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Project on Predatory Student Lending
Legal Services Center of Harvard Law School
Comments on PLUS Loan Program
Proposed Regulations
Docket ID: ED–2014–OPE–0082

Submitted September 8, 2014

These Comments are submitted in response to the Department of Education's proposed amendments to the PLUS Loan Program, published August 8, 2014 (79 Fed. Reg. 46640).

The Project on Predatory Student Lending is dedicated to helping low-income student loan borrowers who have been victimized by predatory practices of for-profit schools. Working in collaboration with other social service providers, community groups, and non-profits, we help and advise student loan borrowers throughout Massachusetts who are struggling with loans they cannot pay and financial and legal systems they cannot navigate alone. The Project is a program of the Legal Services Center, a community-based legal services organization and clinical teaching site of Harvard Law School. Toby Merrill, Director of the Project on Predatory Student Lending, was the alternate negotiator representing legal aid clients at the negotiated rulemaking sessions in which these regulations were discussed.

Our clients come to us with crushing and unaffordable student loan debt in the form of federal, private, and institutional student loans. Their debt often results from enrollment in programs that they never completed, in service of credentials they never obtained. Others complete their programs, but cannot find any of the (falsely) promised employment opportunities that induced them to incur the debt. Many of them have unknowingly signed enrollment agreements containing sweeping arbitration clauses purporting to waive their right to seek relief in court. Parents with modest or low incomes take on massive debts to support their children's education, and ultimately risk foreclosure or eviction when student loan payments or garnishment render homes unnafordable.

Parents who seek our help with debts incurred for their children's education – especially Parent PLUS loans – are often in particularly dire circumstances. The PLUS loans they have obtained have higher interest rates than other types of student loans, lack any limits on amount borrowed, are not eligible for the income-based repayment plans available to other federal student loan borrowers, and can rarely be discharged in bankruptcy. As a result, low-income Parent PLUS borrowers come to us with much larger debts, and fewer options for averting or resolving defaults.

The consequences of such defaults are severe and long-lasting. Without the school, lender, or servicer taking any action in court whatsoever, Parent PLUS loans can be collected through garnishment of wages, tax refunds, earned income tax credits, and social security benefits. Most student loans survive bankruptcy. Defaulted student loan borrowers are also subjected to the extraordinarily lawless practices of the debt collection industry:[1] our clients receive abusive and deceptive letters and are harassed and threatened to the point of physical illness. When they should start to think about how they might be able to provide for retirement, our clients with Parent PLUS loans instead must cope with housing instability and wage or benefit garnishment, even as they are often still providing for the child whose education the loans funded. Over 100,000 recipients of social security experienced garnishment of their benefits because of outstanding student loan debt.

We agree with the Department that the changes to regulation of the PLUS loan program should "strike a balance between the public policy interests of ensuring access to higher education while helping to ensure that borrowers do not take out loans that their past financial credit history indicates they will not repay."[2] We unequivocally support federal policies that provide opportunities for higher education to those for whom it would otherwise be financially out of reach. These policies, including PELL grants, subsidized student loans to low- and moderate-income students, and federal grants directly to schools that serve minority students, are vitally important to increasing access to higher education to low-income students. These programs would be excellent targets for resources intended to expand opportunities for higher education to more low-income students. The Proposed Rule, however, moves only toward broadening the availability of PLUS loans, without attending to related risks to borrowers and taxpayers. These comments highlight ways that the proposed changes harm borrowers and taxpayers, negating the individual and societal gains that federal financing of higher education seeks to promote.

I. The proposed changes expand the availability of PLUS loans to more parents in financial distress.

Each of the changes proposed by the Department loosens limits previously in place to protect borrowers and taxpayers. The Department explicitly acknowledges that no data evidences the safety, much less the helpfulness, of these changes. What little data has been made available suggest that the changes pose risks to borrowers and taxpayers.

A. The proposal creates a "threshold" for delinquent debt without any evidence to support the threshold amount, and with knowledge that applicants approved under the proposed rule will be less likely to be able to repay their loans.

