



Comments of The Project on Predatory Student Lending and Public Citizen to the Department of Education on Notice of Proposed Rulemaking, Docket ID ED-2017-OPE-0112

November 22, 2017

The Project on Predatory Student Lending (Project) and Public Citizen submit these comments on the Department of Education’s Notice of Proposed Rulemaking (NPRM) proposing to further delay implementation of the “Borrower Defense Rule”¹ until July 1, 2019.² Public Citizen is a non-profit consumer advocacy organization with members and supporters nationwide. It works on both policy matters and litigation to defend consumers’ rights to access the civil justice system, including challenges to the use of forced arbitration provisions, class action bans, and mandatory internal dispute resolution processes that impede students’ access to justice and hide wrongdoing from this agency and the public. Public Citizen also works for transparency in lending and to prevent consumers from being taken advantage of by unscrupulous businesses and industries. The Project, part of the Legal Services Center of Harvard Law School, represents hundreds of thousands of low-income borrowers who have debt from for-profit colleges. Our clients have experienced unfair, deceptive, and otherwise illegal conduct at the hands of for-profit colleges. This fraud provides our clients with a complete defense to the repayment of their loans. But despite countless submissions to the Department of Education (ED), our clients have rarely received any response at all, let alone their legally mandated relief.

As ED itself has recognized, the Borrower Defense Rule would “give students access to consistent, clear, fair, and transparent processes to seek debt relief.”³ ED has already delayed implementation of the Borrower Defense Rule, relying on an improper invocation of Section 705 of the Administrative Procedure Act (APA),⁴ and then using that delay to justify a second delay with its Interim Final Rule (IFR) issued on the same day as this NPRM.⁵ The proposed further delay of the Borrower Defense Rule harms student loan borrowers and the economy at large. The NPRM cites no specific respects in which its analysis of the reasons for promulgating the Borrower Defense Rule and of the benefits that the Rule would bring about were erroneous. Instead, it merely relies generally on ED’s expressed desire to revise the Rule. That desire is not a legitimate basis to delay the validly-promulgated Rule.

¹ ED, Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016).

² ED, Notice of Proposed Rulemaking, 82 Fed. Reg. 49,155 (Oct. 24, 2017).

³ 81 Fed. Reg. at 75,926.

⁴ ED, Final Rule; Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27,621 (June 16, 2017).

⁵ ED, Interim Final Rule; Delay of Effective Date; Request for Comments, 82 Fed. Reg. 49,114 (Oct. 24, 2017).

Further delay of the Borrower Defense Rule would aggravate the harms to student loan borrowers and the economy at large caused by student debt incurred to attend predatory institutions.

ED's repeated delays of the Borrower Defense Rule perpetuate the harms to student loan borrowers associated with debt burdens incurred from attending unscrupulous institutions, and are forestalling the positive economic benefits that would result from cancelling that debt. Further delay would continue to hinder student loan borrowers' ability to start a family, get a job, and buy a home.⁶ In the words of a defrauded ITT borrower, "the loans . . . have caused me to put my life on hold."⁷ ED itself recognized these harms in its Regulatory Impact Analysis of the Borrower Defense Rule.⁸ Thousands of borrowers have submitted defense to repayment applications to ED—the vast majority of which remain in limbo—detailing these and other harms that they experience as a result of carrying debt that would entitle them to a borrower defense.⁹ Some of these harms include:

1. *Harm to credit.* Many student borrowers have poor credit as a result of their student loan debt.¹⁰ Because of high principal, high interest rates, and other unfavorable terms, it is not possible for them to repay their loans, especially considering that the credentials they received from fraudulent schools are often worthless on the job market. One told ED, "my credit score is ruined. [A]nytime I apply for some type of credit my student loans show up as negative." Another, who is unable to buy a home and only qualifies for credit cards with extremely high interest rates because of a low credit score, explained that "[w]ithout these loans my credit would be pristine." Even for borrowers who sacrifice in other areas of their lives to make their student loan payments and maintain their credit, the astronomical debt taken out in their names is a red flag to potential creditors. One borrower who beat the odds to maintain a credit score of over 700 has "absolutely no way of utilizing the credit score that I have built up because the debt I currently owe does not allow it. My fantastic credit score is literally useless to me."

