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July 29, 2016

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave. SW., Room 6W232B
Washington, DC 20202

Re: Comments Regarding Borrower Defense to Repayment Notice of Proposed Rulemaking, Docket ID ED-2015-OPE-0103

Dear Mr. Gaina:

We are attorneys with the Project on Predatory Student Lending. The Project is part of the Legal Services Center of Harvard Law School, a community legal clinic and clinical teaching center for Harvard Law School. The Project represents low-income student loan borrowers who have experienced predatory lending in connection with for-profit schools. In particular, the Project frequently represents students who have experienced unfair, deceptive, and otherwise illegal conduct at the hands of for-profit colleges.

We submit this comment in response to the Department of Education's notice of proposed rulemaking regarding borrower defense to repayment.¹ Under separate cover, the Project has submitted comprehensive comments on this important proposal, with and on behalf of legal aid providers who represent low-income borrowers. The narrow focus of this comment relates to the Department's characterization of the legal concept of "educational malpractice."

The Department's proposed rule creates new standards and procedures by which borrowers may apply to have their loans cancelled, based on wrongdoing by their schools. The Department's proposed substantive standard departs from the current standard for such claims, which expressly incorporates state law. Although the Project comments elsewhere that the Department's standard must retain the broadest protections afforded to students under state law, we write here to counter any assertion

¹ Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39,330 (June 16, 2016).

that the new standard proposed by the Department somehow exposes schools (and by extension, taxpayers) to novel forms of tort liability, “opens the floodgates” to claims, or invites “battles of the experts” as to the standard of care applicable in the educational context.

To the contrary, in this respect, the Department’s proposed rule does not depart from well-established precedent under state law, which is that schools are liable for deceptive and unfair practices, including when they fail to deliver educational services of the nature and quality that they claim to offer.²

It is true, as the Department states, that courts tend not to recognize tort claims predicated on a duty of schools to educate their pupils adequately, characterizing such cases as raising claims for “educational malpractice.”³ Yet, this category of disfavored educational malpractice tort claims is exceedingly narrow. Courts have consistently found that educational malpractice does not subsume borrowers’ claims under state and federal consumer protection law,⁴ nor other claims frequently raised by students against their schools, including civil rights claims,⁵ contract claims,⁶ negligence claims,⁷

² See *id.* at 39,337 (emphasizing that “[t]he Department does not intend in these regulations to create a different legal standard” for educational malpractice than that reflected in state law).

³ *Id.* at 39,337 (noting “[c]ourts that have considered claims characterized as educational malpractice have generally concluded that State law does not recognize such claims” and citing *Bell v. Board of Educ. of City of West Haven*, 739 A.2d 321, 325 (Conn. App. Ct. 1999); *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 NW.2d 115, 121 (Iowa 2001)).

⁴ See, e.g., *Makaeff v. Trump Univ., LLC*, No. 10-CV-940-IEG (WVG), 2010 WL 3988684, at *2-3 (S.D. Cal. Oct. 12, 2010) (permitting claims under California consumer protection laws to proceed and rejecting argument that they represented claims for educational malpractice); *Blake v. Career Educ. Corp.*, No. 4:08CV00821ERW, 2009 WL 2567011, at *3-6 (E.D. Mo. Aug. 18, 2009) (similar); *Osberg v. Yale Univ.*, No. CV085021879S, 2009 WL 659072, at *4 (Conn. Super. Ct. Feb. 11, 2009) (similar).

⁵ See, e.g., *Conway v. Bd. of Educ. of Northport-E. Northport Sch. Dist.*, No. 13-CV-5283 SJF WDW, 2014 WL 3828383, at *15 (E.D.N.Y. Aug. 1, 2014) (permitting claims under the federal Individuals with Disabilities Education Act, Rehabilitation Act, and 42 U.S.C. § 1983 to proceed and rejecting argument that they represented claims for educational malpractice); *K.S. v. Fremont Unified Sch. Dist.*, No. C 06-07218 SI, 2007 WL 4287522, at *3 (N.D. Cal. Dec. 6, 2007) (rejecting argument that claim under California civil rights law should be dismissed as one for educational malpractice); *L.M.P. ex rel. E.P. v. Sch. Bd. of Broward Cty.*, 516 F. Supp. 2d 1294, 1301-02 (S.D. Fla. 2007) (rejecting argument that Rehabilitation Act claim constituted assertion of educational malpractice).

⁶ See, e.g., *CenCor, Inc. v. Tolman*, 868 P.2d 396, 399 (Colo. 1994) (“[W]hen students allege that educational institutions have failed to provide specifically promised educational services, such as a failure to offer any classes or a failure to deliver a promised number of hours of instruction, such claims have been upheld on the basis of the law of contracts.”); see also *Robbe v. Webster Univ.*, 98 F. Supp. 3d 1030, 1037 (E.D. Mo. 2015) (permitting claims for breach of contract, promissory estoppel, and breach of good faith and fair dealing to proceed and rejecting argument that they represented claims for educational malpractice); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 94 (2d Cir. 2011) (vacating dismissal of breach of contract claim and rejecting argument that claim was one for educational

and other common-law claims.⁸ Indeed, the vast majority of consumer protection claims against schools proceed without any mention of educational malpractice.⁹ The conduct addressed by these types of claims is precisely the kind of conduct that the borrower defense process aims to address.