The Department currently considers debts of any amount that are ninety or more days delinquent to be an indication that a PLUS applicant has an "adverse credit history," and denies the loan application. Upon request from the applicant, the Department will consider

[1] *See, e.g.*, Deanne Loonin & Persis Yu, *Pounding Student Loan Borrowers: The Heavy Costs of the Government's Partnership with Debt Collection Agencies*, National Consumer Law Center (Sept. 2014); Andrew Martin, *Debt Collectors Cashing in on Student Loan Roundup*, N.Y. TIMES, Sept. 8, 2012, at A1.
[2] 79 Fed. Reg. 46639, 46645 (Aug. 8, 2014).

documentation of "extenuating circumstances." One such circumstance is that the delinquent debt is less than $500, and the applicant submits a statement satisfactorily explaining that balance.[3]

The Department's proposal changes the definition of adverse credit history to exclude delinquent debts up to $2,085. In other words, if an applicant is ninety or more days overdue on a credit card or utility bill, so long as that bill is for less than $2,085, the Department will determine that the applicant's credit is perfectly satisfactory, and approve the applicant to borrow unlimited amounts of taxpayer money at an interest rate of 7.2%.[4]

"The Department," however, "does not have data to determine if borrowers who would have been considered to have an adverse credit history in the absence of the proposed regulations have a greater incidence of default or repayment difficulty."[5] In other words, there is no evidence to suggest that granting unlimited credit to applicants with $2,085 of delinquent debt is reasonably likely to do more good than harm to borrowers and taxpayers. To the contrary, $2,085 simply represents the median amount of delinquent debt that caused denials of Parent PLUS applications last year.[6] Indeed, the Department acknowledges, albeit opaquely, that borrowers whose applications would have been denied under the prior standard are less likely to be able to pay back their Parent PLUS loans.[7]

While more forgiving standards for negative credit history may be appropriate for Parent PLUS loans, it is reckless for the Department simply to approve half of the applicants it would previously have rejected. In order to protect applicants as well as taxpayers, the Department should implement any loosened credit standards in a rational fashion. For instance, the Department could ensure that it extends credit to those whose blemished credit histories do not indicate more serious financial problems by excluding from consideration types and amounts of debt that have been shown not to correlate with credit risk, such as certain medical debts. By implementing a considered underwriting that seeks to avoid borrower defaults, the Department could expand the availability of PLUS loans to those they will actually help, rather than blindly

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[3] *See* 34 C.F.R. § 685.200(c)(1)(vii)(D) ("the Secretary may determine that extenuating circumstances exist based on documentation that includes, but is not limited to . . . a satisfactory statement from the borrower explaining any delinquencies with outstanding balances of *less than* $500") (emphasis added). The Notice of Proposed Rulemaking misstates the effect of the current regulations, suggesting that applicants may qualify for PLUS loans by submitting statements explaining delinquent debts of *more than* $500. *See* 79 Fed. Reg. 46639, 46645 ("Current § 685.200(c)(1)(vii)(D) specifies that, for purposes of documenting extenuating circumstances, the Secretary may rely on a satisfactory statement from the applicant explaining any delinquency with an outstanding balance greater than $500.").

[4] Parent PLUS loans made during the 2014-2015 school year will have a 7.21% interest rate. *Interest Rates for New Direct Loans*, Federal Student Aid, https://studentaid.ed.gov/about/announcements/interest-rate (last visited Sept. 5, 2014).

[5] 79 Fed. Reg. at 46645.

[6] *Id.* ("to reflect the estimated median debt level for all debts with a status of in collection, charged off, or 90 or more days delinquent, from all Parent PLUS loan denials resulting from all credit checks conducted between the spring of 2012 and the spring of 2013"). By this reasoning, the Department might instead approve applicants based on the average height of the prior year's denied applicants.

[7] *Id.* ("if a subsidy rate were available for this subgroup of PLUS borrowers, it would likely differ from the overall PLUS subsidy rate").

accepting a large number of applicants[8] for whom such loans were previously deemed imprudent.

B. The proposal shortens to two years the length of time that debts in collection and charged off debts will constitute adverse credit history, thereby ignoring debts that are still subject to collection lawsuits in <u>every</u> state.

The proposed regulations shorten the time that debts of over $2,085 that are in collection or that have been charged off will constitute adverse credit history from five years to two years. The Department explains that it settled on a two-year period because an even shorter, one-year period would not be not sufficient "to measure a PLUS loan applicant's history," but a five-year period is appropriate only for "major, long-term items" such as default determinations, bankruptcies, foreclosures, repossessions, tax liens, garnishments, or write-offs of other federal student loans.[9] The Department, however, offers no affirmative justification of its choice of a two-year period.

One way to determine a reasonable period for considering charged off debts and debts in collection would be to relate the period to the statute of limitations for the debt. The statute of limitations is the length of time, determined by the state, after which a creditor may no longer sue to collect a debt. Although the statute of limitations on a written contract varies from state to state, the average period in all states and the District of Columbia is just over six years.[10] The shortest in any state is three years, and the most common statute of limitations on a written contract is six years—used by twenty-two states—and the next most common are five years (eight states), three years (eight states), and ten years (seven states).[11] Therefore, the proposed regulation declines to consider debts that would still be subject to collection by lawsuit in <u>every</u> state. [12] The proposed period is less than a third of the average of state statutes of limitations on written contracts.

