



VETERANS EDUCATION SUCCESS

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DeVos's Proposed Borrower Defense Rule Rewrites Epitaph For Predatory Schools Like Corinthian and ITT

(Washington, D.C.) Today, the Department of Education released its proposed rewrite of the Obama administration's 2016 Borrower Defense regulation.

"On issue after issue," said Walter Ochinko, the VES Research Director who served as a Borrower Defense negotiator in 2016 and 2018, **"the DeVos proposed rule takes the side of predatory schools, eviscerating the protections that the previous administration accorded to defrauded students. It would be unconscionable for the Department to incentivize default by limiting eligibility to file a claim to those students who have stopped paying off their federal student loans and are in collections. Moreover, consistent with its perspective on for-profit schools, the Department's proposal rewrites the history of Corinthian—the large for-profit school that declared bankruptcy in 2015 when the Department imposed a \$30 million fine for the school's widespread misrepresentation of job placement rates. Corinthian was treated unfairly, the Department concludes. Such revisionism is astonishing given that Corinthian was the "poster child" for predatory schools. Do DeVos and her for-profit-industry staffers really believe that students would be better off if predatory schools like Corinthian were allowed to continue defrauding students? Unfortunately, it appears that the answer is yes."**

During both the 2016 and 2018 rulemaking negotiations, robust discussion occurred around key issues related to defining the standards and process for borrower defense, including eligibility, group discharges, time limits, the appropriate misrepresentation standard, evidentiary requirements, financial responsibility protections, and forced arbitration. Student advocates urged the Department to (1) focus on the systemic nature of misrepresentation by predatory schools by establishing a standard and process with minimal barriers to loan relief; (2) put in place financial responsibility

standards that deter schools from engaging in risky behavior to ensure that taxpayers won't be left holding the bag for student loan discharges; and (3) allow students to exercise their constitutional right to bring claims to impartial judges and juries.

Rather than protecting students *as well as* taxpayers, the proposed rule incentivizes bad behavior by predatory schools, sending the message that (1) few students will actually be eligible to file a borrower defense claim; (2) schools can engage in risky behavior with a reduced likelihood of being asked to provide financial guarantees to protect taxpayers from the cost of loan discharges; and (3) students will have no alternatives to forced arbitration, which exists primarily to shield predatory school behavior from scrutiny by both the public and by the Department of Education.

So, just how bad is DeVos's proposed regulation, which would apply to any new federal student loans originated after its July 2019 implementation? Let's look at how student veterans who attend predatory schools, like Corinthian and ITT Tech, would fare if the regulation were implemented as written:

- ***Proposed Eligibility Limitations.*** Although the proposed rule seeks public comment on whether students who are paying down their federal loans should be allowed to file borrower defense claims, the Department appears to prefer limiting eligibility to borrowers who have *defaulted* on their loans and are in collections. This preference is evident in the arguments laid out in the proposed rule.

First, the Department erroneously asserts that the statutory basis for its 1995 borrower defense rule limited claims to students who had already defaulted. Second, it argues that allowing students who are not in default to file claims would open the floodgates to "frivolous" applications and would require instituting appropriate barriers, such as substituting a more onerous evidentiary standard. Third, the Department asserts that limiting eligibility to students in default would reduce the regulatory burden on the Department because there would be "fewer successful defense to repayment applications, and therefore fewer discharges of loans." It would also let predatory schools off the hook for their reprehensible behavior by severely and unfairly limiting who is eligible for loan forgiveness.

Limiting eligibility to students in default would be a disservice to all defrauded students who are in repayment. Despite finding that employers don't respect a degree from predatory schools like Corinthian or ITT, most veterans choose to continue making student loan payments in order to avoid the severe consequences of default. For active-duty servicemembers who are using Defense Department educational benefits or the GI Bill, defaulting could result in the loss of their security clearance and discharge from the military.

In reality, the Department's own preference to limit claims to those in default creates an "incentive to default." The Department even suggests that advocates

might encourage students to default in order to qualify for loan forgiveness. Because the 2016 rule applied to students in repayment, there was no such incentive.