2. *Denial of employment due to poor credit.* Perversely, students who enrolled in higher education to improve their career prospects are experiencing the opposite; they are being denied employment because of the poor credit they have as a result of their student loans.¹¹ One borrower explained, "[p]rospective employers see the bad credit reports and deny us jobs thinking we are incapable of paying our bills therefore wouldn't be good employees." Another said: "I can't get a job in my field because they do credit checks. I can't better my life because I am financially unable to pay due to not having a job." A lack of employment options makes it even harder to repay loans, creating what multiple borrowers have described as a "vicious cycle."

⁶ See 81 Fed. Reg. at 76,051.

⁷ All of the quotes from borrowers in this comment are from defense to repayment applications submitted to ED by defrauded students of ITT Technical Institute (ITT), a for-profit college that recently filed for bankruptcy.

⁸ See 81 Fed. Reg. at 76,050-51.

⁹ More than 2,000 ITT students have submitted defense to repayment applications, but only a handful have been granted, and most have received no response from ED at all.

¹⁰ See 81 Fed. Reg. at 76,051 (citing "[r]ecent literature . . . suggest[ing] that high levels of student debt may . . . increase credit constraints").

¹¹ See *id.* (noting that defaulted borrowers may "be denied a job due to poor credit").

3. *Difficulties obtaining utilities, obtaining insurance, and renting apartments.* Bad credit has myriad implications for student borrowers beyond denials of employment and their inability to secure additional loans.¹² Many see their apartment rental applications denied because of their student loan debt. Unable to buy or rent a home, these borrowers have extremely limited housing options. One told ED, “I am currently homeless and unable to even get approved for an apartment due to my credit score and low income.” Many borrowers have experienced homelessness because of their student loan debt. Borrowers also face unaffordable insurance premiums and are not able to obtain utilities.

4. *Inability to pay professional licensing fees.* Predatory schools frequently misrepresent the necessity and cost of additional certifications that students need to enter their chosen fields. Once students graduate, many are surprised to learn that they need to take and pay for certification exams, which is only made more difficult by high student loan payments.¹³ One borrower explains: “I can’t afford to pay for the certifications I need to move into a field relevant to my course of study, and I haven’t been able to since I graduated.” After investing so much time and money in their education, these students are unable to move forward in their careers.

5. *Inability to open a checking account.* Student loan debt prevents student borrowers from participating in the economy in even the most basic ways. Some borrowers are not even able to open a checking account.¹⁴ One borrower told ED, “[m]y husband’s and my credit score is ruined to w[h]ere we can’t . . . have a bank account.” Another “basically had to go completely off the grid and stay off the grid.”

6. *Reduced home ownership.* Many student borrowers are unable to purchase a home because of their student loans.¹⁵ One borrower explained, “now that the loans have hit my credit has dropped 100 points which will prevent me from getting a car or house of my own.” Another borrower’s “new family is living in a room sleeping on the floor because we can’t afford adequate housing.”

7. *Increased probability of bankruptcy.* Crushing student loan debt makes student borrowers more likely to have to file for bankruptcy.¹⁶ One borrower has “a significant amount of credit card and health related debt that I should be paying off instead of this loan.” Another “will likely have to file for bankruptcy just to handle even part of the loans.” Because student loans are extremely hard to discharge, even if borrowers do declare bankruptcy, they will remain in significant debt. There is no statute of limitations on federal student loans, so these loans follow borrowers for the rest of their lives.

¹² See *id.* (noting that for defaulted borrowers, “everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge”).

¹³ See *id.* (noting that defaulted borrowers may “struggle to pay fees necessary to maintain professional licenses”).