The elimination of more than half of the look-back period for debts in collection and charged off debts is completely arbitrary. The Department offers no facts nor any hypothesis as to why one and two-year-old debts are more reasonably considered adverse credit history, or more closely tied to risks to borrowers and taxpayers than three, four, and five-year-old debts. Moreover, the Department's data show that when lenders did <u>not</u> consider charged off debts and debts in collection as indicators of adverse credit history, borrowers defaulted an average of about 45% more frequently than when lenders <u>did</u> consider these indicators of adverse credit

[8] The Department estimates that approximately 370,000 more PLUS loan applicants would be found not to have an adverse credit history under the proposed changes. *See* 79 Fed. Reg. at 46641.
[9] 79 Fed. Reg. at 46646-47.
[10] *See* Gale, *Civil Statutes of Limitation*, 0020 SURVEYS 1.
[11] *Id.*
[12] The Department determined that, "because the statute of limitations on debts varies from State to State, we do not think that it is a useful standard in determining the length of the look-back period for collections and charge-offs in the PLUS loan program." 79 Fed. Reg. at 46646. That the limitations periods vary does not undermine their relevance to the length of time for which a charged off debt or a debt in collections should be considered adverse credit history.

history.[13] By choosing to ignore evidence of financial distress when granting access to unlimited credit, the Department does a disservice to struggling families, who may be approved for and borrow multiple years of PLUS loans and then be sued on other outstanding debts of which the Department was aware.

Under the proposed rule, the Department would be required to approve unlimited PLUS loans to borrowers without significant income and with large debts that have recently been charged off or sent to collections. Lending huge amounts of money[14] to low-income people already in financial trouble is precisely the predatory practice that caused the sub-prime mortgage disaster.

II. Without any assurance that the proposed changes will not actually harm families, the proposed regulations advance an empty conception of "access."

Because no evidence supports the proposition that the proposed changes would "ensur[e] that borrowers do not take out loans they will be unable to repay without hardship" nor "protect[] the Federal fiscal interest by ensuring that borrowers repay their student loans," the proposed changes are justified only by the assertion that they will "[e]nsur[e] greater access to higher education for all students and families."[15]

"Access to higher education" necessarily requires the meaningful opportunity to benefit from higher education.[16] Parent PLUS loans can only create real access to higher education for lower-income students when those loans are affordable to the borrower for the life of the loan, and do not foreseeably put the financial well-being of the parent at risk over the term of the loan.[17] When a child's opportunity to attend college entails her parent's financial ruin, the underlying policy should instead be described as anti-social security, or, more simply, a debt trap. Students whose parents' credit would not otherwise permit significant student loan debt do not gain "access" to higher education by means of federal loans to those parents in unlimited amounts. To the contrary, this type of reckless lending is injurious to families, and systematic reckless lending is injurious to society.

The limited data released by the Department include troubling signs that many outstanding PLUS loans are not affordable, and that the proposed changes would exacerbate the

[13] The three-year cohort default rates for Parent PLUS borrowers provided for the second negotiating session separate Direct Loan and FFEL borrowers for 2006-2010. *See PLUS Borrowers 3-Year Cohort Default Rate*, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii2-plusborrowers-cdr.xls. During the time when the loans in those cohorts were made, FFEL lenders denied applicants who had debt that had been charged off or was in collections, while the Direct PLUS loan program approved applicants with those same credit indicators. On average, the Direct Parent PLUS borrowers defaulted 45.5% more than the FFEL Parent PLUS borrowers.

[14] In 2014, Parent PLUS borrowers for students who attended four-year schools owed an average of over $22,000. *See Debt of PLUS, Parent PLUS, and Graduate PLUS Borrowers*, http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii2-debtofplus.xls.

[15] These are the three purposes offered in the Notice of Proposed Rulemaking. 79 Fed. Reg. at 46645.

[16] See OXFORD ENGLISH DICTIONARY (3d ed. 2011) ("Access: The right or opportunity to benefit from or use a system or service").