Consumer protection claims are especially important to our clients – and to the borrower defense framework – because such claims permit relief for unfair and deceptive acts or practices, types of behavior at the center of for-profit schools’ misconduct.¹⁰ These claims do not implicate educational malpractice because they arise from statute, not from a putative common-law tort duty to educate adequately.¹¹ Thus, such claims constitute legitimate bases for borrower defenses. A few examples of such claims demonstrate this distinction:

First, our clients have been misled about job prospects and post-graduate earnings. In our experience, for-profit colleges often induce prospective students to enroll with

malpractice); *Kashmiri v. Regents of Univ. of Cal.*, 156 Cal. App. 4th 809, 826 (Cal. Ct. App. 2007) (affirming breach of contract and rejecting argument that claim constituted educational malpractice).

⁷ **Negligence.** See, e.g., *Doe v. Yale Univ.*, 748 A.2d 834, 847 (Conn. 2000) (distinguishing between “viable negligence claim” predicated on duty not to cause physical harm by negligent conduct and educational malpractice claim); *Griffin v. Sanders*, No. 11-CV-12289, 2013 WL 3788826, at *13 n.10 (E.D. Mich. July 19, 2013) (permitting gross negligence claims to proceed and rejecting argument that they represented claims for educational malpractice). **Negligent misrepresentation.** *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 NW.2d 115, 121 (Iowa 2001) (permitting claim for negligent misrepresentation to proceed and cautioning, “We must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice.”). **Negligent infliction of emotional distress.** See, e.g., *Vega v. Sacred Heart Univ., Inc.*, 871 F. Supp. 2d 81, 84 (D. Conn. 2012) (permitting claim for negligent infliction of emotional distress to proceed and rejecting argument that it constituted assertion of educational malpractice).

⁸ See, e.g., *Christensen v. S. Normal Sch.*, 790 So. 2d 252, 254–56 (Ala. 2001) (explaining that fraud actions against schools are cognizable notwithstanding bar on claims for educational malpractice).

⁹ See e.g., *Bobbitt v. Acad. of Court Reporting, Inc.*, 252 F.R.D. 327, 329, 345 (E.D. Mich. 2008) (granting class certification in suit by former students against for-profit college alleging, *inter alia*, violations of the Michigan Consumer Protection Act, where “[t]he thrust of the plaintiffs’ case centers on the allegation that the Academy misrepresented to prospective students its ability to grant valid associate’s degrees”); *Beckett v. Computer Career Inst., Inc.*, 852 P.2d 840, 841, 844 (Or. Ct. App. 1993) (affirming judgment that school violated Oregon Unlawful Trade Practices Act where school’s admissions officers promised former students 85% to 96% job placement despite fact that school reported rates averaging 50% to accreditor); *Enzinna v. D’Youville Coll.*, 946 N.Y.S.2d 66, 2010 WL 8400136, at *5 (N.Y. Sup. Ct. 2010) (denying motion to dismiss in suit by former students alleging that their school misrepresented graduates’ eligibility to seek licensure in all states), *aff’d* 922 N.Y.S.2d 729, 730 (N.Y. App. Div. 2011).

¹⁰ See, e.g., MASS. GEN. LAWS ch. 93A § 2 (2016) (prohibiting “unfair or deceptive acts or practices in the conduct of any trade or commerce”).

¹¹ See, e.g., *Makaeff v. Trump Univ., LLC*, No. 10-CV-940-IEG (WVG), 2010 WL 3988684, at *2–3 (S.D. Cal. Oct. 12, 2010) (contrasting claim for educational malpractice, based on a duty to adequately instruct, with consumer protection claim, based on failure to provide certain services as promised).

promises of post-graduate employment in their field of study and high earnings.¹² The reality is that these for-profit schools routinely inflate the employability and earning potential of students,¹³ leaving our clients thousands of dollars in debt, unable to find a job in their field of study, and unable to pay back their loans.

Second, our clients have been misled about transferability of credits. In our experience, for-profit colleges often induce prospective students to enroll by promising that the credits earned there will be transferable to other schools – often with express reference to the schools’ accreditation.¹⁴ This practice seeks to persuade students who are suspicious of schools or otherwise hesitant to commit; it also preys on students who envision for-profit education as a stepping stone to further educational attainment. These promises belie the significant limits on the transferability of credits that our clients earn at for-profits. When students of for-profit schools seek to transfer credits – because they have dropped out, would like to transfer, or have graduated but still cannot find a job – they frequently cannot.¹⁵ This non-transferability puts students in the unfair situation of either staying at a school where they do not wish to continue their education or starting over completely at another school.

