at ¶¶ 13-15; Ex. 3, Laura Smith Decl. at ¶ 7.
[149] Ex. 1, Robyn Smith Decl. at ¶¶ 33-37, 62-65.
[150] *See* Ex. 1, Robyn Smith Decl. at ¶ 20 (describing that often private attorneys will not represent clients in claims against schools or federal student loan matters because they will not collect attorneys' fees); Ex. 2, Tyler Decl. at ¶ 13 (describing a client who tried, and failed, to sue his school pro se).
[151] 2019 Rules, 84 Fed. Reg. at 49,841.
[152] *See* Ex. 1, Robyn Smith Decl. at ¶ 15.
[153] *See* Ex. 1, Robyn Smith Decl. at ¶ 15; Ex. 2, Tyler Decl. at ¶ 7.
[154] *See* Ex. 1, Robyn Smith Decl. at ¶¶ 12, 43-44; Ex. 2, Tyler Decl. at ¶¶ 9-10.

of between 5 and 50 hours of work on each application.[155] And, even after receiving an attorneys' help to compile an application, borrowers with meritorious claims are receiving denials under the prior rule, forcing legal aid organizations to weigh their clients' options.[156] The 2019 Rules do nothing to alleviate the burdens preventing borrowers from attaining relief under the 2016 Rules; to the contrary, they make it even more difficult to get relief.[157] Despite legal aid organizations' valiant efforts, borrowers will certainly fare worse under the 2019 Rules.

B. Legal aid attorneys will need to dedicate significantly more time to help borrowers complete forms and respond to schools under the 2019 Rules' borrower defense process.

The 2019 Rules will involve a lengthier application form that will take more time for the advocate to complete than it already took to assemble an application under the 2016 Rules. Advocates will need to engage in substantially more factual investigation and back-and-forth with their clients to show that the borrower satisfied the Rules' impossible standards, as discussed above.

Furthermore, the 2019 Rules will require advocates to engage in extended, time-sensitive representation. Legal aid advocates will be pressed to help borrowers assemble a complete application supported by evidence within three years of the date the borrower left school.[158] Advocates will again need to provide time-sensitive representation to borrowers to analyze and respond to a school's response to the borrower's application.[159] The process established by the 2019 Rules puts the borrower and the school in an openly adversarial process, and how the student responds to a school's submission may determine the outcome of a borrower's application.[160] The heightened back and forth between school and borrower will further limit the number of former students that legal aid attorneys are able to take on as clients.[161] The heightened workload created by the 2019 Rules will further reduce how many low-income clients legal aid organizations can represent in borrower defense proceedings.[162]

[155] Ex. 1, Robyn Smith Decl. at ¶ 88. *See also* Ex. 2, Tyler Decl. at ¶ 12 (spending an average of 12 hours just preparing an application form, excluding time spent interviewing the client).
[156] *See* Ex. 1, Robyn Smith Decl. at ¶ 65. From December 2019 until May 2020 the Department granted 10,133 applications and denied 45,228 applications. U.S. Dep't of Educ., May 2020 Borrower Defense Report, https://bit.ly/2OsJIQ4
[157] *See* Ex. 1, Robyn Smith Decl.at ¶ 87; Ex. 2, Tyler Decl. at ¶¶ 16-18, 20-22.
[158] 34 C.F.R. § 685.206(e)(6)(i).
[159] 34 C.F.R. § 685.206(e)(10)(i).
[160] *Id.*; 2019 Rules, 84 Fed. Reg. at 49,837.
[161] *See* Ex. 2, Tyler Decl. at ¶ 16.
[162] *See* Ex. 1, Smith Decl. at ¶ 87; Ex. 2, Tyler Decl. at ¶ 17.

C. The 2019 Rules require that advocates conduct extensive investigations to unearth documentary evidence necessary to substantiate their clients' borrower defense claims.

Advocates share the evidentiary burdens students face in compiling a complete application that satisfies the heightened requirements of the 2019 Rules. To zealously represent each client, the legal aid advocate will need to exhaust every avenue that might yield documentary evidence that substantiates their client's claims against their school and fully unearths the extent of the school's misconduct. Because there are numerous sources that hold relevant information about a school, those efforts will take time. As Robyn Smith, an attorney at LAFLA explained:

> [W]e often spend extensive time obtaining documents to support each client's application. We often submit a FERPA request for student records to the school if it still exists. If it does not, then we research who maintains the student records, which could be a state agency, a third-party custodian of records, or a bankruptcy trustee if the school has filed for bankruptcy. We then must spend time requesting the records from the appropriate party which can also take time. Sometimes state agencies and/or bankruptcy trustees have the records, but take time to find them because they are disorganized. We also often submit FOIA requests to the Department, California Public Records Act requests to the Bureau for Private Postsecondary Education, look for old catalogs, websites and advertisements on-line and through the "Way Back Machine," and research lawsuits by state attorneys general or private parties and request documents from them. Sometimes we obtain voluminous documents that we must then review and organize. If our client has contact information for other former students or former school staff, we will often attempt to contact these people to interview them and prepare declarations. In addition, in some cases we will find experts who will agree to submit declarations.[163]

Legal aid staff use their legal expertise to get evidence the client would not be able to attain on their own.[164] Moreover, borrowers and advocates alike will be deprived from discovering evidence that would have been exposed in court through student lawsuits because of the 2019 Rules' removal of limitations of when schools can compel students to arbitrate. As a result, representing each defrauded borrower will take more dedicated time from any advocate who agrees to represent them than is otherwise required under the 2016 Rule.

