Members of Congress to Sec. DeVos: Stand up for students and families, reverse delay of protections for defrauded students

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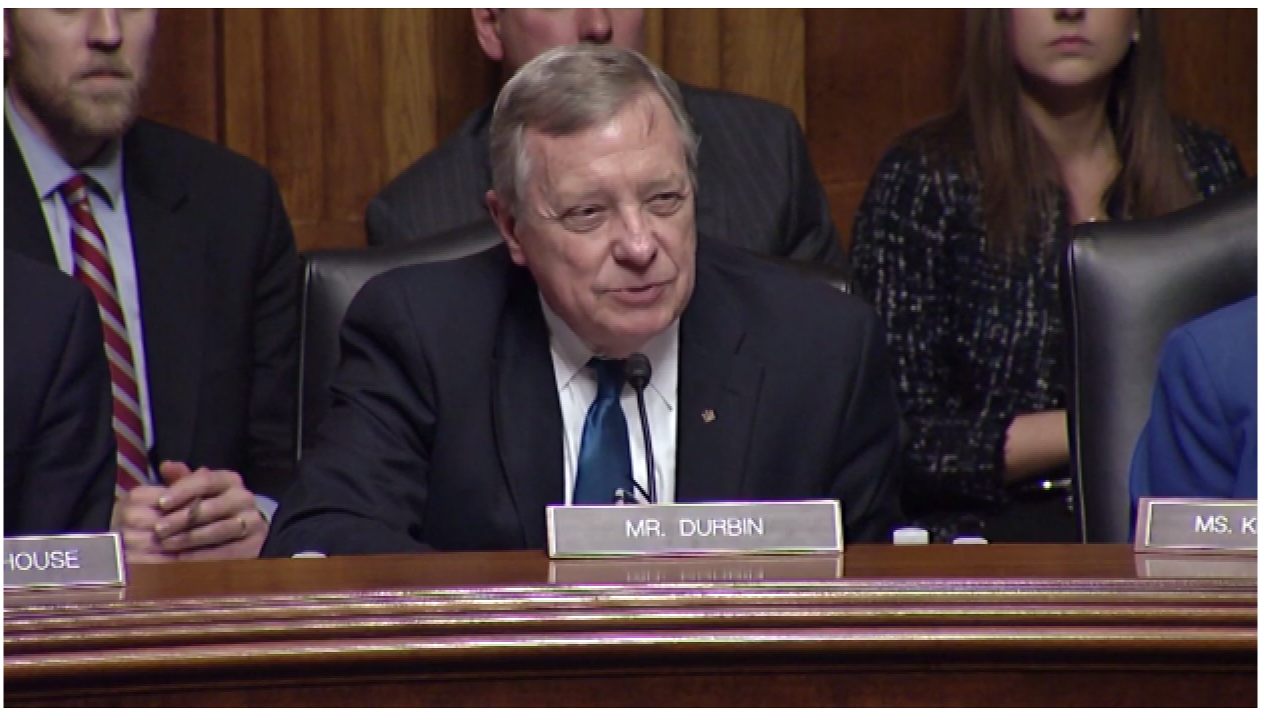

WASHINGTON – Led by Senators Dick Durbin (D-IL), Patty Murray (D-WA), Elizabeth Warren (D-MA), and Sherrod Brown (D-OH),and Representatives Bobby Scott (D-VA), Rosa DeLauro (D-CT), Susan Davis (D-CA), and Suzanne Bonamici (D-OR), 48 Members of Congress sent a letter to Secretary of Education Betsy DeVos slamming her recent decision to delay the “borrower defense” rule thatwould provide defrauded students with debt relief and hold predatory institutions accountable for cheating students across the country.

“The widespread fraud committed by Corinthian wreaked havoc on the lives of tens of thousands of students nationwide, leaving them with high levels of debt, poor job prospects, useless degrees and credentials, and in many cases no degree at all,” wrote the Members of Congress. **“Delaying the provisions of the borrower defense rule will be enormously detrimental to states, taxpayers, and thousands of student loan borrowers.”**

The “borrower defense” rule was finalized in October 2016, and was set to go into effect July 1, 2017. Ahead of this deadline, Senators Murray, Warren, Brown, and Durbin urged Secretary DeVos to stand up for students and taxpayers and fully implement the rule. The rule included further protections for students, including banning forced arbitration, automatically discharging the loans for students who attended schools that collapsed, and requiring for-profit colleges to notify prospective students of poor repayment outcomes. Additionally, the rule protects taxpayers by placing risky schools on the hook to repay students and the federal government when they close or defraud students.

