



Docket ID ED–2018–OPE–0027

Comments on Proposed Rules on Borrower Defenses and Financial Responsibility

August 30, 2018

The National Association of Student Financial Aid Administrators (NASFAA) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) published July 31, 2018, concerning borrower defenses to loan repayment and financial responsibility standards for institutions. NASFAA represents nearly 20,000 financial aid professionals who serve 16 million students each year at approximately 3,000 colleges and universities of all sectors throughout the country. NASFAA member institutions serve nine out of every ten undergraduates in the U.S.

We appreciate that the Department opened negotiation on financial responsibility with appropriate experts taking part to replace those provisions in the 2016 final rule that had not properly been subject to that process. We will defer comment on that aspect of the current NPRM to experts in that field. We limit our comments to the borrower defenses and discharge provisions.

We agree that the 2016 borrower defenses final rule needed improvement, including a better balance between relief for borrowers and due process for schools. This balance is not easy to achieve. The Department’s intention to provide borrowers and schools with equal opportunity to provide evidence and arguments, and to review and respond to evidence, is essential to a fair process. However, we are concerned that the pendulum has shifted too far once again, now making it too difficult for borrowers to obtain relief. While students do have responsibility for making informed choices, they do not become sophisticated consumers or financial experts upon turning 18 or graduating high school; the least experienced and least sophisticated students are those most likely to be preyed upon by bad actors, and reliance on disclosures is impractical and insufficient to protect students adequately.

In general, with regard to this NPRM, we believe that:

- Affirmative as well as defensive claims should be allowed. The same processes and standards of preponderance of evidence should apply to affirmative and defensive claims.
- Establishing a federal standard for a federal program is reasonable and should promote more equitable treatment, provided that (1) access to state processes or other means of legal action are not precluded or impeded, and (2) results of those processes will be used to help support claims of misrepresentation.

- Misrepresentation is a serious violation that should carry significant consequences; the institution's intent should be taken into account for purposes of penalties and LS&T determinations, but not for borrower defenses where misrepresentation has caused harm to the borrower.
- Reckless disregard for the truth is a reasonable component of the definition of misrepresentation if it is viewed as a weighing of facts and demonstrated by a preponderance of the evidence.
- If a borrower has been harmed, or clearly will suffer harm, as a result of the institution's misrepresentation, full relief should be granted, other than very limited cases where the value of harm done is directly related to the misrepresentation itself, and is clear and straightforward.

Federal Standard: Misrepresentation

In general, we support the concept of a federal standard and limiting borrower defenses to cases of misrepresentation relating to educational services. However, asking a borrower to prove an institution's intent to mislead or deceive is an impossibly high expectation. The responsibility to do so should be the Department's, under the existing misrepresentation rules of subpart F that relate to institutional eligibility and LS&T. We do agree that the definition of misrepresentation for borrower defense purposes can differ, but not to a higher bar. We reiterate our position made in response to the NPRM that led to the 2016 rules:

"We believe a distinction can be made between requiring responsibility for error by making a harmed consumer whole -- even if a false or misleading statement was unintentional or not made with the school's prior knowledge -- and imposing additional penalties on a school that shows a pattern or intent to deceive or defraud. The misrepresentation regulations would be used for multiple purposes, one that would subject the school to substantial penalties including loss of eligibility, and one that would support borrower defenses against repayment. For purposes of institutional eligibility and other substantial penalties, intent or knowledge on the part of the school should be a factor. Lack of intent to misrepresent or mislead should not, however, affect a legitimate borrower defense."

The current NPRM incorporates a preponderance of evidence test that the borrower reasonably relied upon the misrepresentation under the circumstances in deciding to obtain a Direct Loan to attend the school, and suffered harm as a result. We believe that is a sufficient standard for the purpose of a borrower defense. With the complexity of federal requirements, the intensity of modern communications, and the drive towards maximum transparency, it is

not difficult to overlook or unintentionally disseminate erroneous information. However, if the school's failure to prevent misrepresentation harms a borrower who relied on incorrect information that amounts to a misrepresentation, the borrower should have recourse regardless of the school's intent to deceive or mislead. A parallel exists in the making of student loans: if a school errs in certifying a student's eligibility, the school is held liable even if it did not intend the error.

