United States Senate
WASHINGTON, DC 20510

August 30, 2018

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Docket ID ED- 2018-OPE-0027

Dear Secretary DeVos:

We are writing in strong opposition to the U.S. Department of Education's ("Department") proposed regulations to limit borrower defense to repayment ("borrower defense") and to dismantle debt relief for student loan borrowers who have been cheated, misled, or defrauded by predatory colleges. This proposed rule is a near-total reversal of efforts by the previous administration to more effectively and fairly carry out provisions in the *Higher Education Act* (HEA) providing debt relief to distressed borrowers who were deceived or left stranded by their colleges and were struggling to pay back loans with a worthless or non-existent degree. The Department has a responsibility to help federal student loan borrowers and their families. Instead, the proposed borrower defense rule would effectively end debt relief to cheated and defrauded students, rolling back $12.7 billion—more than 85 percent—of the debt relief that was estimated for borrowers under the previous rule.[1]

The two largest collapses of colleges in the history of higher education, Corinthian Colleges, Inc. ("Corinthian") and ITT Educational Services, Inc. ("ITT Tech"), resulted in tens of thousands of borrowers clamoring for help when they found themselves in debt, with degrees or credits of little value, and with few job prospects. These students, and others like them, were subject to unlawful, unfair, deceptive, and abusive practices that have unfortunately become all-too-common in higher education. Victims of these harms have spent countless hours, energy, and money in pursuit of an education that will leave them with little more than a mountain of debt.

Congress intended students to receive debt relief in these situations and other unlawful behavior under the *Higher Education Act*. Unfortunately, the proposed rule is deeply flawed and does not meet the requirements contained in federal law. It fails to protect students and will encourage precisely the kind of abuse that harmed so many borrowers in recent years. The Department must reverse course immediately and withdraw this highly misguided regulatory proposal.

1. The proposed rule would require borrowers to first default on their loans to become eligible for debt relief. Under the Department's preferred approach and one of two proposed alternatives, borrowers may only seek relief while in post-default administrative collection

[1] U.S. Department of Education. Notice of proposed rulemaking: 83 FR 37242. Net Budget Impacts & Accounting Statement. July 31, 2018. https://www.federalregister.gov/d/2018-15823/p-654

proceedings, rather than when their loan is in good standing. This proposal for "defensive" claims is deeply unfair and harmful to borrowers, as it would only allow claims during extremely short windows of time before wage garnishment, debt collection litigation, or federal offset of tax refunds or Social Security benefits. The proposal would also require borrowers to severely damage their credit, thereby risking their ability to qualify for future financial aid, mortgages, car loans, credit cards, or personal lines of credit. Student loan default even puts the security clearances of military service members and the well-being of their families at risk. The proposed policy could constrain many borrowers from gaining upward mobility—forcing them to choose between the consequences of defaulting on their loans for just the chance to be considered for debt relief, or being stuck with fraudulently-issued student debt.

As the Department's analysis admits, a clear consequence of requiring borrowers to first default on their loans before they can get relief will be to encourage further default on such loans—also known as "strategic default." A National Bureau of Economic Research study found that, during the 2008 housing crisis, distressed mortgage borrowers otherwise unlikely to default were up to 20 percent more likely to strategically default given similar terms of a home mortgage modification program.[2] Cheated and defrauded student loan borrowers who are forced to default for relief may be even more likely to do so if they expect income or stagnation loss due to the lack of educational value, experience frustration with their loan servicer, or face poor local economic conditions. The Department does not explain why it is willing to risk long-term harm to borrowers and an increase in default collection costs in order for borrowers to obtain relief from misrepresentation or fraud.

Not only is this proposal poor public policy, but it also breaks from previous practices adopted by both Democratic and Republican administrations. The Department has inaccurately asserted that "affirmative" claims were not permitted until the Obama Administration reinterpreted the 1995 borrower defense regulations. Yet, as the Legal Services Center of Harvard Law School makes clear, the Department accepted "affirmative" borrower defense claims well before 2015, including numerous cases between 1998 and 2003.[3] The Department's reliance on inaccurate information makes clear its motives are political, rather than the best interests of students.

Congress's intent in the HEA is also clear. Section 455(h) of the HEA states that a borrower may assert a "defense to repayment" of a Direct Loan. Throughout the HEA, repayment is defined to mean any stage in which the borrower is required to submit payments to the federal government for the outstanding balance of their loans—without regard to whether the loan is current, delinquent, or in default. Other statutorily mandated loan discharge and cancelation options also apply to all stages of loan repayment.