¹⁴ See *id.* (noting that a defaulted borrower may “be unable [to] open a new checking account”).

¹⁵ See *id.* (citing Jennifer M. Shand, *The Impact of Early-Life Debt on the Homeownership Rates of Young Households: An Empirical Investigation* (2007)).

¹⁶ See *id.* (citing Dora Gicheva, *The Effects of Student Loans on Long-Term Household Financial Stability* (Univ. of North Carolina Greensboro Dep’t of Econ. Working Paper no. 14-02, 2014)).

8. *Decreased long-term probability of marriage.*¹⁷ Student loans not only affect the finances of borrowers—their impact is felt even in the most personal areas of borrowers’ lives. For one borrower, crushing debt “has put my family planning on hold.” Another “was afraid to get married because I didn’t want my student loan debt to hurt my husband’s credit score.” Yet another borrower says, “I have a fiancé that I can’t marry or support because of my financial situation, and that only makes the mental anguish a million times worse. . . . I may never be able to have a life or family now.” Those who do get married face further difficulties: “[m]y marriage is in danger because of constant stress.”

9. *Inability to re-enroll in high quality education.* Perversely, the loans student borrowers took out to advance their goals of higher education and increased opportunity now stand in the way of them doing so, leaving them unable to attend higher value institutions.¹⁸ A borrower sums it up: “After the LACK of education I received from the school, I wanted to attend another school but couldn’t because I was maxed out on loans.”

Certain groups of students would experience additional harms as a result of the delay. For example, students are often left stranded with worthless debt when their predatory schools close.¹⁹ The Borrower Defense Rule ensures automatic loan relief for students whose schools closed on or after November 1, 2013, and before they could complete their programs. So long as those students did not enroll at another Title IV-participating school within three years, they would have received automatic loan discharges. The Borrower Defense Rule also gives Federal Family Education Loan Program (FFEL) borrowers the right to appeal guaranty agencies’ denials of closed school discharge applications to ED. Further delay deprives students of these important rights and benefits.

Beyond the Borrower Defense Rule’s provisions concerning borrower defense procedures, the Rule provides important new provisions that seek to ensure financial responsibility of proprietary schools and to provide disclosures to students when a school’s students are unable to repay their loans. In promulgating the Rule, ED documented the important needs served by these provisions, and their benefits to students, the public, and the federal fisc. ED recognized that the Rule’s financial responsibility provisions would deter unscrupulous schools from defrauding students,²⁰ and that the Rule’s loan repayment disclosure requirement would enable students to make “more informed enrollment and financing decisions.”²¹ Although

¹⁷ See *id.* (citing Dora Gicheva, *In Debt and Alone? Examining the Causal Link between Student Loans and Marriage* (Working Paper, 2013)).

¹⁸ See *id.*

¹⁹ See, e.g., Eva-Marie Ayala, *Hundreds of Veterans Scramble after Garland For-Profit College Closes*, Dallas Morning News, Sept. 28, 2017, <https://www.dallasnews.com/news/education/2017/09/28/hundreds-veterans-scramble-garland-profit-college-closes>; Elizabeth Olson, *For-Profit Charlotte School of Law Closes*, N.Y. Times, Aug. 15, 2017, <https://www.nytimes.com/2017/08/15/business/dealbook/for-profit-charlotte-school-of-law-closes.html>; Kristen Taketa, *Hickey College in St. Louis Stops Accepting New Student Applications*, St. Louis Post-Dispatch, Jun. 21, 2017, http://www.stltoday.com/news/local/education/hickey-college-in-st-louis-stops-accepting-new-student-applications/article_de82cce1-9c15-5ee5-9776-f9d18d215f2a.html; see also Accrediting Council for Independent Colleges and Schools, “Institution Closings,” <http://www.acics.org/commission%20actions/content.aspx?id=1476> (listing more than 60 school closures since November 2016).