We agree that reckless disregard for the truth should be part of the definition of misrepresentation. We would like to see some discussion by the Department on the meaning of "reckless" in relation to disregarding the truth. We believe that it should be viewed as a demonstrable weighing of facts supported by a preponderance of the evidence. If the Department does not remove intent from the definition, reckless disregard for the truth should clearly provide an alternative to demonstrating intent.

We are concerned that the list identifying evidence of misrepresentation in 685.206(d)(5)(iv) does not seem to allow for other circumstances. The introductory text to the list reads "Evidence that a misrepresentation described in paragraph (d)(5) of this section may have occurred includes:". This wording implies the list is exhaustive. We recommend, "Evidence that a misrepresentation described in paragraph (d)(5) of this section may have occurred includes **but is not limited to:**".

In the list itself, subclause (G) refers to "A representation regarding the availability, amount, or nature of any financial assistance available to students from the institution or any other entity to pay the costs of attendance at the institution that the school does not fulfill following the enrollment of the borrower." The school can be directly responsible only for aid under its own control. While the school should be held accountable for unfounded misrepresentation of aid from other entities, it cannot be held accountable if the other entity does not fulfill its promise to provide funds that the institution reasonably anticipated. Further, changes in a student's circumstances or eligibility may legitimately preclude a school from fulfilling pre-enrollment projections of aid.

The NPRM removes judgments and breaches of contract from standards under which defense to repayment claims may be made, while preserving the borrower's right to seek redress separately from state or other processes. We understand why state-based legal actions may not automatically prove the new federal standard and should not necessarily be an automatic basis for federal liabilities imposed on schools. This exclusion is somewhat mitigated by the Department's clarification in the preamble that "breaches or judgments may be considered as evidence of a misrepresentation, to the extent they bear on an act or omission related to the educational services provided." We would be more reassured, however, if this view were also reflected in the actual regulatory language.

We suggest that the Department modify the proposed rule to ensure that it reviews any state judgments for relevance to the federal standard before requiring additional documentation from the borrower. If the basis for the state judgment would also satisfy the federal standard, and there is no substantiated assertion that the state process did not afford the school the chance to present its own evidence, the borrower's claim of misrepresentation should be accepted and the process should proceed to the harm stage. If the state judgment does not satisfy the federal standard, any clock on time limitations on the borrower should start from the Department's notification to the borrower of the results of this review.

We note that the list of excluded bases for claims at 685.206(d)(6) does leave the door open for breach of contract as a basis for a borrower defense claim "if the school's act or omission would otherwise constitute the basis for a successful defense to repayment." Are we correct to assume this means that breach of contract can serve as a basis for a defense to repayment if it relates directly to the educational services provided by the institution?

We suggest that findings of fraud or misrepresentation regarding educational services by *federal* processes such as audits, program reviews, and Inspector General investigations, should be considered an automatic finding for borrower relief, so that the borrower only need demonstrate harm to qualify for discharge. The proposed rule language in 685.206(d)(5)(iii) states that "The Secretary may also consider evidence otherwise in the possession of the Secretary, including from the Department's internal records or other relevant evidence obtained by the Secretary, provided that the Secretary permits the institution to review and respond to this evidence and to submit additional evidence." This provision should be used to maximum effect to aid borrowers with legitimate complaints. The paragraph should be clarified and strengthened by stating outright that findings of substantial misrepresentation under 668.71 during the time period a borrower enrolled is sufficient evidence for the borrower's claim, absent a successful appeal from the institution.

In fact, the Department should include in the regulation that it will treat any relevant and substantiated information in its possession as it would a FOIA request, and make that information, so far as is legally allowed, available to both the borrower and the school.

Internally, the Department should consider significant and plausible allegations of misrepresentation by multiple borrowers as reason to launch its own investigation of a school, the outcome of which can substantiate any borrower claims and enable those claims to move on to the harm phase.

Essentially, use of determinations already made or made as a result of multiple allegations of misrepresentation would be an alternative to a group process and would ultimately reduce the Department's burden in reviewing individual claims of misrepresentation, other than establishing harm. It would more proactively assist borrowers for whom proof of institutional

intent in making misrepresentations could be a barrier to justice, should the Department not remove intent in the final rule.

We encourage the Department to ensure the final rule language does not preclude the Department from establishing group processes if it finds a reasonable basis for reducing burden to the borrower or expediting claims, without curtailing due process for schools.

