

June 29<sup>th</sup>, 2021  
Docket ID: ED-2021-OPE-0077

Dr. Michelle Asha Cooper  
Acting Assistant Secretary for Postsecondary Education  
and Deputy Assistant Secretary for Higher Education Programs  
United States Department of Education  
400 Maryland Avenue, SW  
Room 2C179  
Washington, DC 20202

Dear Dr. Cooper,

Thank you for the opportunity to provide input on topics for negotiated rulemaking. The American Association of University Professors (AAUP) submits these comments in response to the U.S. Department of Education's ("the Department") Office of Postsecondary Education (OPE) announcement on May 24<sup>th</sup> of a public comment and hearing period to "receive stakeholder feedback on potential issues for future rulemaking sessions."<sup>1</sup> These written comments elaborate the live comments that were provided by the AAUP at OPE's public hearing on June 21st.

The AAUP is the oldest organization of its kind, representing faculty and graduate employees in institutions of higher education. Since its founding in 1915, the AAUP has been an active and influential voice in higher education. The AAUP defines and develops fundamental professional values, standards, and procedures for higher education; advances the rights of academics, particularly as those rights pertain to academic freedom and shared governance; and promotes the interests of higher education teaching and research.

#### SCOPE AND LIMITATIONS OF PROPOSED RULEMAKING

Shared governance is one of the AAUP's core values. We appreciate the new leadership of the Department and the OPE in their efforts the past few months to convene listening sessions, hold public comment and hearing periods, and meet with stakeholders about major areas of concern. The broad scope of the proposed rulemaking session in the Department's May 24<sup>th</sup> announcement reflects the myriad concerns that have been raised about the regulatory processes and final rules issued under the Department's leadership of Secretary Betsy DeVos. We are hopeful that this upcoming regulatory process will be able to reach consensus and better serve students and borrowers. Furthermore, we hope that as many seats at the negotiating table will be opened for student, faculty, veteran, consumer, and borrower interest groups as there are for vendors and their affiliated institutions.

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<sup>1</sup> <https://www.ed.gov/news/press-releases/department-educations-office-postsecondary-education-announces-public-hearings-protections-students-loan-repayment-targeted-loan-cancellation-programs-and-other-higher-education-regulations>

Below, we provide a set of priorities for the upcoming negotiated rulemaking focused on better protecting students by addressing predatory practices and holding colleges accountable. We also firmly believe that much can be done outside the regulatory process; we support and encourage efforts by the Department to take immediate steps to implement programs, issue guidance, and use existing authorities to address pressing issues ahead of and after rulemaking.

This process does not, so far, address three areas of concern that will dramatically shape the regulatory landscape:

First, the lack of discussion in this public comment and negotiated rulemaking process to develop a broad-based solution for defaulted student loan borrowers. According to the Department, nearly 7.5 million federal student loan borrowers are in default,<sup>2</sup> about 19 percent of the 40 million Americans who owe federal student loans.<sup>3</sup> While there certainly are some borrowers who will be able to rehabilitate their loans, convert to income-driven repayment plans, and eventually regain good standing, the process to do so may be too arduous for some. Federal student loans are only beginning to be discharged in bankruptcy; for those who do not have the means to return to good standing nor seek a bankruptcy discharge, there are few options: federal student loans do not have a statute of limitations on their collection and borrowers are unlikely to escape the draconian consequences (without, of course, federal debt cancellation). Many of these debts may be in default for so long as to be considered uncollectable by most states and lenders. A full overview of the student lending regulatory landscape must include discussion of how to clear out uncollectable, older debts and streamline a path out of default.

Second, the unresolved question of how and when to resume federal student loan repayment. The series of executive orders establishing a nationwide forbearance on interest and repayment offered much-needed relief to borrowers. However, there has not been any guidance issued to date on how to resume repayment, and the freeze has been extended multiple times. Servicers are unsure of how to resume repayment without catastrophic impacts on borrower's loan status; the Department's own analysis states that a certain portion of borrowers will mistakenly be put into default when payments resume. Borrowers who are in good standing cannot have their good credit ruined because of faulty loan administration. And, even if good guidelines to resume repayment are issued, there are certain classes of borrowers who are owed debt cancellation (such as those covered by changes to borrower defense implementation) who might be put into repayment when they ought not to be.

And third, the President's unfulfilled campaign promise to cancel some federal student loans. Proposals to cancel student debt vary broadly, from just certain classes of loans for borrowers struggling before the pandemic, to a targeted and means-tested dollar amount, to full cancellation. Any and all of these proposals would reduce the federal student loan portfolio and would greatly shape conversations in future negotiated rulemaking sessions.

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<sup>2</sup> <https://www.forbes.com/sites/adamminsky/2021/04/23/a-student-loan-default-nightmare-looms-for-75-million-borrowers/?sh=1791b4de3d2f>

<sup>3</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/pausing-federal-student-loan-payments/>

While outside of the scope of feedback sought in this comment period, we urge Departmental leadership and the President to come to a decision this summer on what level of executive action they will take to cancel student debt, and determine a longer timeline for resumption of federal student loan repayment. Ideally, they can do so before negotiated rulemaking sessions begin this summer, so that the Department might solicit more tailored comment from stakeholders on how to manage repayment programs within a smaller loan portfolio.