²⁰ See 81 Fed. Reg. at 76,050 (noting that financial responsibility provisions “introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist”).

²¹ *Id.* at 75,926.

ED has offered no explanation of how its conclusions in these regards were erroneous, it now proposes additional delay in the implementation of these provisions, which will in turn delay the achievement of the benefits associated with them.

Further delay of the forced arbitration and class action waiver provisions is particularly harmful to student loan borrowers and the public.

The Borrower Defense Rule includes a provision prohibiting schools that receive Title IV funding from relying on forced arbitration clauses and class action waivers. Class action waivers prevent students who all experienced the same fraudulent practices from bringing a single case against their school and, because individual students typically cannot afford to hire their own attorneys, limit students' access to legal representation. Arbitration clauses force students into secretive tribunals, with limited review. The results of arbitrations are usually kept confidential, which prevents students from establishing a pattern of illegal behavior by a school and impedes law enforcement agencies from investigating the fraud. As ED remarked in promulgating the Borrower Defense Rule:

[E]vidence showed that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program. It is undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school[s] to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.²²

Thus, ED found that limiting the ability of recipients of Title IV funding to force students to agree to these predatory provisions would “enable more borrowers to seek redress in court.”²³ Continuing to delay the Borrower Defense Rule would deprive borrowers of the ability to seek that redress. For some claims, the statute of limitations will run out during the delay, which will prevent these students from ever having a chance to prove their allegations in court.

The purported justifications for further delay are insufficient and illogical.

None of the reasons provided in the NPRM furnish a sufficient basis to further delay the Borrower Defense Rule and deprive student borrowers of the benefits of that rule.

The NPRM's Regulatory Impact Analysis details minor cost savings, such as those in schools' “annual paperwork burden,”²⁴ but fails to account for the much more significant harms that would be faced by students as a result of the delay. In promulgating the Borrower Defense Rule, ED itself emphasized that the Rule would “give students access to consistent, clear, fair, and transparent processes to seek debt relief.”²⁵ Delay deprives borrowers of that consistency,

²² *Id.* at 76,025.

²³ *Id.* at 75,939.

²⁴ 82 Fed. Reg. at 49,158.

²⁵ 81 Fed. Reg. at 75,926.

clarity, fairness, and transparency, a cost that ED now fails to recognize. Notably, when ED did conduct a thorough analysis of the effects of a potential delay that included the effects on borrowers, it found that “[d]elaying the regulations would delay the improved clarity and accountability from the regulations without developing additional data within a definite timeframe.”²⁶ ED accordingly concluded that “we do not believe the benefits of such a delay outweigh the costs.”²⁷ Recently, ED’s own Inspector General expressed concern about ED’s delay of the Rule’s financial responsibility provisions, which, if enforced, “would improve [Federal Student Aid]’s processes for mitigating potential harm to students and taxpayers.”²⁸

The NPRM asserts that “delaying the final regulations for an additional year will have limited effect.”²⁹ But for student borrowers, who are often living on a month-to-month basis, yet another year’s delay is significant. Every day, these borrowers face difficult decisions because of their constrained finances and, in the words of one borrower, the “[e]motional stress of constant debt.” Borrowers describe their loans as “stressful,” “overwhelming,” “weighing me down in life,” and “crushing.” They feel “depressed,” “discouraged,” “grief, hopelessness, empty, [w]recked,” and “broken.” Several even expressed “suicidal thoughts.” These statements demonstrate that delaying loan relief would have serious consequences. One borrower “can’t even feed myself some weeks because I have to pay these” loans. Student borrowers are “tired of being hungry and worrying where [they] will end up because of this mess.” An additional year of crushing debt, bad credit, and uncertainty would be a heavy burden.