Definition of “Borrower”

Under proposed 685.206(d)(1)(i), “borrower” includes the student on whose behalf a parent borrowed. Please explain this provision further. Can the parent him or herself raise a defense to repayment? For a parent loan, must the student raise the defense?

Financial Harm to the Borrower

The requirement that the borrower be harmed in order to qualify for relief should be sufficient to prevent frivolous claims and abuse even if the Department has to adjudicate some claims that are questionable. An efficient process should be able to reject early on most claims based on unacceptable reasons, especially those enumerated in the proposed regulatory language under 685.206(d)(6).

Language explaining what may not be considered causes or indications of harm under 685.206(d)(5)(v) is helpful to understanding the requirement.

Harm is not entirely quantifiable in most cases, other than for significant differences between advertised and actual institutional charges. Trying to grade or quantify degrees of harm present too many pitfalls and cannot assure accurate accounting for a borrower’s loss of time and opportunity. Further, harm resulting from misrepresentation is likely to accumulate over time: harm does not cease to accrue to a borrower upon filing a claim. Thus, the borrower should not have to demonstrate a certain amount of harm; if a borrower’s claim of misrepresentation is substantiated and there is resultant harm, full relief should be granted unless the harm can be shown to be of a limited and obviously quantifiable nature (such as significant differences in institutional charges, as noted above). The proposed rule at 685.206(d)(3)(v) should be changed to reflect that approach.

We also wonder why, in 685.206(d)(5)(v), the last sentence of the introductory text states “Evidence of financial harm includes the following circumstances:” rather than “Evidence of financial harm includes, **but is not limited to**, the following circumstances:”? The list that follows in subclauses (A) through (D) may not be the only circumstances that demonstrate harm. We believe the list should not be restrictive.

Also, subclause (C) in that list is “the borrower’s inability to secure employment in the field of study for which the institution expressly guaranteed employment.” We believe the borrower

should be able to expect an ability to secure *full-time* employment in the field of study.

We agree with the statement in 685.206(d)(v) that “Financial harm is such monetary loss that is not predominantly due to intervening local, regional, or national economic or labor market conditions as demonstrated by evidence before the Secretary or provided to the Secretary by the borrower or the school. Financial harm cannot arise from the borrower’s voluntary decision to pursue less than full-time work or not to work, or result from a voluntary change in occupation.” While the borrower might have to certify that he or she is not unemployed or employed only part-time as a result of a personal decision, the borrower should not have to disprove that the other factors are not the cause of harm; that should be up to the school or Department to prove. Also, whether the economic conditions that disallow a finding of harm are local, regional, or national should in some way relate to the institution’s claims, if it made any. For example, if the school claimed that its program of study was developed to address the needs or requirements of local industry, only the economic conditions of the local economy should affect determination of harm. If the local economy is unaffected, then any downturns in national conditions should not preclude a finding of harm.

Defensive Vs. Affirmative Claims

NASFAA supports allowing both defensive and affirmative claims, and requiring the same standard of preponderance of evidence for either. It is flatly immoral to impose conditions that require a borrower to default before he or she can assert a borrower defense. After decades of counseling students to avoid default, telling them now to default in order to comply with a bureaucratic process is unworkable.

It is equally unjustifiable to expect a higher standard of proof for affirmative claims. If a borrower fails to meet a higher standard for an affirmative claim, and is then unable to repay, would he still have a right to make a defensive claim under a lower bar of proof? That seems counterproductive and unnecessarily burdensome.

It is, in our view, appropriate to require affirmative claims to be filed within three years of leaving the institution. We would also point out that if, as the Department implies, evidence of misrepresentation is more likely to be available within the first three years after the student leaves school, it makes far more sense to allow affirmative claims; revealing fraud or misrepresentation earlier rather than later helps prevent more students from suffering the same harm if those misrepresentations continue.

We do not agree with the Department’s interpretation that the statutory language at 20 USC 1087e(h) does not encompass affirmative claims:

(h) Borrower defenses

Notwithstanding any other provision of State or Federal law, the Secretary

shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part, except that in no event may a borrower recover from the Secretary, in any action arising from or relating to a loan made under this part, an amount in excess of the amount such borrower has repaid on such loan.

There is no exclusionary language here referencing particular types of claims; the term “defense to repayment” does not imply to us that the borrower may only assert a reason for discharge during collection proceedings; and the prohibition against recovering more than the borrower has repaid argues for the interpretation that Congress anticipated a borrower could assert a claim even while in repayment.

