August 11, 2022

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202  
ATTN: Jean-Didier Gaina

RE: Docket ID: ED-2021-OPE-0077

Dear Secretary Cardona:

I’m writing on behalf of the Hispanic Leadership Fund (“HLF”), a non-partisan advocacy organization dedicated to strengthening working families by advancing common-sense public policy, where I serve as President. The Hispanic Leadership Fund has consistently supported non-traditional approaches to education, including career-oriented colleges that provide enhanced, more flexible career options and economic empowerment to non-traditional students.

We support the Department’s stated goal of protecting student borrowers by providing relief to those who have been defrauded by their institutions but are concerned that the proposed regulations go far beyond this goal. As such, I write to raise concerns about the impact of the proposed changes to the Borrower Defense to Repayment (“BDR”) Rule.

First, we are compelled to note that the 30-day comment period is insufficient and inconsistent with the Department’s own references to Executive Orders 12866 and 13563. USDE invited the public to assist the Department “in complying with the specific requirements” associated with those two EOs. Specifically, Executive Order 13563, “Improving Regulation and Regulatory Review,” states that “each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.” (Sec. 2(b)) [emphasis added]. Accordingly, we ask the Department to consider extending the comment period.

As another threshold matter, we question the Department’s authority to promulgate certain aspects of the rule. The Department’s proposed regulations would provide for loan forgiveness based upon borrower defense claims on a mass scale in such manner as would threaten the fiscal integrity of the student aid program and violate the Department’s statutory duty to oversee and manage the program. The Department has a fiduciary duty to operate within the confines of the regulatory and statutory framework.

The Federal Claims Collection Act (“FCCA”) obligates the Department to “try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency[,]” 31 U.S.C. § 3711(a)(1); see also 34 C.F.R. § 901.1(a) (“Federal agencies shall aggressively collect all debts arising out of activities of, or referred or transferred for collection
services to, that agency.”). Federal student loans constitute “claims” of the U.S. government. 31 U.S.C. § 3701(b)(1)(A). Section 3711(a)(2) authorizes the Department to “compromise a claim of the Government of not more than $100,000 (excluding interest)” without Attorney General approval, but this limited authority only applies to a single claim and does not extend to the group borrower defense discharges totaling millions of dollars. 31 U.S.C. § 3711(a)(2).

Further, the Department’s proposed regulations expanding the grounds and processes for discharging loans beyond the limited scope of statutory authority for borrower defense claims (e.g., by permitting automatic forgiveness under section 685.406(f)(7) and group discharges under section 685.402) implicates appropriations issues and the Antideficiency Act. See U.S. Const., art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); 31 U.S.C. § 1341, et seq. Group student loan discharges, as the NPRM proposes, are contrary to Congress’s explicit requirements and of the constitutional requirement that taxpayer funds shall not be drawn and expended absent lawful appropriations. We also question whether the Department has adequately described the reasons and justifications for the rule. In particular, the Department, in the NPRM, cites to its “experience” handling BDR claims, but similarly admits that it has not yet adjudicated a single claim under the 2019 standard. As such, the Department’s analysis in the NPRM does not satisfy the minimum statutory requirements set forth under the Administrative Procedure Act (“APA”).

I. The Proposed Rule Changes Transform BDR into a Blanket Loan Forgiveness Vehicle

A recent Government Accountability Office (“GAO”) report found that the Department underestimated the cost of the federal Direct Loan program by $311 billion. Given the history of the regulatory efforts related to borrower defense to repayment and the significant economic impact, we are concerned that the proposed BDR rule would further exacerbate the cost of the cost of the federal Direct Loan program. Accordingly, we would ask that the Department delay finalizing proposed rule until additional time has been provided to fully review the costs and benefits associated with these proposals.