Full letter text is here and below:

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Secretary DeVos:

We are writing in strong opposition to the U.S. Department of Education’s (“Department”) recent decision to delay the borrower defense rule and abandon its responsibility to protect students and taxpayers. The justifications made by the Department for delaying the effective date of borrower defense are legally questionable, inconsistent, and clearly prioritize the concerns of special interests over those of struggling students and families.

Congress granted the Department the authority to discharge the debts of students who have been cheated by institutions of higher education because students should not be stuck with the bill when a predatory school commits fraud—particularly fraud that is designed to capture their student aid. Over the years, some colleges have engaged in routine and widespread misconduct and have skirted federal rules in the pursuit of profit. The results have been higher levels of debt, poorer outcomes for students, and more risk for taxpayers. The authority to discharge outstanding debt and reimburse students for amounts paid on their student loans was instrumental in addressing the collapse of Corinthian Colleges, Inc. ("Corinthian"). The widespread fraud committed by Corinthian wreaked havoc on the lives of tens of thousands of students nationwide, leaving them with high levels of debt, poor job prospects, useless degrees and credentials, and in many cases no degree at all.

At the time of this massive school closure, the Department was relying on antiquated borrower defense regulations developed in 1994. In order to ensure a fair system for addressing the needs of students who were defrauded by predatory colleges abusing federal funds, the Department initiated negotiated rulemaking and public comment last year to update the old rule and include additional consumer and taxpayer protections. This rulemaking considered and incorporated the advice and recommendations from numerous individuals and groups concerned with or involved in the student financial assistance programs, including students, institutions of higher education, and many Members of Congress. The feedback from both rulemaking and public comment is documented extensively in 81 FR 75926. The Department's action to delay provisions of the final rule disregards stakeholder feedback and provides insufficient reasoning before a new rulemaking can take place.

In announcing a partial delay of the effective dates of sections of the borrower defense rule on June 16, 2017, the Department cited 5 U.S.C. § 705 of the Administrative Procedure Act (APA), which allows an agency to suspend an agency action pending judicial review when it "finds that justice so requires." The Department has never before used a justification under 5 U.S.C. § 705 to delay the implementation of a pending regulation due to litigation. To do so now in order to delay consumer protections for student borrowers and safeguards for taxpayers is both highly unusual and legally suspect. If the mere existence of a lawsuit is enough for the Department to trigger the delay of a rule's implementation, then the narrow circumstances envisioned in the APA would widen considerably beyond the intent of Congress.

Furthermore, it is unclear how any other justifications to delay the implementation of the borrower defense rule would be legally defensible. In order to ensure the Department does not simply override the interests of stakeholders, the APA and the Higher Education Act (HEA) prohibit the Department from unilaterally amending or delaying a regulation except in very narrow circumstances or through a new rulemaking process. For example, the Department may waive negotiated rulemaking to modify a regulation in cases where it finds "good cause" that a new negotiated rulemaking session would be "impracticable, unnecessary, or contrary to the public interest." These justifications to bypass rulemaking have been used only in rare instances. In this case, implementing the borrower defense rule without delay is practicable, necessary, and strongly in the public interest. Delaying the provisions of the borrower defense rule will be enormously detrimental to states, taxpayers, and thousands of student loan borrowers.

In the Department's notice delaying the effective date it noted that the borrower defense regulation would require institutions of higher education *"to modify their contracts in accordance with the arbitration and class action waiver regulations, which may be contrary to their interests. Postponing the final regulations will avoid the cost that institutions would incur in making these changes…"* Indeed, this was the express intent of the regulation issued, and the modification of institutional enrollment contracts is not an unforeseen impact of the regulation. The final rule was published in the Federal Register on November 1, 2016 and institutions have had eight months to prepare for implementation. Responsible institutions would have already done the work to come into compliance with this provision, as it was set to go into effect less than a month before the delay was announced. It is unclear why the Department suggests that the burden of coming into compliance with the rule justifies delaying it.

Pre-dispute, forced arbitration clauses—often buried in the fine print of school enrollment agreements—limit students' rights of legal redress. Under forced arbitration, students lose their legal rights to file lawsuits as individuals or as part of a class action. Forced arbitration prevents students from holding institutions directly accountable for abuses in an open and impartial forum. The secrecy of arbitration proceedings and the use of gag orders also prevent student complaints from becoming public, and thus hampers the ability of the Department, other federal regulators, state authorizers, and state law enforcement agencies to uncover wrongdoing.