We also believe that as a matter of fairness and equity, borrowers of loans first disbursed prior to 7/1/19 should continue to have access to affirmative as well as defensive claims, which the proposed rule does not seem to encompass. This is especially true if a borrower’s defense to repayment claim has failed under the current state law standard. As a matter of equity, those borrowers should be permitted to file a claim under the federal standard.

Non-federal Relief

We appreciate the clear statement in 685.206(d)(12)(iii) of the borrower’s right to pursue relief under applicable law for recovery of any portion of a claim exceeding discharged amounts or any other claims arising from unrelated matters. However, (d)(12)(i) is less clear. We believe that, if only partial relief is granted, any amounts granted outside of the federal borrower defense process should first be credited towards loan amounts that are still the borrower’s responsibility under the federal process. In other words, a borrower’s obligation to repay discharged amounts should be reinstated as a result of non-federal relief only if full relief had been granted in the federal process, or the non-federal relief exceeds the portion of the borrower’s loan remaining due to partial federal relief.

Time Limitation [685.206(c)(3) and (d)(13)]

We agree that restraints on the time the Department has for initiating a liability proceeding against a school should run from the determination of discharge eligibility rather than from the student’s last year of attendance. We do not understand why the Department retains the current time limitation for loans made prior to 7/1/19, given that defensive claims can occur well past that time period.

Pre-Dispute Arbitration, Class Action Suits

The NPRM reverses the November 2016 rule’s ban on pre-dispute arbitration and class action waivers. The preamble discussion makes a case to allow *pre-dispute arbitration*, however we believe the Department should not use such arbitration as a substitute for a borrower’s right to a defense to repayment based on misrepresentation, nor should it allow arbitration to run out

the clock on a borrower's time period for filing a discharge claim. Further, if the Department does not ban arbitration agreements outright, it should at least definitively state that no arbitration agreement may abrogate a borrower's right to file a federal defense to repayment claim, and that the borrower may initiate such a claim at any time regardless of the arbitration process.

The preamble does not adequately explain why *class action waivers* should be allowed, and does not reassure us that such a waiver cannot affect a borrower's ability to file a borrower defense claim or to use a class action lawsuit to help support a claim of misrepresentation. For example, a borrower may claim that he was significantly misled by a recruiter's verbal information about job qualifications and placement. That could be a case of the borrower's word against the recruiter's. However, if many students claim to have had similar experiences, it may help to establish a pattern of misrepresentation that lends credence to the borrower's case.

In the preamble, the Department states that, "As part of its adjudication of a defense to repayment, and if the evidence is directly and clearly related to the loan or to the school's provision of education services for which the loan was provided, the Department may also consider as evidence findings of fact by a court of competent jurisdiction or arbitrator, admissions of fact by the school made in a court of competent jurisdiction or arbitration, and court orders." Such evidence may come from arbitration, but there is little chance of it coming as a result of a lawsuit if the Department supports a school's curtailment of legitimate class action. Would class action lawsuits not alert the Department that a pattern of misrepresentation may be present?

At a minimum, any disclosures required of a school regarding arbitration or class action waivers should specify that they do not preclude a student from seeking relief through the federal borrower defenses to repayment provisions. The Department should also consider barring class action waivers if the school has no independent pre-dispute arbitration process, if it declines to ban them outright.

Borrower Responsibility

The Department states that its "goal is to enable students to make informed decisions prior to college enrollment, rather than to rely on financial remedies after the fact when lost time cannot be recouped and new educational opportunities may be sparse. Postsecondary students are adults who can be reasonably expected to make informed decisions if they have access to relevant and reliable data about program outcomes."

Informed decisions are certainly an important goal, and we should work with students to avoid bad choices that result in lost time and opportunities. Realistically, however, disclosures have limited effectiveness, are already overwhelming in volume and are not well targeted in terms of

timing or importance. The worst victimization takes advantage of students who are not equipped with the experience and resources to fully understand the legal ramifications of these choices, particularly by predatory schools that may be attempting to mislead students. We should not abandon those students to the principle of *caveat emptor*.

The Department points out that “Institutions are prohibited from misleading students by providing false or incomplete information, and remedies should be provided to a student when misrepresentation on the part of an institution causes financial harm to that student. However, students also have a responsibility when enrolling at an institution or taking student loans to be sure they have explored their options carefully and weighed the available information to make an informed choice.”