[163] Ex. 1 at ¶¶ 51-53.
[164] *See id.* at ¶¶ 36-37 (describing the extensive added evidence LAFLA attorneys added to a borrower's pro se borrower defense application).

D. The 2019 Rules will make it substantially more difficult for legal aid organizations to provide assistance to low-income borrowers submitting pro se applications.

Even under the 2016 Rules, it took advocates hours to provide advice to borrowers submitting their own application.[165] Because the 2019 Rules are so complex and difficult to satisfy, advocates will be forced to dedicate more time to explaining the ins and outs of borrower defense and decoding the legal terms[166] that govern whether relief is available for both direct representation and pro se clients. Previously, some advocates emphasized to borrowers completing application pro se that they should focus on providing affidavit testimony that present a clear picture of his or her school's misconduct and the impact their loans have had on their lives.[167] While before, advocates emphasized that a borrower provide as complete a picture as possible of their school experience, the 2019 Rules necessitate that they understand what documentary evidence will show that the school's misrepresentation "directly and clearly relates to enrollment or continuing enrollment … or the provision of educational services for which the loan was made" and what "financial harm" will make the borrower eligible for relief.[168] Further, ED hasn't consumer-tested its application forms and doesn't provide borrowers with assistance to complete the form, meaning legal aid organizations will need to guide borrowers through how to complete the form itself.[169] Borrowers already struggled to compile a complete application under the prior standards; the 2019 Rules only heighten barriers for borrowers applying for relief without a lawyer.

Additionally, because the 2019 Rules impose new drawbacks to filing a borrower defense form, advocates will be forced to help borrowers assess whether the risks are worthwhile. Under the Rules, borrowers who apply but are denied or partially granted will have their interest capitalized when the Secretary reinitiates repayment.[170] Moreover, the 2019 Rules give schools permission to withhold transcripts (if otherwise permitted by state law) if students' borrower defense application is granted.[171] Advocates will need to carefully discuss the potential consequences of filing a borrower defense application with each applicant.

[165] *Id.* at ¶¶ 43-50 (describing the process LAFLA provides when advising borrowers submitting their own applications, and noting they spent up to 5 hours on each case).
[166] Indeed, even negotiators were confused by the legalese in proposed regulatory language during negotiated rulemaking and ED acknowledged it would be confusing for schools and borrowers alike. Legal Aid Community, Comment Letter on Borrower Defense NPRM 2018, *supra* note 7, at 14.
[167] Ex. 1, Robyn Smith Decl. at ¶¶ 48-50.
[168] 34 C.F.R. §§ 685.206(e)(3)-(5); 2019 Rules, 84 Fed. Reg. at 49,816, 49,819-20.
[169] Legal Aid Community, Comment Letter on Borrower Defense 2018 NPRM *supra* note 7, at 80-81.
[170] 2019 Rules, 84 Fed. Reg. at 49,816. While the 2016 Rules also allowed the Department to capitalize interest, it had not done so previously. *See Borrower Defense to Repayment*, U.S. Dep't of Educ. (July 4, 2020), https://bit.ly/2OPekv6.
[171] 2019 Rules, 84 Fed. Reg. at 49,837.

E. Advocates will dedicate substantially more time to educating the public about student loan laws under the 2019 Rules.

The changes in the 2019 Rules will allow ED to abrogate its responsibility to protect borrowers from misconduct and educate them about predatory schools and their federal student loan rights,[172] and as a result, legal aid advocates will be the only line of defense for many defrauded borrowers. To fill the education-gap left by ED, some legal aid advocates will dedicate more time to educate their current clients and the public about the 2019 Rules' relief eligibility standards, the importance of seeking legal advice quickly after they believe a school has defrauded them, and the need to keep all school marketing, enrollment, and loan materials for at least a few years after leaving their school. Thus, the 2019 Rules make every stage of representation more challenging and complicated for legal aid advocates and will make it difficult for legal aid organizations to continue serving the same volume of clients as they did under the prior rules.

CONCLUSION

Amicus urges this court to grant NYLAG's Motion for Summary Judgment to ensure that borrower defense is not made an illusory remedy for borrowers seriously harmed by the misrepresentations of predatory schools across the county.

Respectfully submitted,
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[172] *See* 2019 Rules, 84 Fed. Reg. at 49,823 ("[T]he Department has emphasized the need for students to be engaged and informed decisions about their education choices.[…] We believe borrowers are able to inform themselves of their options, if they have been harmed by an institution's misrepresentation."); *id.* at 49,828 ("The Department disagrees that students are largely reliant on their own testimony to file a defense to repayment claim. The Department urges students to make informed consumer decisions and treats students as empowered consumers. While students should request important information that is relevant to their enrollment decision in writing, institutional misconduct is never excusable[.]").

CERTIFICATE OF SERVICE

I certify that on this 24th day of July 2020, I electronically filed the foregoing brief using the CM/ECF system, which I understand to have caused service to the counsel for all parties.

Respectfully submitted,

/s/ Andrew Pizor