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[2] Mayer, Christopher, Edward Morrison, Tomasz Piskorski, and Arpit Gupta. "Mortgage Modification and Strategic Default: Evidence from a Legal Settlement with Countrywide." *National Bureau of Economic Research.* May 2011. http://www.nber.org/papers/w17065.pdf

[3] Connor, Eileen. Director of Litigation, Project on Predatory Student Lending, Legal Services Center of Harvard Law School. August 2, 2018. https://www.regulations.gov/document?D=ED-2018-OPE-0027-0011

2. The proposed rule would establish a bar for relief so high that few, if any, students could ever reach it. By proposing a highly restrictive federal standard, the Department is seeking to upend the definition of misrepresentation and the process borrowers would use to demonstrate harm. If this proposal were enacted, it would make obtaining relief impossible for the vast majority of borrowers, even those who have been the clear victims of abusive, misleading, or fraudulent practices. The proposed federal standard is unfair to borrowers and places the interests of predatory schools above the interests of students. The Department's own estimates show that the rate of misconduct by predatory colleges will remain largely the same—but students will be denied relief when this misconduct occurs.

Most notably, the proposed rule would require consumers to prove that the institution acted *"with knowledge of its false, misleading, or deceptive nature or with reckless disregard for the truth."* The ability for student loan borrowers to demonstrate that bad actors had such intent is extremely difficult without the benefit of legal counsel and the opportunity for discovery—both of which the Department discourages by permitting forced arbitration and bans on class action. If Corinthian borrowers applied for relief under the Department's proposed standard in 2015, few if any would have received relief despite clear federal and state findings that the college chain widely falsified its job placement rates and numerous *False Claims Act* lawsuits from whistleblowers alleging fraudulent activity.

Additionally, the proposal removes a path to group relief for similarly-situated borrowers. As has been the case with the vast majority of claims received by the Department, common facts regularly apply to groups of borrowers who have been harmed in the same ways. The Department repeatedly raises concerns about the potential burden of processing a mounting backlog of borrower defense claims, but reviewing all applications in a case-by-case manner will only add to the extreme delays for borrowers, greatly decreasing the efficiency of the Department's review and creating unacceptable barriers for borrowers.

Further, by requiring any misrepresentation be *"directly and clearly"* related to the making of a Direct Loan, the Department would further disadvantage borrowers with a high legal bar. Loan disbursement is an abbreviated moment in the student onboarding process. If the borrower is lied to or misled months after they enroll, or their federal loan has been disbursed, they may still experience substantial harm if provided misleading information about their future job prospects or coursework. It makes little sense to limit eligibility for relief to cover only misrepresentations that occur during a small fraction of the borrower's education.

3. The proposed rule restricts debt relief even for students whose colleges collapse in the middle of their program. Proposed changes to the process for borrowers to receive loan cancelation when their schools collapse ("closed school discharge") would sharply limit options for students and could push students toward lower-quality educational options whenever corporate owners decide to close a school. Specifically, the proposal would eliminate the opportunity for borrowers to receive closed school discharge if they were offered an opportunity to complete their education through a teach-out. The proposal eliminates the path to loan discharge in such cases regardless of whether the opportunity was accessible, in the same mode

of instruction originally chosen by the student, or of any comparable quality to the program in which the student was enrolled. Institutions are liable for the costs of closed school discharges and will take every available means to limit such liability; as a result, this provision would encourage predatory colleges to submit subpar teach-out plans that are not in students' best financial or educational interest. The Department asserts that accreditors would only approve quality teach-out plans, but provides no evidence to support this assertion. Recent campus closures have shown that some colleges' teach-out plans only offer options that require students to travel hundreds of miles away to a different campus or to transition from in-person, on-campus instruction to an entirely online program, neither of which may be realistic or beneficial arrangements for students.

In proposing to reverse provisions for automatic discharge offered under the previous rule, the Department argues it cannot discharge loans without an application because students must sign an attestation that they were not offered an opportunity for a teach-out—a requirement of the Department's own creation. Students should be able to receive a loan discharge if the teach-out was not in their interest and they choose not to take it, and they should receive a discharge automatically if their school closes and they do not re-enroll.

4. The proposed rule disregards the historical role for states in consumer protection. Under an exclusively federal standard for misrepresentation, the ability for states to protect their consumers from abusive practices in student aid would be sharply limited. The proposal would jettison a state law basis for claims that has been a bedrock of the borrower defense rule for decades. Few Corinthian borrowers could have ever received relief if this federal standard had been in effect. The Department even admits that the "*vast majority of the borrower defense claims filed since 2015 have alleged that the school at issue made statements to the borrower that amount to misrepresentations under State law.*" Yet, without any explanation, the Department proposes to remove the ability for future borrowers to present evidence that their right to be protected as consumers has been violated. Instead, the final rule should adhere to demands from states, attorneys general, legal experts, and Members of Congress that a federal standard should only serve as a "floor" for student relief. States are directed under Sec. 495 of the HEA to enforce consumer protection laws and to notify the Secretary of violations of federal law. The Department has no reasoned basis to override states' authority to protect their residents.