The BDR Rule as currently proposed provides an avenue for borrowers of federal student loans to be discharged or have the remaining balance of their student loan debt eliminated. Traditionally, the onus was on the student to prove a successful BDR claim. Students would have to prove to the federal government that they “were misled or defrauded” by their school. BDR may also be granted if the borrower’s institution of higher education is found to have engaged in alleged misconduct in violation of state law. The proposed rule appears to jettison these basic requirements in favor of a permissive rule that provides many avenues for discharge. We have serious concerns about the expansion of the BDR rule.

The Biden Administration’s U.S. Department of Education has shown an appetite to expand the scope of this program far beyond its original intent. To date, 800,000 people have had their loans forgiven. A majority of the beneficiaries didn’t even apply for the loan forgiveness. There are 45 million student loan borrowers who owe approximately $1.7 trillion in student loan debt.1

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The proposed changes to the BDR rules would turbocharge this type of loan forgiveness on the narrowest of grounds. The Department would lower the burden of proof on the student borrower so far that it essentially guarantees a blank check for forgiveness of their student loans, under almost any circumstances. The Department also proposes to renew stale claims and apply new standards to these old claims. The Department has removed any requirement that students provide evidence of harm or detrimental reliance. Essentially, these changes would guarantee student success in the discharge process.

In addition, the Department has proposed a group claims process that essentially offers the Department a path forward to forgive thousands of loans en masse. This change creates a host of concerns, but most importantly, the proposed changes would place an undue tax burden on the millions of Americans who chose not to get a post-secondary education. In addition, we have grave concerns that the billions needed to offset these losses will increase inflationary pressures on our economy, and unduly burdening consumers and small businesses who are struggling to recover from the COVID-19 pandemic, rising inflation, and a global recession.

In response to the Department’s proposed rule, we ask the Department to provide justification for the expansion of the current rule as it applies to individuals and also the expansive group process. We believe that students harmed by their schools should be eligible for relief, but this rule fails to include provisions sufficient to ascertain whether an individual, or an individual as part of a group, actually sustained harm. This is a fundamental flaw in the proposed rule.

II. The Proposed Rule Changes Unduly Burdens Students at Nontraditional Institutions

After a thorough review of the NPRM, we have concluded that the proposed rule burdens non-traditional institutions in an unacceptable and unsustainable way. Many of the career oriented institutions that students from underserved communities prefer for their flexible scheduling and approachable online curriculum will likely be economically harmed by these new rules. In fact, the Department specifically mentions the focus on for-profit institutions in the Preamble.

Data has shown that at the most selective private schools and universities enrollee’s rates are not keeping up with the growth of Hispanic communities. Non-traditional schools are particularly important for Hispanic students who stand to benefit from additional educational options. The drop in the number of Hispanic Serving Institutions (HSIs) underscores the importance of non-traditional schools. Many career-oriented and proprietary institutions are a vital means of economic and academic empowerment for people who might otherwise be left behind. More than 22 percent of Latino adults have earned some form of postsecondary credential or degree.

Furthermore, after two years into the COVID-19 pandemic, supporting these non-traditional schools is now more important than ever. Through the pandemic, and the recognized shift to online learning modules, it has become apparent, that many career-oriented and proprietary institutions are in fact pioneers in this modality. Another fact that came to light, is the importance of career-
oriented and proprietary to certain occupations. For example, over half of all respiratory therapists are educated at proprietary institutions. The importance of these schools cannot be understated.

The Biden Administration’s Department of Education continues to focus solely on what they call “high volume” schools, which appears to be point to career oriented institutions that provide the services that many students want. HLF believes education policy “should facilitate increased opportunities in modern vocational and skills training for adults.” We support career and technical training that gives students access to jobs that are critical to the function of our economy—healthcare workers, truck drivers, and many other vocations.

To conclude, we thank you for the opportunity to provide HLFs comments on this important issue. We hope you will reconsider the proposed changes to the Borrower Defense to Repayment Rules. Our nation’s working families need more options, not less.

Sincerely,

Mario H. Lopez
President
Hispanic Leadership Fund

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