



State of California
Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

March 5, 2018

The Honorable Elisabeth DeVos
United States Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Negotiated Rulemaking on Borrower Defense and Financial Responsibility

Dear Secretary DeVos:

We, the undersigned Attorneys General of California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, write to share our views on the U.S. Department of Education's ("Department") current rulemaking efforts on borrower defense and financial responsibility. We have followed closely the Department's recently concluded negotiated-rulemaking sessions on these issues and are dismayed by the Department's proposals. We have great concern that the Department will issue a proposed rulemaking reflecting these proposals and write to share our comments about those flawed proposals. From top to bottom, the Department has offered proposals that, if enacted, will be disastrous for students and taxpayers. These proposals provide no realistic prospect for borrowers to discharge their loans when they have been defrauded by their schools. Similarly, these proposals will not identify problematic schools and hold them accountable when they engage in misconduct. The only winners will be predatory schools. We urge the Department to consider and address the serious concerns outlined below before publishing rules for public comment.

State attorneys general serve an important role in the regulation of private, postsecondary institutions. Our investigations and enforcement actions have repeatedly revealed that numerous for-profit schools have deceived and defrauded students, and employed other unlawful tactics to line their coffers with federal student-loan funds. We have witnessed firsthand the heartbreaking devastation to borrowers and their families. Recently, for example, state attorneys general played a critical role in uncovering widespread misconduct at Corinthian Colleges and American Career Institute, and then working with the Department to secure borrower-defense relief for tens of thousands of defrauded students.



The Department now seeks to rescind and replace its regulations on borrower defense and financial responsibility. The Department does not address these issues with a clean slate. Rather, the Department benefits from the experience and judgment of a rulemaking committee that it convened just two years ago to address these very same issues. That committee's efforts resulted in the Department promulgating final regulations in November 2016 that went a tremendous distance to achieving the Department's then-stated goal of giving defrauded borrowers access to a consistent, clear, fair, and transparent process to seek debt relief. At the same time, the 2016 regulations protected taxpayers by holding accountable schools that engage in misconduct and ensuring that financially troubled schools provide the government with protection against the risks they create. With little explanation, however, the Department has discarded all the hard work and achievements of the 2016 rulemaking and repeatedly delayed the effective date of the Department's duly promulgated 2016 regulations, in favor of convening a new rulemaking committee to start from scratch.

The Department now appears poised to publish for public comment proposed rules on borrower defense and financial responsibility that completely miss the mark. If the proposals offered by the Department during the 2017-18 negotiated-rulemaking sessions are implemented, they will provide an unworkable process for defrauded students to obtain loan discharges, and will do nothing to deter and hold accountable those predatory schools that defraud their students. Although not an exhaustive list, below are some of the most glaring issues with the Department's proposals, which we urge the Department to consider before publishing proposed rules:

Applicable Standard. The Department proposes a "federal standard" applicable to borrower-defense claims that is wholly inadequate and would serve only to limit defrauded students' access to critical loan relief. This federal standard would saddle borrowers with an unreasonable and unfair evidentiary burden to demonstrate that they were defrauded by their schools. Rather than adopt the reasonable standard applicable in all relevant civil litigation, the Department appears poised to force students to meet the more onerous "substantial weight of the evidence" or "clear and convincing evidence" standards. There are no special rights or interests at stake in the borrower-defense context that justify imposing a heavier evidentiary burden on students. Indeed, given that many borrowers will seek relief without an attorney, the evidentiary burden should be as relaxed as possible. The Department's proposed standard further compounds the difficulty in asserting a borrower defense by defining actionable misrepresentations as only those that are intentional or made with a reckless disregard for the truth. This is completely out of step with well-established consumer-protection law, which imposes strict liability on bad actors for their deception. It is hard to imagine how a borrower could ever establish a school's intent without a lawyer and without access to discovery. As experience has shown us, far too many students who are eligible for relief never seek it. The Department should make it easier, not harder, for defrauded students to come forward and obtain relief.

The Department's proposed federal standard ignores decades of well-established consumer-protection law and the critical role that state law has played in defining and identifying predatory consumer conduct. Under the proposed federal standard, violations of state consumer-protection laws and judgments obtained against schools under these laws will no longer constitute a basis for a borrower-defense claim. Instead, the Department has enumerated a short list of misconduct that could establish a successful borrower-defense claim under a federal standard. This cursory list does not begin to capture the universe of predatory-school misconduct. For example, the Department's proposal would not make a school's material breach of an enrollment agreement an actionable defense—possibly the clearest grounds for providing relief to a student. The Department's refusal to allow students to assert all claims and defenses they have against the school in the borrower-defense process, not just limited "federal" defenses, favors the interests of predatory schools over students and would deny relief to borrowers who have been indisputably victimized by their schools.

Role of Attorneys General. The Department has proposed a borrower-defense process that excludes any role for state attorneys general. This exclusion both reverses the Department's longstanding practice of partnering with state attorneys general and ignores recognized responsibilities of states in the "triad" of higher-education oversight and their unique role in protecting students. Recognizing our critical role, the Department's 2016 regulations specifically included judgments obtained by state regulators as an *automatic* basis for borrower defense. Those same rules also recognized investigations and enforcement actions commenced by state attorneys general as early warning signs that a school might be financially irresponsible and at risk of shutting down. Under the 2016 regulations, actions taken by state attorneys general served as critical deterrents to school misconduct by jeopardizing predatory schools' continued access to federal funds. States have been and will continue to be on the frontlines of bringing school abuses to light and protecting students through enforcement of our state consumer-protection laws. Continued formal recognition of our regulatory efforts would help streamline and strengthen borrower defense. The Department's plan to cut state attorneys general out of this process, despite our unique role in identifying and prosecuting abusive schools, is illogical and inefficient. Such an ill-advised course of action would harm students and taxpayers alike.