5. The proposed rule sharply limits students' basic legal rights and puts taxpayers at greater risk. The Department's proposal to allow forced arbitration and class action "waivers" will deny students the opportunity to hold companies and colleges that harm them accountable. It is well documented that these provisions are tucked into the fine print of enrollment agreements at predatory colleges.[4] Contrary to the Department's claims, forced arbitration is often stacked against students who face substantially better-resourced opponents in secret, non-appealable proceedings that use the same arbitrator to routinely decide cases in the college's favor. Additionally, class action restrictions prevent students from working together to assert their legal rights. Both of these provisions of the proposed rule will result in misconduct being hidden from

[4] Habash, T. & Shireman, B. "How College Enrollment Contracts Limit Students' Rights." *The Century Foundation.* April 28, 2016. https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/

the Department, accreditors, and states, and will undermine the intent of the HEA to protect students and taxpayers.

As the Department admits, under its proposed rule, *"students will have reduced access to a judicial forum, which would decrease the ability of a borrower to hold the institution publicly accountable."* The Department provides no evidence to support the assertion that arbitration is a net benefit to students or that their costs would be lower under the proposed rule or any reasonable alternatives. Furthermore, despite claims that it supports student choice, the Department does not explain why students should not have the option to pursue the dispute resolution of their choice rather than being forced into arbitration. Disclosures are not sufficient. The Department must act to prevent forced arbitration and class action waivers in college enrollment agreements.

Worse yet, while proposing to give institutions the legal upper hand as they contest claims against students, the Department also proposes to shield institutions from financial liability, thereby putting taxpayers at heightened risk if a school shuts down or has a large number of borrower defense claims. The previous rule identified a series of events that would act as early-warning indicators that a college may not be able to meet its financial obligations and required financially unstable colleges to set aside surety to reimburse federal taxpayers. These taxpayer protections were strongly supported by the Department's Inspector General.[5]

Now, the Department proposes to slash the number and effectiveness of these early warning indicators, thereby increasing the financial risk to taxpayers. The Department also seeks to weaken the definition of "current in debt payment," a key component of an institution's general standards of financial responsibility, and would instead enforce that requirement on a case-by-case basis despite the significant risk to taxpayers. The Department should not allow schools to escape their financial responsibilities. The Department should not proceed in redefining a core tenet of financial responsibility and put taxpayers at risk.

6. The proposed rule harms students and their families with needlessly punitive provisions. A number of provisions demonstrate an antipathy toward borrowers that suggests students are to blame for the harm they were subjected to by predatory colleges. In applying for borrower defense discharge, borrowers would be required to attest that their financial harm is not the result of their workplace performance, decision to work less than full-time, or disqualification for a job, including from failing a drug test, criminal history or driving record requirements, or health qualifications. Borrowers who have been cheated or defrauded have suffered in countless ways, financially, emotionally, and otherwise—and should not be asked such intrusive and irrelevant questions. It also makes little sense to penalize borrowers who were able to get jobs through their own hard work despite their fraudulent or misrepresented educational institutions.

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[5] U.S. Department of Education, Office of Inspector General. "Federal Student Aid's Processes for Identifying At-Risk Title IV Schools and Mitigating Potential Harm to Students and Taxpayers." February 24, 2017. https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a09q0001.pdf

questions. It also makes little sense to penalize borrowers who were able to get jobs through their own hard work despite their fraudulent or misrepresented educational institutions.

The proposed rule also allows colleges to deny access to, or refuse to verify, transcripts for those former students who receive a full loan discharge. The Department asserts it has "always been the case" that colleges can do this, but provides no evidence this is true. Such an interpretation is not mentioned in any Department guidance or regulation, and in fact, the proposal adds language in § 685.206 to implement this harmful authority, suggesting it is new policy. Students have already spent time and money in pursuit of an education, and it should be irrelevant to the institution whether a federal loan obligation is relieved. Indeed, this provision could encourage further abuse of students by allowing predatory colleges to withhold transcripts as a means to discourage students from seeking relief. Furthermore, under the *Family Educational Rights and Privacy Act*, a student has the right to inspect or review his or her education records.
In summary, the proposed rule puts the interests of predatory colleges over the interests of students and their families. The federal government can never restore to students the time that was lost or the dreams of educational opportunity that were shattered by predatory colleges. Far from remedying any harm to students, this proposed rule would unjustly punish cheated and defrauded borrowers in countless ways. If implemented, the proposed rule will increase defaults, reduce educational quality, create inequities for borrowers, limit institutional accountability, exacerbate predatory behavior, and undermine student and taxpayer protections.