ED also fails to account for the impact of delaying other provisions of the rules. An additional year of delay in implementation of the arbitration and class action provisions of the Rule will result in another year in which students who seek to assert claims against schools are likely to find themselves forced into an ineffectual and expensive dispute resolution process—individual arbitration. Because statute of limitations clocks will continue to tick on students’ claims during that year of delay, the effect of that delay cannot be waved off as “limited.” In addition, during the period of delay, students will continue to have to make choices about what schools to attend without the information that would be provided by the Rule’s provision regarding repayment rate disclosure. Students who commit to a school that turns out to be a debt-trap will face long-term consequences, and will take little comfort in the assertion that the effect of only another year of delay is “limited.” Likewise, financially irresponsible schools that continue to participate in the federal loan program during the additional period of delay without providing the letters of credit that would otherwise be required under the provisions of the Rule may saddle the federal government with significant financial consequences.

ED’s statement that it will “continue to process borrower defense claims under the existing regulations”³⁰ does not comport with the experiences of student borrowers, many of whom submitted claims years ago and have not heard anything from ED. Taking advantage of existing regulations’ silence on the process for asserting borrower defense claims on non-

²⁶ *Id.* at 76,049.

²⁷ *Id.*

²⁸ Letter from Kathleen S. Tighe, Inspector General, ED, to Sen. Patty Murray (Oct. 31, 2017), <https://www2.ed.gov/about/offices/list/oig/misc/lettersenmurraybdgeoctober2017.pdf>.

²⁹ 82 Fed. Reg. at 49,157.

³⁰ *Id.* at 49,156.

defaulted loans, ED has ignored such claims altogether. In a July 7 letter to Senator Durbin, ED confirmed that despite sitting on 65,169 pending claims, it had not approved a single one since January 20, 2017.³¹ That number has only grown since July: more than 87,000 applications for relief were pending before ED as of October 24, 2017.³²

The NPRM fails to identify any specific deficiencies in the Borrower Defense Rule and the findings and rationale supporting it other than ED's desire to rewrite it.

The NPRM cites as the reason for delaying implementation “[ED]’s intent to convene a committee to develop proposed regulations to revise the regulations on borrower defense.”³³ Other than its desire to rewrite the Borrower Defense Rule, ED does not identify any specific respect in which the provisions of the Rule are unlawful or unjustified, nor does it explain which of its findings and reasons justifying the Rule were erroneous or unsupported. The Rule went through an extensive negotiated rulemaking and notice-and-comment process, and was duly promulgated more than a year ago on November 1, 2016. But for ED’s illegal delays under Section 705 and the IFR, the Borrower Defense Rule would already be in effect, as of July 2017. Without citing any new information or otherwise justifying its change in position, ED has undertaken the rulemaking process all over again—ignoring the comprehensive, legitimate rule that already exists. This is not a sufficient basis to delay a rule. The factual circumstances that justify the Rule have—if anything—only become more compelling. Predatory, for-profit institutions continue to operate, saddling students with worthless debt.

The costs imposed on borrowers by the proposed delay are real and massive: the money devoted to debt service on student loan debt does not provide borrowers with any basic life necessities, and leaves them scrambling to pay for food, housing, and healthcare. By unnecessarily delaying the Borrower Defense Rule for yet another year, the proposed delay would exacerbate the harms of crushing student loan debt and deprive students of benefits ED has already concluded would be meaningful and justified under the Higher Education Act.

Thank you for the opportunity to submit these comments. If you have any questions about these comments, please contact Amanda Savage at asavage@law.harvard.edu or Adam Pulver at apulver@citizen.org.

³¹ Letter from James F. Manning, Acting Under Secretary, ED, to Sen. Richard J. Durbin (July 7, 2017), <https://www.durbin.senate.gov/imo/media/doc/17-010570%20Durbin%20Outgoing.pdf>.

³² Offices of Sens. Elizabeth Warren & Richard J. Durbin, *Insult to Injury: How the DeVos Department of Education is Failing Defrauded Students* 1 (2017), https://www.warren.senate.gov/files/documents/2017_11_Warren_Durbin_Borrower_Defense_Report.pdf.

³³ 82 Fed. Reg. at 49,156.