United States Senate
WASHINGTON, DC 20510

August 1, 2016

The Honorable Dr. John King
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202

Dear Secretary King,

Thank you for your strong commitment to providing debt relief to students who have been the victims of unlawful, unfair, deceptive, or abusive practices in higher education. We commend the significant improvements in the proposed "borrower defense" regulation[1] published by the U.S. Department of Education ("the Department"). The regulation, once finalized, will provide important new protections for borrowers and critical tools to hold institutions of higher education accountable. We write to express our strong support for many elements of the proposed regulation and to suggest a number of ways to further strengthen the rule to protect student borrowers.

Our nation's students should never have to worry about being preyed upon while they work hard and invest in themselves with postsecondary education. Unfortunately, recent cases of unscrupulous and illegal conduct, including the falsification of job placement rates by Corinthian Colleges, have highlighted the urgent need for the borrower defense regulation. The current borrower defense proposal would create a long overdue pathway to federal student loan discharge for those who are the victims of unlawful and abusive practices. The regulation will also protect taxpayers by creating an important incentive against future abusive practices which, if they are allowed to continue, could cause a cascade of closed school discharges and borrower defense claims already authorized under federal law. To achieve the Department's intended and necessary goals, we urge a few essential revisions to close unintended loopholes and strengthen the process for students.

We are pleased to see the proposed rule provides a path for groups of defrauded borrowers to get the automatic relief they deserve without the need for time-consuming individual applications. Individualized review of all claims for borrower defense makes little sense. Over the years, some colleges have routinely engaged in widespread misconduct that is driven by an institutional culture that rewards skirting federal rules in the pursuit of profit. The results have been higher levels of debt, poorer outcomes for students, and more risk for taxpayers. Unfortunately, cases involving this type of behavior will likely increase until the new incentives created by the rule change institutional behavior. In addition, the Department does not have the capacity to review and process applications one-by-one in a timely manner. Finally, most discharge claims will have substantially similar facts at hand. For these reasons, group relief is at the heart of making the borrower defense rule work efficiently and in the best interest of students.

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[1] 81 FR 39329, June 16, 2016, https://federalregister.gov/a/2016-14052.

The small number of discharges granted to former Corinthian College students relative to the breadth of the school's fraud have also shown the limitations of an individualized approach. While essential, outreach to borrowers is an insufficient remedy to the scope of harm that fraudulent schools inflict on students and their families. While we support trying to recoup as much of the discharged funds from the school as possible, it is also our longstanding position that relief to students should not depend on this process. For this reason, the Department should modify the rule to ensure that the due process afforded to schools under the joint fact-finding process does not limit, suspend, delay, or deny the relief that students are entitled to under the law. For borrower defense claims involving schools that close down, there is also no need for a hearing. Instead, when schools close, the Secretary should have the authority to automatically cancel the loans for groups of students.

If the Department intends for its rule to be successful, it must formally acknowledge the valuable contributions that State Attorneys General and other law enforcement agencies and entities make in uncovering cases of misconduct which may entitle borrowers to relief. However, the proposed rule makes no mention of these resources. Not only do others who protect borrowers deserve a minimum level of responsiveness to submissions they make on borrowers' behalf, but the public interest also requires a level of transparency to their requests for debt relief. Therefore, the proposed regulation must include formal mechanisms for State Attorneys General and other law enforcement agencies and regulatory entities to supply evidence, make group referrals to the Department, and receive written responses to the submissions of such evidence and referrals. The Department should also ensure that violations of any state law against unfair, deceptive, or abusive acts or practices will be used to evaluate a borrower defense claim.

Prior cases of institutional misconduct have also shown that the Department sometimes fails to intervene quickly enough, allowing institutions to continue drawing down taxpayer funds and harming students in the process. The regulation must therefore ensure that when the Department adjudicates borrower defense claims on a group basis, the process of group formation is independent of political considerations and conflicts of interest. First, the regulation should stipulate that Department offices involved in making policy, overseeing budgeting, or assessing school compliance with federal student aid rules should not be involved in reviewing or adjudicating borrower defense claims. Furthermore, the Department must ensure there are clear separations of roles and responsibilities within the borrower defense process. In particular, the office responsible for presenting the claim on behalf of a group should not be the same office that decides the merits of the claim. Delegating some roles, particularly the role of a hearing official, to administrative law judges or their equivalent would be one way to address potential conflicts of interest and ensure that roles and responsibilities are appropriately divided between different offices.