[17] The Department asserts: "PLUS loans often help lower-income students who may lack the personal or family resources to pay for college." 79 Fed. Reg. at 46651.

problem. Although PLUS loans are the only type of student loan to require any evaluation of the borrower's credit, almost 100,000 Parent PLUS borrowers were unable to make payments for nine or more months within their first three years of repayment[18] during the period for which the Department provided data.[19]

III. Meaningful Access Entails Affordability.

The way to ensure that Parent PLUS loans provide meaningful access to higher education – access that does not recklessly trade children's tuition for their low-income parents' financial well-being – is to interpret "adverse credit history" to mean a credit history that reflects adversely upon the risks presented by lending an applicant a significant amount of money to that person. This approach permits the Department to consider a broad range of factors in determining adverse credit history, as lenders in the discontinued FFEL program were explicitly permitted to do when unlimited PLUS lending first came into being.[20] Regulations requiring the Department to consider factors indicating the affordability of the loan would be a natural and reasonable reading of the statutory prohibition on PLUS loans to borrowers with "adverse credit history."[21]

During the negotiated rulemaking sessions, federal negotiators took the position that, twenty years ago, the Secretary determined that consideration of a borrower's ability to repay was not statutorily authorized, and because the statute has not been amended in the intervening twenty years, that determination stands.[22] However, the twenty-year-old statement merely asserts that the Department was not authorized to impose an additional ability-to-repay regulatory criterion separate from its regulations defining adverse credit history.[23] Incorporating measures of affordability into the "adverse credit history" standard would not run afoul of this interpretation, and would serve all three of the Department's stated interests—(meaningful) access; avoiding lending that will cause financial hardship; and protecting taxpayers.

Even if Secretary Riley's statement, made in a 1994 Notice of Proposed Rulemaking for the FFEL Program, were taken to mean that regulations requiring consideration of ability to repay PLUS loans are not statutorily authorized under any circumstances, the statement does not preclude the Department from reconsidering Secretary Riley's interpretation of the statute. Indeed, given the changes to the federal student aid program that have taken place in the last

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[18] *See PLUS Borrowers 3-Year Cohort Default Rate*, *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/pii2-plusborrowers-cdr.xls.

[19] *See id*.

[20] *See* Proposed Rules, 59 Fed. Reg. 12484-01, 12488 (Mar. 16, 1994) (noting, in response to FFEL lenders' concerns about borrowers' ability to repay their newly-unlimited PLUS loans, that "a lender is not prohibited from maintaining a lending policy that would examine parental ability to repay the PLUS loan").

[21] 20 U.S.C. §1078-2(a)(1)(A); 20 U.S.C. §1078e(a)(1).

[22] *See*, *e.g.*, Rachel Fishman, *Program Integrity Negotiated Rulemaking Session 2, Day 3*, New America EdCentral (March 28, 2014), http://www.edcentral.org/program-integrity-negotiated-rulemaking-session-2-day-3/.

[23] *See* Proposed Rules, 59 Fed. Reg. 12484-01, 12488 (Mar. 16, 1994) ("Some lenders recommended that the proposed regulations used to determine borrower eligibility for PLUS loans go beyond a standard to determine adverse credit history to also include a determination of a borrower's ability to repay the debt. Although the Secretary shares the lenders' concerns, he declined to accept the negotiators' recommendation because there is no statutory authority for including such an additional eligibility criterion. However, the Secretary notes that a lender is not prohibited from maintaining a lending policy that would examine parental ability to repay the PLUS loan.").

twenty years, including the inception of the Direct Loan Program in 1994 and the elimination of the FFEL Program in 2010, the Department has reason to reconsider this untested assertion.

In the Notice of Proposed Rulemaking, the Department does not mention its reliance on its prior interpretation of the statute. Instead it takes up the position, for the first time, that the term "adverse credit history" has a specific, restrictive meaning that permits only the consideration of "an individual's history of repaying existing debt" or "whether that individual has repaid debt in the past," and not "whether the individual has the financial ability to repay a specific level of debt."[24] However, the Department cites no authority for this new and restrictive definition, which is at odds with common usage and its own usage in another context. On its Federal Student Aid website, used to provide information to borrowers, families, and the public, the Department defines adverse credit history as "a summary of your financial strength, including your history of paying bills and your ability to repay future loans."[25]

Despite the broad statutory delegation to the Department to determine the meaning of the term adverse credit history, the Department's most recent justification for refusing consider factors related to an applicant's ability to repay insists on a narrow reading not supported by the statutory text, its interpretation of the phrase elsewhere, nor common sense. We urge the Department to acknowledge its authority to consider the affordability of Parent PLUS loans for individual applicants, and to include factors that indicate that an applicant can afford significant debt in its regulations defining adverse credit history. To do otherwise invites severe financial harm to the families of limited means that these changes claim to benefit.

We thank the Department for its consideration of these comments. Please feel free to contact Toby Merrill with any questions at 617-390-2576 or tomerrill@law.harvard.edu

[24] 79 Fed. Reg. at 46645.
[25] *Glossary*, Federal Student Aid, https://studentaid.ed.gov/glossary (last visited Sep. 5, 2014) (emphasis added).