

STATEMENT OF THE NATIONAL STUDENT LEGAL DEFENSE NETWORK ON THE RELEASE OF THE DEPARTMENT OF EDUCATION'S PROPOSED BORROWER DEFENSE RULE

July 25, 2018

“Today’s proposal is a giveaway to predatory for-profit colleges and a stunning show of indifference toward students working to better their lives. Make no mistake, the proposal destroys the rights of student loan borrowers—especially low-income students and students of color. With the stroke of a pen, Secretary DeVos and her team of former for-profit college executives have proposed giving fraudulent institutions *de facto* immunity while effectively stripping their victims of a realistic path to debt relief. If any version of this proposed rule were to go into effect, predatory companies will make out like bandits. Meanwhile, students, taxpayers, and institutions that try to play by the rules will be left holding the bag.”

- Aaron Ament
President, NSLDN

An early summary of NSLDN’s major takeaways:

1. DeVos Appears Poised to Strip Defrauded Students of the Ability to Affirmatively Seek Borrower Defense Relief, Even if Students Have Mountains of Evidence to Support Their Claim

Today’s announcement by the U.S. Department of Education confirms that, if a student has evidence that his or her school committed fraud or other misconduct, the Education Department no longer wants to hear about it. Indeed, rather than trying to help devastated students, the Department is looking to make the borrower defense process the “last resort” for students.

Secretary DeVos has had more than eighteen months to analyze the important subject of this rulemaking. Nevertheless, in today’s announcement, she remains unable to detail her preferred approach – instead offering two possible ways to revise the regulations. But make no mistake: regardless of which of the two alternatives she chooses, Secretary DeVos has confirmed that she cares more about protecting predatory institutions than she does about protecting students. Under both of the alternative approaches, Secretary DeVos is setting the standard so high as to effectively destroy loan relief for aggrieved student borrowers.

The Department’s first approach eviscerates the borrower defense process by barring students from filing affirmative claims for debt relief. Instead, students will be able to make their case if—and only if—they first default on their federal student loans. This means that students who were victims of fraud and other misconduct, but who are also diligently making their loan payments, will be shut out of the process entirely.

Being forced to enter default in order to even make a claim puts students in an impossible position: either ignore the harms committed against you or expose yourself to the “severe” consequences of default, including wage garnishment, tax refund offsets, and adverse credit reporting. As the Department describes it, when you default:

- The entire unpaid balance of your loan and any interest you owe becomes immediately due (this is called “acceleration”).
- You can no longer receive deferment or forbearance, and you lose eligibility for other benefits, such as the ability to choose a repayment plan.
- You will lose eligibility for additional federal student aid.
- The default will be reported to credit bureaus, damaging your credit rating and affecting your ability to buy a car or house or to get a credit card.
- Your tax refunds and federal benefit payments may be withheld and applied toward repayment of your defaulted loan (this is called “Treasury offset”).
- Your wages will be garnished. This means your employer may be required to withhold a portion of your pay and send it to your loan holder to repay your defaulted loan.
- Your loan holder can take you to court.
- You may not be able to purchase or sell assets such as real estate.
- You may be charged court costs, collection fees, attorney’s fees, and other costs associated with the collection process.
- It may take years to reestablish a good credit record.
- Your school may withhold your academic transcript until your defaulted student loan is satisfied. The academic transcript is the property of the school, and it is the school’s decision—not the U.S. Department of Education’s or your loan holder’s—whether to release the transcript to you.

See <https://studentaid.ed.gov/sa/repay-loans/default#default>.

Borrowers should not have to expose themselves to this list of harms in order to challenge misconduct by schools.

There is simply no connection between a borrower’s repayment status and a school’s predatory practices. Indeed, today’s proposal is an extreme reversal from the Department’s previous practice, which allowed borrowers to apply for relief regardless of their loan repayment status. Under this radical new approach, not a single one of the 165,000+ borrower defense claims received over the past three years would be accepted. Even if students have mountains of evidence to show how their school misled them, the Department declares today that it simply does not want to hear about it.