In written answers to questions for the record submitted during your confirmation, you indicated that you believe that students who have concerns or complaints about their institutions have the right to raise those concerns publicly and, when students are defrauded by their college, that they have a right to seek legal remedies in court. So we find it suspicious that that you now believe these legal rights for students are unnecessary or problematic. The regulation's prohibition on the use of forced arbitration, class action bans, and gag orders includes issues that could result in borrower defense claims, and as such serves to protect taxpayers. It is also against the interest of justice to allow the use of forced arbitration, class action bans, and gag orders in higher education.

The Department asserts that a delay of borrower defense will avoid *"significant costs to the Federal government and ultimately the Federal taxpayer."* This assertion and circular logic is plainly at odds with the facts. By the Department's own estimate, processing claims for the current cohort of borrowers under the new standard would only increase costs by 10 percent compared to the existing 1994 rule, which is in large part due to the additional Secretarial authority provided by the new rule to protect taxpayers. Therefore, a precipitous increase in costs under the new rule is not a foregone conclusion, and is largely under your control. Furthermore, the Department's primary budget scenario of the borrower defense rule noted that institutions would annually transfer an estimated $994 million to students and the federal government as reimbursement for successful claims. In short, the borrower rule protects taxpayers and reduces the costs of discharges to taxpayers by placing schools on the hook for the costs of their own fraud and establishing new tools to be used at the discretion of the Secretary to require risky schools to provide funds to cover costs of potential discharges for fraud or closure. These provisions would deter misconduct and send a strong message to schools that they will be held financially accountable for mistreating their students. While the rule is delayed, these reimbursements will be put on hold indefinitely, which will result in increased costs to the federal government and ultimately to the federal taxpayer.

The rule you have chosen to delay would also further safeguard taxpayers by providing you with tools to ensure colleges are financially responsible. Specifically, the tools at your disposal include requiring schools to obtain a letter of credit or surety in the case of triggering events such as serious state or federal investigations; loss of eligibility of gainful employment programs; withdrawal of owner equity; or a suspension of trading in or delisting of an institution's stock that could lead to a credit downgrade. Many of these examples occurred during or leading up to the collapse of Corinthian. In the last full fiscal year preceding its collapse, Corinthian received $1.439 billion in Title IV, HEA funding. Under the rule you have delayed, the Department would have the power to require an institution like Corinthian to guarantee that some of the federal funds it receives can be paid back in the case of closure.

Finally, the decision to suspend automatic closed school discharge provisions—which have been eligible for early implementation since November 1 of last year—will harm student loan borrowers. This provision of the borrower defense rule established processes for automatically discharging the outstanding debt of students three years after their institutions closed. As of June 9, 2017, there were at least 412 campuses that are recorded to have closed on or after November 1, 2013 through June 30, 2014. Former students who attended these 412 schools are potentially eligible for immediate relief if the Department would lift this unnecessary delay. According to the Department's analysis, less than half (47 percent) of all federal student loan borrowers who attended schools that closed between 2008 and 2011 had received the closed school loan discharge they are legally entitled to, in part because schools are not required to notify students of their eligibility for loan discharge. Further, in the Department's own Fiscal Year 2018 budget proposal, it notes that costs associated with the automatic closed school discharge provisions have already been incorporated into budget assumptions for the Direct Loan program. Costs associated with automatic closed school discharge are therefore not unexpected costs that would justify a delay of this provision or the rule.

The borrower defense rule is supported by twenty state attorneys general who work directly with defrauded students and have witnessed these abuses for years. A recent report by the Department's Office of Inspector General found that the borrower defense rule will improve the Department's procedures for *"identifying Title IV schools at risk of unexpected or abrupt closure"* and *"mitigating potential harm to students and taxpayers."* The rule is further supported by numerous advocates for students, consumers, communities of color, faculty, and staff. Groups representing military veterans and servicemembers—who have suffered some of the most egregious forms of fraud and abuse at the hands of predatory colleges in recent decades—also strongly support the borrower defense rule.

Our nation's students should never have to worry about being preyed upon while they work hard and invest in themselves with postsecondary education. The borrower defense rule is a critical part of the Department's responsibility to protect students and appropriately oversee taxpayer dollars. Delaying the rule directly harms students and taxpayers, and will increase the risk of repeating recent history when students were left holding the bag while executives at collapsing institutions walked away with millions in profits. We urge you to reverse course and allow the borrower defense rule to go into effect immediately.