We are also pleased that the proposed rule takes steps to ban the use of mandatory arbitration clauses, which force students to waive their legal rights to file lawsuits as individuals or as part of class actions. Such a ban will provide important protections for students, taxpayers, and the Federal government from the harms caused by the use of forced arbitration agreements by institutions of higher education. The Department can do even more, however, and must close loopholes in the proposed rule that enable institutions to continue to engage in abusive practices that may result in discriminatory treatment by institutions against some categories of

students and their claims. The final rule should draw a clear line that bars any pre-dispute arbitration agreement between an institution and a student. This will prevent institutions from pressuring or misleading students into signing away their ability to resolve a future dispute in court. The final rule should also use the Department's clear legal authority to cover all students and all claims related to the making of a loan or the provision of educational services, not just those that could ultimately become part of a borrower defense proceeding. The regulation should clearly prohibit an end-run around of the ban on forced arbitration by also stopping institutions from using arbitration to decide the enforceability of their agreements. Finally, it is important that the final rule acknowledge that the Federal Arbitration Act does not prevent or restrict the Department from directing institutions to forego the use of forced arbitration clauses as a condition of the institution's receipt of federal funding through Department programs.

Students who have been defrauded have often spent countless hours, energy, and living costs in pursuit of an education that will leave them with little more than a worthless pile of debt. The borrower defense rule will provide critical incentives to prevent future cases of this misconduct. However, there is more that the Department should do to provide borrowers who have already been harmed with debt relief. The proposed rule suggests that the Department will subject borrowers to a complex economic analysis to determine the amount of their harm or the value of their educational benefit. However, common sense and established consumer law tells us that the Department should presume, at a minimum, that the borrower's entire loan be discharged.

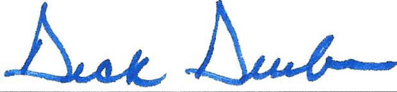
We can never fully remedy the harm done to students through shattered dreams and lost time, and an analysis of the value of their educational benefit would unjustly penalized defrauded borrowers who were able to get jobs through their own hard work and diligence despite their fraudulent schools. An individual, case-by-case analysis of injury or educational benefit would also be an unworkable administrative burden on the Department, which would delay relief that borrowers urgently deserve and jeopardize the possibility of automatic group discharge. While it is reasonable for the Department to have the ability to perform a more nuanced determination of relief when clear and convincing evidence demonstrates that a full discharge is inappropriate, this tool should be rarely used, and the Department should begin with a presumption of full relief in all circumstances. Furthermore, "Appendix A" of the rule should be removed because it adds confusion to the process, is unclear when it would be applied, opens the calculation of relief to students to unfair variation between similar cases, and does not change the Department's power to grant partial or full relief without these guidelines.

We thank the Department for issuing a strong proposed borrower defense rule to provide relief to students and protect taxpayers. Many of the current elements of the rule are a real victory for students and should be retained. However, as outlined above, we believe there are areas in which the proposed rule could be improved to close unintended loopholes, increase accountability to students, and reduce the complexity of the regulation. We look forward to continuing to work with you to protect students in higher education.

Sincerely,

PATTY MURRAY
United States Senator

ELIZABETH WARREN
United States Senator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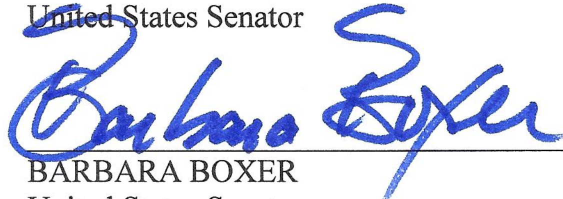
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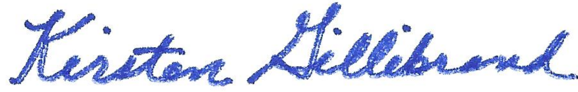
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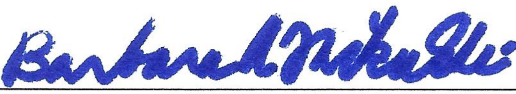
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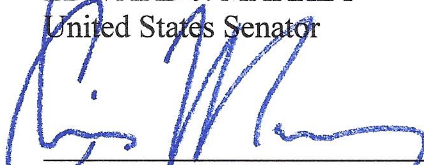
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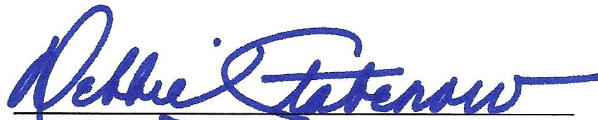

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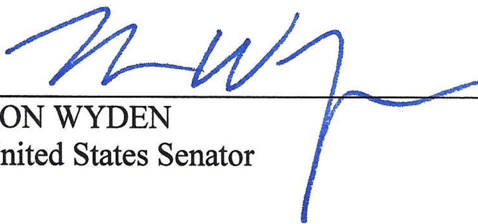

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