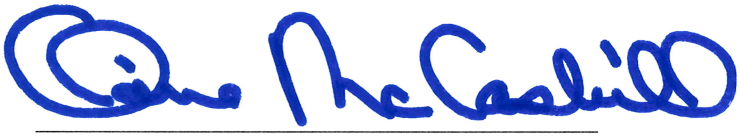
Our nation's students should never have to worry about being preyed upon while they work hard and invest their time, energy, and money in postsecondary education. The Department has a clear responsibility to protect students, but this proposal will only increase the risk of repeating recent history when students and taxpayers were left holding the bag while executives at collapsing institutions walked away with millions of dollars in profits. The Department should reverse course and withdraw this highly misguided proposal, and begin to process the extreme backlog of claims it has already received. Thank you for your consideration of our comments.

Sincerely,

PATTY MURRAY
United States Senator

RICHARD J. DURBIN
United States Senator

BILL NELSON
United States Senator



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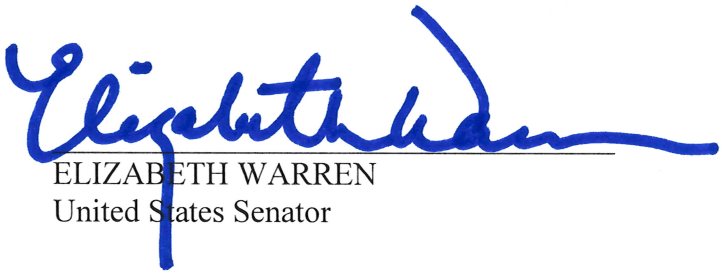

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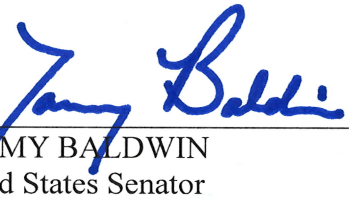

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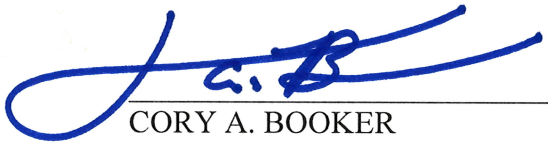

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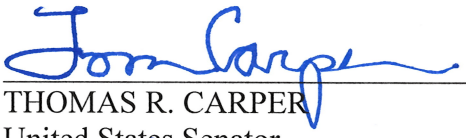

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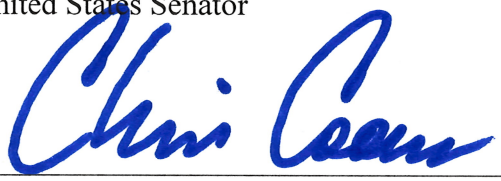

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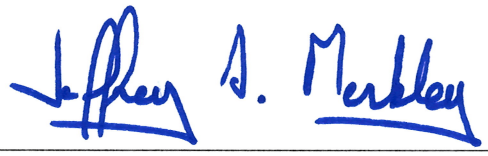

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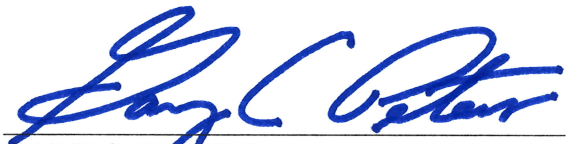

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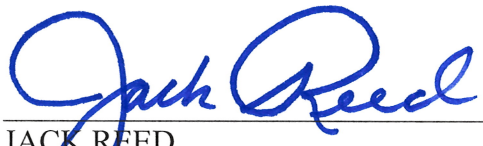

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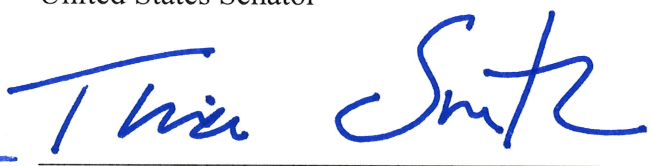

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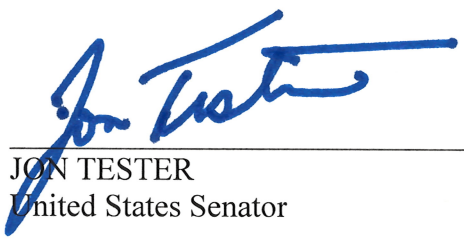

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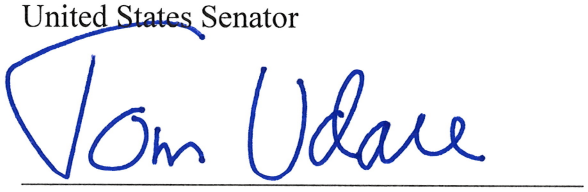

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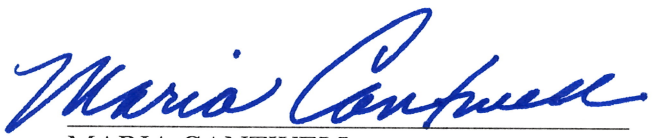

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