Statute of Limitations. Imposition of any statute of limitations on borrower-defense claims—let alone the Department's proposed three-year statute of limitations—is patently unfair. Generally, statutes of limitations can be raised to prevent an affirmative suit for relief. However, well-established principles allow a borrower to *defend* against a collection suit even if it is too late for the borrower to bring an affirmative suit. If the rule were otherwise, borrowers could find themselves in the draconian predicament of being legally obligated to repay a loan that was conclusively procured illegally. Because there is no corresponding time limit for the Department to collect on student loans, fundamental fairness dictates that no statute of limitations should apply to a borrower's ability raise defenses to repayment.

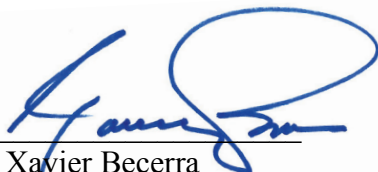
Group Process. Absent from the Department's proposals is a streamlined process to discharge groups of similar borrower-defense claims. Our investigations and prosecutions repeatedly reveal that predatory schools engage in systemic misconduct that subject all prospective and enrolled students to the same abuse. It is both inefficient and unfair to require defrauded students to submit individual claims proving each instance of fraud when a school's misconduct is already well established through, for example, an investigation by a state attorney general. This was true in both the collapse of Corinthian Colleges and American Career Institute, and in both cases the Department recognized and implemented expedited procedures to provide groups of defrauded students with streamlined relief. A group process is necessary to ensure that all students who are entitled to relief obtain that relief.

Mandatory Arbitration and Class-Action Waivers. We have found that almost all predatory schools require students to sign away their legal rights by forcing students to agree to arbitrate any and all disputes that they may have and to waive their right to participate in a class action against the school. These agreements undermine law enforcement. Mandatory arbitration suppresses students from bringing meritorious claims and prevents information about the few disputes that are brought from ever coming to light. Similarly, bans on class actions often make it financially infeasible for students to secure legal representation, meaning those claims too are never brought. Preservation of the fundamental right of students to sue their school in court when they have been wronged—including through the use of class actions—ensures that school misconduct cannot be swept under the rug and that students have the ability to seek damages or other legal remedies to hold schools to account. As the Department did with its 2016 regulations, it is critical that the Department ban schools from imposing pre-dispute arbitration and class-action waiver on students.

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The Department has decided to do away with its carefully considered and duly promulgated 2016 regulations on borrower defense and financial responsibility. The Department's proposals on these issues offered at its recently concluded negotiated-rulemaking sessions suggest the Department is now intent on publishing proposed rules that do little to protect students and taxpayers. We urge the Department not to issue a notice of proposed rulemaking with these flawed proposals.

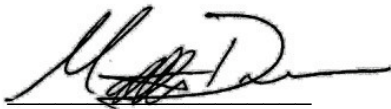
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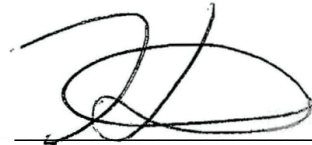
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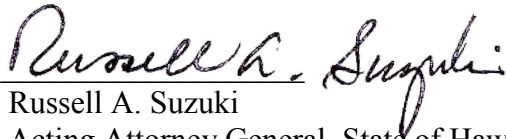
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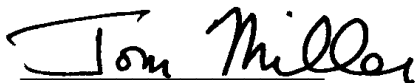
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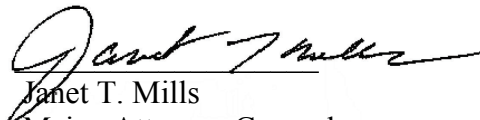
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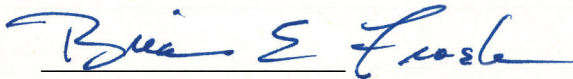
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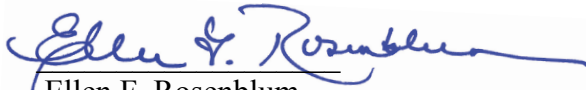
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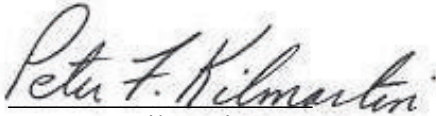
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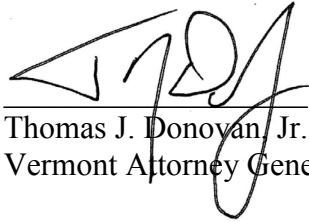
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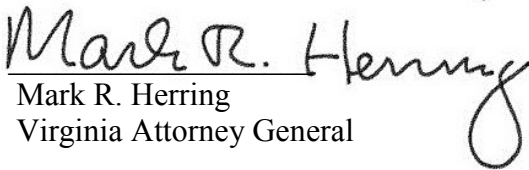
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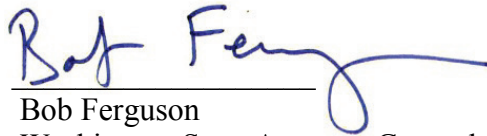
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