Third, our clients have been misled by for-profit schools about their student loans. Common topics for misrepresentation include the amount of loans, whether loans are federal or private, and even that the loans must be repaid and are not grants.¹⁶ These misrepresentations often arise amidst a high-pressure sales environment created by for-profits. For example, students routinely report that they were hounded by recruiters from their schools.¹⁷ They also report that admissions staff rushed them through the

¹² Cf., e.g., *Special Instructions for Certain Everest Institute, Everest College, Everest University, and WyoTech Students*, U.S. DEP’T OF EDUC., <https://perma.cc/S957-QRXW> (“The Department has found that between 2010 and 2014, Everest Institute, Everest College, and Everest University ... as well as WyoTech, misrepresented job placement rates for many of their programs of study.”).

¹³ See, e.g., *id.*

¹⁴ See e.g., Survey Response of Robert Heckathorn, Ex. 024 to Affidavit of Jennifer Snow, Plaintiff Commonwealth of Massachusetts’ Memorandum in Support of Motion for Summary Judgment, *Massachusetts v. Corinthian Colls., Inc.*, No. 14-1093 (Suffolk. Sup. Ct. Dec. 23, 2015) (“They said they were accredited!”).

¹⁵ See, e.g., Affidavit of Robert Heckathorn at ¶¶ 6-7, Ex. 29 to Plaintiff Commonwealth of Massachusetts’ Memorandum in Support of Motion for Summary Judgment, *Massachusetts v. Corinthian Colls., Inc.*, No. 14-1093 (Suffolk. Sup. Ct. Dec. 23, 2015) (reporting that credits from for-profit school did not transfer to another school).

¹⁶ See, e.g., Survey Response of Adriana M. Balbin at *2-3, Ex. 070 to Affidavit of Jennifer Snow, Plaintiff Commonwealth of Massachusetts’ Memorandum in Support of Motion for Summary Judgment, *Massachusetts v. Corinthian Colls., Inc.*, No. 14-1093 (Suffolk. Sup. Ct. Dec. 23, 2015) (reporting that for-profit school signed student up for a federal loan and told her it was a grant).

¹⁷ See, e.g., *id.* at *2 (reporting that student received approximately five calls per day from school recruiter).

process of signing up for loans without fully explaining what they were signing and without providing adequate time to read the materials.¹⁸

Finally, our clients have been misled about the specific educational services they will receive. For instance, for-profit schools have told our clients that they would be learning from instructors with years of relevant experience, when in fact the instructors were recent graduates of the school; schools have promised our clients externship placements in their field of study, when in fact the school routinely placed students in externships completely unrelated to students' coursework; and schools have stated that our clients would use specific industry software and hardware in the classroom, when in fact these resources were not even available at the campus in question.

In our experience, all of the above practices are common among for-profit colleges. These practices are all plainly deceptive, deeply unfair, and patently illegal under consumer protection law in Massachusetts and many other states.¹⁹ Consumer protection claims challenging these practices are unrelated to arguments about educational malpractice because such claims are provided by statute and turn on questions of deception and unfairness, not on a putative common-law duty to educate adequately.²⁰ The current defense-to-repayment framework permits such claims and the new framework should continue to do so.²¹

The Department has expressed its intention to preserve current state law regarding educational malpractice.²² To that end, we urge the Department to rely on the understanding of educational malpractice expressed in the notice of proposed rulemaking as it enacts the borrower defense regulations. This approach will permit

¹⁸ See, e.g., *id.* at *3 (“I was rushed into signing [financial aid] forms and not given the time to read them”).

¹⁹ See, e.g., MASS. GEN. LAWS ch. 93A § 2 (prohibiting “unfair or deceptive acts or practices in the conduct of any trade or commerce”).

²⁰ See, e.g., *Elmendorf v. Duke Univ.*, No. 1:14CV697, 2015 WL 4094175, at *2–4 (M.D.N.C. July 7, 2015) (recommending that claims of unfair and deceptive practices and negligent misrepresentation be allowed to proceed because plaintiffs adequately alleged false statements by school and rejecting argument that claims constituted claims for educational malpractice), *report and recommendation adopted*, No. 1:14CV697, 2015 WL 4878175 (M.D.N.C. Aug. 14, 2015).

²¹ 34 C.F.R. § 685.206(c) (2016) (“In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.”); 34 C.F.R. §682.209(g) (2016) (“Any lender holding a loan is subject to all claims and defenses that the borrower could assert against the school with respect to that loan....”).

²² Notice of Proposed Rulemaking, 81 Fed. Reg. at 39,337 (emphasizing that “[t]he Department does not intend in these regulations to create a different legal standard” for educational malpractice than the standard reflected in state law).

student borrowers to continue to protect their rights in the face of unfair, deceptive, and illegal school conduct.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Alec Harris', with a long horizontal flourish extending to the right.

Alec Harris

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A handwritten signature in blue ink, appearing to read 'Victoria Roytenberg', with a stylized, cursive script.

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