2. Secretary DeVos’ So-Called “Alternative” Approach – Which Permits Students to Affirmatively File Borrower Defense Claims – Is No Alternative At All and Forces an Unprecedented Invasion of Individual Privacy By the Department of Education

Perhaps recognizing the absurdity of the above approach, the Department is considering an “alternative” that would allow aggrieved students to affirmatively submit claims for debt relief to the Department. But make no mistake: this so-called “alternative” is, at best, disingenuous

because it will create an impossibly high hurdle for student loan borrowers and will require those borrowers to disclose personal facts that are completely unrelated to the merits of their claim. First, the Department readily admits that it may require borrowers bringing affirmative claims to meet a higher burden of proof than is required of private litigants, *i.e.* a “clear and convincing evidence” instead of the “preponderance of the evidence” standard that is used in most civil litigation. The Department’s sole justification for suggesting a higher burden is to prevent borrowers from asserting “frivolous claims” for debt relief. Yet the Department concedes that it “does not have sufficient information” to know whether this concern is legitimate and bases its beliefs on a “random sample” that is “insufficiently representative to support conclusions.”

Second, the Department will force students making affirmative claims (and defensive claims under the other alternative) to release to the Department an unprecedented amount of personal information, unrelated to the claims brought by the student, and designed only to shame, embarrass and dissuade students from bringing the affirmative claim. Students will be forced to “sign a waiver allowing the institution to share relevant portions” of the student’s “education record” with the Department. Students may then be required to submit information about performance-related employment actions, whether the student was disqualified from working in the field, or whether the student chose to work less than full-time in the chosen field. Students will also be forced to disclose whether they have lost a job due to the “ability to pass a drug test, satisfy criminal history or driving record requirements, and meet any health qualifications.” Secretary DeVos does not – and indeed cannot – establish how such *post-graduation* factors are even remotely tied to misconduct *by an institution*.

3. Regardless of the Means or Timing of Asserting the Claim, Secretary DeVos Wants to Impose a Standard That She Knows Borrowers Can Never Satisfy

Even under the “preponderance of the evidence” standard, Secretary DeVos’s proposed rule creates another hurdle by requiring borrowers to establish not merely that an institution made false, misleading, or deceptive statements to induce enrollment or re-enrollment, but also that the company or school made such statements with the knowledge that the statements were false, misleading, or deceptive, or that the company acted with a reckless disregard for the truth. But injured students will have no access to internal documents or emails of college executives or recruiters, and thus it will be virtually impossible to state a claim against a school.

There is simply no legal or policy justification for imposing a standard the Department knows full-well borrowers will be unable to satisfy and is above what is required by state and federal consumer protection laws.

Today’s rule therefore lays a deadly financial trap for borrowers, many of whom are already in financial distress. If borrowers want to challenge their school’s conduct, they first need to expose themselves to massive risk by defaulting on their student loans (or under the “alternative” approach, open themselves up to massive invasions of privacy). When they do, the standard they will have to meet will be so high that they are almost certain to lose. This is not how a government should treat its most vulnerable citizens.

4. DeVos Intends to Effectively Eliminate the Longstanding Availability of Loan Discharges Available for Students Attending an Institution that Closes

The Department has long applied a rule that students who attend a school when the school closes, or students who attended shortly before such a closure, could *choose* to transfer their credits, seek a discharge of federal student loans, or participate in a teach out plan offered or facilitated by the closing institution. Through the proposal announced today, Secretary DeVos has announced her intent to strip students of that choice. Instead of allowing the individual to decide what is best for his or her education, in light of the circumstances, the Department will permit *the closing institution* to make that choice for its students.