Yes, students need to be responsible in their decisions, but that expectation must be predicated on accurate, accessible, understandable, digestible information provided at appropriate times. NASFAA has consistently supported strong misrepresentation rules. We need to balance real need for student protections with expectations of student responsibility.

The Department further notes that it “has an obligation to enforce the Master Promissory Note, which makes clear that the student is not relieved of his or her repayment obligation if later they regret the choices they made. And while the Department wishes to protect borrowers from misrepresentation and fraud, the Department also wishes to ensure that programs that have not engaged in misrepresentations are not forced to pay unsubstantiated claims that may result in diminished academic offerings or outright closure.”

That is a necessary balance. We would add that the Department also needs to examine the effectiveness of its gatekeeping obligations, as well as the nature of its partnership with accrediting agencies and states, to prevent participation in the Title IV programs by academic programs with little in the way of real merit to offer students. An initiative to work with experts in relevant fields to improve approval of career programs and to work with Congress for meaningful gatekeeping parameters for initial program eligibility determinations, would help students more than subsequently looking for ways to withdraw eligibility.

Penalty for 100% Discharge

Concerning 685.206(d)(3)(vi), we are at a loss to understand why a school that is subject to liability for fraud or misrepresentation should have any right to withhold a student’s transcript. Even if no credits are transferable, transcripts may help establish admissibility, need for remedial work, satisfaction of prerequisites, or placement at an appropriate level of coursework. A student who has been sufficiently harmed by misrepresentation to obtain 100% borrower relief should not be further harmed by withheld transcripts. Even more perplexing, why would a borrower who suffered 100% harm be penalized for receiving relief when a borrower who ostensibly suffered less harm is not?

Yet more inexplicable, why should a student who borrowed a small loan that covered only part of tuition but got 100% relief be penalized when a student who paid all tuition with a loan but got 75% relief – possibly more in dollars than the student with the small loan – is not penalized? This rule makes no sense at all. The institution lost money because of an action or omission for which it is responsible, but the student most harmed is penalized.

If a school's misrepresentation is demonstrable enough to pass the rigorous proposed federal standard and severe enough to result in a total discharge of the loan, the school should be prohibited from recouping from the borrower any penalty imposed by the Department. Thus, the school should not be able to claim an outstanding charges balance against a former student as a result of reimbursing the loan loss to the Department.

False Certification Discharge

The ability to rely on data and statements provided by a student on the FAFSA is one of the longest-standing principles underlying the financial aid process. However, it is always caveated by the institution's responsibility to resolve conflicting information or reasons to believe information may be wrong. Further, a school should not be absolved of liability if its representatives encourage students to answer FAFSA questions untruthfully in order to receive federal aid and thereby be able to enroll. Thus, while we agree that a student who submits a false statement on which a school relies should not qualify for a false certification discharge, we suggest including language that provides exceptions when the school had information to the contrary or good reason to believe the statement was incorrect.

Closed School Discharge

While the Department should take into consideration whether an accreditor-approved teach-out opportunity was provided, it should also provide an appeal process through which a borrower may demonstrate why he or she was unable to avail him or herself of that opportunity and therefore, should qualify for a closed school discharge. For example, the teach-out might involve travel or timing constraints that make the teach-out impractical or unreasonable. Students choose programs not just for their academic content, but for compatibility with job responsibilities, family commitments, personal limitations or disabilities, and other such considerations. When a school closes, the student's educational opportunities may become far more restricted regardless of whether a teach-out opportunity was available.

We also urge the Department to use group processes and automatic discharges in the absence of teach-outs. Closed schools must make arrangements for continued recordkeeping and should have no further right to withhold transcripts, regardless of loan discharges.

Effect of Discharge on Subsidized Usage Period

We strongly support recalculation of the subsidized usage period and restoration of subsidies

when any discharge occurs. This action makes the harmed borrower more completely whole.

Conclusion

Our comments are made with the goal of creating an appropriate balance between relief for borrowers, and due process and accountability for schools. To that end, we are concerned that the provisions of the proposed rule, in combination with each other, create an imbalance, with too many barriers for borrower relief.

Thank you for your consideration of our comments as you finalize the regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin Draeger". The signature is fluid and cursive, with a long horizontal stroke at the end.

Justin Draeger, President & CEO