- **No Group Discharge.** Although the Department successfully partnered with the California state Attorney General to document Corinthian's systematic misrepresentation, there is no group discharge process under the proposed rule—each veteran would have to submit an individual borrower defense application. The 2016 rule, in contrast, included a group discharge process to help expedite the Department's review of comparable claims against the same school. Moreover, actions by accreditors, which the Department relied on in the case of ITT in 2016, appear to hold little weight in the proposed rule. The Department intends to view such actions as requiring discretionary rather than mandatory responses on its part.
- **Caveat about Time Limits to File Claims.** In the case of time limits on filing claims, the devil is in the details. Although none are recommended in the proposed rule, there is a significant caveat. Veterans in default who face having their wages garnished or their tax refunds withheld must meet filing deadlines of 30 to 65 days in order to challenge such actions. Veterans who miss these deadlines are out of luck because the proposed rule renders them ineligible to file a borrower defense claim. The 2016 rule had no time limits on filing claims for the discharge of loan balances still owed.
- **Narrow Misrepresentation Standard.** The proposed rule excludes "quality of education," which the Department characterizes as difficult to quantify. Consequently, the standard lets predatory schools off the hook when they skimp on instruction but claim "we're as good as Harvard." For example, Corinthian sent nursing students to a "scientology museum" rather than hospitals for practical training and another predatory school used "veterinary supplies" in its nursing classes. ITT Tech reportedly used outdated equipment and textbooks for its information technology classes. Another common complaint from veterans is the churning of instructors teaching a class as well as the prevalence of instructors whose idea of teaching is reading from the textbook. None of these issues are considered valid concerns in the proposed rule.
- **Daunting Evidentiary Requirements.** The proposed rule acknowledges that veteran students probably don't have a tape recording of what they were told by school admissions staff. Nonetheless, it requires veterans to submit "additional evidence" of misrepresentation; show "reckless disregard" on the part of the school; and demonstrate that they relied on the misrepresentation and were harmed financially in specific ways. Taking out expensive loans that they wouldn't have if their school hadn't lied to them doesn't count. If a veteran happened to land a job *despite attending a predatory school*, the merit of the claim will be viewed as questionable. In contrast, the 2016 rule presumed veterans relied on any school misrepresentations that were found to be widespread and even waived the

requirement for an application. Although veterans may lack documentary evidence of misrepresentation, their complaints are strikingly consistent and, as such, provide strong evidence of systemic fraud on the part of predatory schools: (1) ending up with student loans that they didn't want, need, or authorize given their generous GI Bill benefit; or (2) being "rushed" to enroll by ITT Tech admissions staff who used electronic notepads to obtain signatures so that veterans couldn't see the actual documents they were signing, (3) being told that their credits will transfer to any other public or nonprofit institution, and (4) finding that their schools' accreditation doesn't really qualify them to obtain the state licensure or certification needed for employment.

- ***Holding Institutions Financially Responsible.*** The proposed rule substantially weakens the front-end, financial responsibility standards in the 2016 regulation that identified early warning signs of risky school behavior. Schools that triggered these early warning signs would have been required to provide the Department with financial guarantees (letters of credit) as insurance that taxpayers wouldn't be left holding the bag for loan discharges related to school closures and borrower defense claims. The proposed regulation, however, drops the use of lawsuits related to the making of a federal loan as an early warning sign and shrinks the number of mandatory early-warning signs from eight to three. Thus, failing to meet the requirement that schools obtain at least 10 percent of their funding from sources other than federal student aid would no longer automatically require a school to provide the Department with a financial guarantee. When Corinthian, and ITT closed abruptly, the Department had no or insufficient up-front financial guarantees to cover the costs of student loan discharges resulting either from their closure or from the significant number of borrower defense claims.
- ***Preference for Forced Arbitration.*** Not only does the proposed rule demonstrate a preference for limiting who is eligible to file a borrower defense claim, but it also cuts off redress through the courts. The rule doesn't ban forced arbitration provisions, which are common among predatory schools but entirely absent from college enrollment agreements at public and nonprofit institutions. In fact, the rule says that the Department prefers that students and schools resolve disputes among themselves. It's not, however, a level playing field. Forced arbitration puts the school in charge of hiring a mediator—an individual who has a financial incentive to rule in its favor. Between 2011 and 2015, *only 71* students pursued arbitration against Corinthian with the American Arbitration Association (AAA), *only one* received any monetary award (\$14,445), and *none* received any non-monetary relief. In contrast, the 2016 regulation barred schools that participate in title IV from using forced arbitration clauses and class action bans to insulate themselves from liability for the same types of fraudulent conduct that could also give rise to a borrower defense claim. It also increased transparency by requiring schools to report data on arbitration outcomes, reporting that the Department now claims is too burdensome for both schools and the Department.

The proposed rule purports to better balance the interests of students, taxpayers, and schools. In reality, it extends a lifeline to predatory schools. In the eyes of this Department, borrowers have replaced predatory schools as the most likely threat to taxpayers' investment in the federal student loan program.

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Veterans Education Success is a nonprofit organization dedicated to protecting and defending the integrity and promise of the GI Bill and other federal education programs for veterans and servicemembers.