Under the Department's radical new proposal, if a school simply offers a teach-out plan, student borrowers will be de facto ineligible to receive discharges of federal student loans due to the closure of the school. This is a huge detriment to students who are already upended due to the closure of the school. Moreover, it represents an enormous giveaway to failing schools and their owners, who will continue to receive federal funds and immunize themselves from losses, even when the causes for the closure are of the institution's own making. Instead of having the option for a loan discharge, students at closing schools will now be financially forced into teach-out programs that have little to no quality oversight and may be of reduced value, in light of the closure.

For a Secretary who has prided herself on individual choices in education, this is particularly striking.

In addition, under the 2016 borrower defense rule, eligible borrowers who were enrolled at a school that closed on or after November 1, 2013 and who had not re-enrolled at another school within three years of that closure were eligible to have their loans automatically discharged. This rule had the potential to provide critical relief to thousands of borrowers who were not aware of their rights. Today, DeVos says no to all of these students, who will now be left with crippling debt from schools that closed on them before they were able to graduate.

5. DeVos to Allow Schools to Impose Mandatory Arbitration and Require the Waiver of Class Action Lawsuits

In yet another giveaway to corporate interests, Secretary DeVos is proposing to reverse the Department's 2016 rule and allow schools to forcibly shut students out of the courts altogether through so-called pre-dispute mandatory arbitration clauses and class action bans. If this rule goes into effect, schools will have free reign to bar student access to the courthouse doors.

The 2016 ban on mandatory arbitration and class action waiver provisions was rooted in not only the unfairness of the provisions to students – but also on the need to make sure that information that was used against institutions was raised in proceedings that are open to the public. By permitting schools to force students into secret, non-public arbitration proceedings, Secretary DeVos is allowing schools to hide the allegations made against them and suppress evidence of

fraud and other misconduct. Her views are extreme – and the proposal will allow corporate institutions to *force* students to waive their constitutional right to access the courts.

6. DeVos to Expose U.S. Taxpayers to Massive, Unnecessary Risk

Because federal student loans, not to mention Pell Grants, are funded by U.S. taxpayers, a school at risk of closure or high numbers of borrower defense claims presents a serious risk to U.S. taxpayers. For example, within six months of the collapse of ITT Technical Institutes, the Department of Education provided over \$150 million in closed school discharges to students impacted by the closure.

Recognizing the potential risk to the U.S. taxpayer, the 2016 borrower defense rule established a number of early-warning triggers that would have required institutions to provide financial protections (in the form of a letter of credit) to the Department that could be used, if and only if, student loan discharges were later granted against the schools.

Today, the Department decided to protect the financial interests of institutions, including for-profit companies, rather than act as stewards of taxpayer dollars. For example, the 2016 rule *required* institutions to take steps to make sure that U.S. fiscal interests were sufficiently protected if a federal agency or state filed a lawsuit against the institution. Secretary DeVos has proposed to remove that requirement. Similarly, the 2016 rule required financial protection for U.S. taxpayers if an institution’s accreditor required the school to devise and submit a plan for teach-out in the event of closure (which can happen when the accreditor believes there is a risk of closure). Secretary DeVos apparently discounts the views of the accreditors in this regard and has removed this requirement – at the expense of taxpayers. Baked into Secretary DeVos’s proposal, there are plenty of other examples of giveaways to benefit corporate interests, all of which will be funded by American taxpayers.

7. Once Again, Secretary DeVos Refuses to Put Faith in State Law Enforcement Agencies

Under the 2016 borrower defense rule, the Department gave particular credence to *successful* state law enforcement agency actions – finding that borrowers were eligible for loan relief if they, or a state Attorney General, obtained a favorable contested judgment based on state or federal law. In the proposed rule announced today, the Department seeks to eliminate that process – asserting that such a state court judgment can be considered only as “evidence” to support a borrower defense claim. Even if a state Attorney General can bring a case to trial and convince a jury that a school has intentionally defrauded its students – that is simply not enough for Secretary DeVos. She wants students to show more.

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