## PUBLIC SERVICE LOAN FORGIVENESS

We are pleased to see efforts from the Department, after a letter from AAUP and other unions,<sup>4</sup> to meet with faculty borrowers who encountered PSLF problems and the inclusion of PSLF in the rulemaking calendar. In that vein, we urge you to take immediate action to cancel the student loan debt of all public sector workers who have completed a decade or more of service. The PSLF program was created to ease the burden of student loan debt for a generation of educators, nurses, servicemembers, and others who have chosen careers in public service. With narrow terms of approval, administrative mismanagement, and widespread servicer error and abuse, the federal government has fundamentally failed to deliver on this promise.

Last month, new data from the Department has revealed that 82 percent of borrowers who are working in an eligible job and have the right type of loan to qualify for PSLF have been repaying their loans for less than the 120 months required to have their loans discharged; of these borrowers, half had previously consolidated from Federal Family Education Loans (FFEL).<sup>5</sup> Any payment made before consolidation cannot, under current rules, be counted towards the 120 qualifying payments. It is unclear how long the average borrower made payments before consolidation, but we do know that some servicers have a history of misleading borrowers on getting into the right kind of loan to eventually qualify for PSLF. It stands to reason, given servicer mismanagement of this crucial step of the PSLF process, that the Department should take some action to give borrowers “credit” for their public service regardless of the kind of loan they once had.

As part of this rulemaking process, negotiators and Departmental staff must work to solve the problems uniquely faced by faculty job insecurity. About three-quarters of faculty are off the tenure track, and more than half of faculty are part time.<sup>6</sup> Complicating matters further, some faculty work “full time,” but by combining multiple part-time contracts at different institutions. This state of affairs is not for lacking of faculty trying to secure full-time positions, but due to institutions’ desires to keep faculty in lower-paid positions with fewer benefits. Gig work erodes the foundation that has made American higher education among the greatest in the world, and faculty job security is a problem that we urgently need to resolve in other forums. Updated PSLF guidelines should not penalize faculty for holding a part-time or adjunct position.

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<sup>4</sup> <https://www.nea.org/about-nea/media-center/press-releases/public-service-workers-demand-promised-student-debt-relief>

<sup>5</sup> <https://www.marketwatch.com/story/tens-of-thousands-of-public-servants-face-delays-accessing-student-loan-relief-due-to-a-simple-oversight-11623689287>

<sup>6</sup> [https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.YMJo5\\_IKiUk](https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.YMJo5_IKiUk)

We need to act quickly to deliver real relief before federal student loan repayment is due. The rulemaking committee should recommend that any public service worker who has made payments for ten years, regardless of the type of federally-backed loan, be granted automatic forgiveness; moving forward, any public service worker, regardless of the number of hours they work, in an income-driven repayment plan should be eligible to participate in PSLF after ten years of payments.

The Department must provide opportunities for those closest to our broken student loan system to help fix it. In forming the rulemaking committee, we urge the Department to offer more seats to organizations or individuals that represent affected faculty members. They can speak directly to the systematic problems that their members have faced in PSLF eligibility, and in dealing with servicers to achieve forgiveness.

## INCOME-DRIVEN REPAYMENT

In 1994, Congress created the first income-contingent repayment plan, which was designed to forgive the remainder of a borrower's balance after 25 years of repayment. That repayment period on new, similar programs has since been reduced to a minimum of 20 years. Income-driven repayment (IDR) plans are seen as a safe way for borrowers with high balances to get more reasonable monthly payments: after significant promotion of these plans by servicers and the federal government, nearly half of American borrowers are on one. The earliest people to get their remaining balances forgiven would have been eligible for debt forgiveness starting in 2015, yet less than 20 borrowers have reached this milestone.<sup>7</sup>

The shocking lack of success in borrowers to achieve forgiveness through IDR is an urgent problem for the Department to address, both through administrative action and through the negotiated rulemaking process. To get a complete picture of problems that can be solved through these pathways, we urge the Department to start an audit of the student loan portfolio and the borrowers currently in IDR. Under the waiver provision granted by the HEROES Act, combined with an information sharing arrangement with the Internal Revenue Service, the Department should automatically and retroactively enroll borrowers in income-driven repayment if they meet criteria for being in financial distress.

Beyond that, as with PSLF, the Department should revise its eligibility policies to "grandfather" in any payments made by borrowers before starting on their income-driven repayment plan. Borrowers may have started the repayment process in another type of loan or may have received poor advice from their servicer; such actions should not penalize the borrower. Once the audit of the income-driven loan portfolio is complete, the Secretary should automatically cancel the remaining balances for any newly-eligible borrowers who qualify.

Alongside these administrative actions, the Department should convene a negotiated rulemaking committee to streamline the slate of income-driven repayment plans into a single plan. An updated rule should ensure that any garnished wages, Treasury offsets, or administrative forbearances count as qualifying payments; provide a shorter repayment window for those who receive public assistance; and ensure access for defaulted borrowers and borrowers who hold Parent PLUS loans.

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<sup>7</sup> <https://money.yahoo.com/student-loans-income-based-repayment-143332684.html>

## GAINFUL EMPLOYMENT

The AAUP welcomes the Department's push to strengthen rules that offer greater consumer protections and information for students as they seek to enroll. Transparency of data alone will not replace real oversight and accountability to protect students and taxpayers. Real oversight of for-profit colleges is deeply needed as part of our post-pandemic recovery. As with the Great Recession, there are signs this year that for-profit college enrollment is on the rise as students seek a credential to make themselves more competitive in the shifting job market.

The 2014 rule, while imperfect, offered students a few key metrics on which to review programs and an annual process for program grades to be made public. Critically, it would have cut off programs that consistently failed to improve their students' debt to earnings ratio and took steps to improving accreditation and licensing issues. We support the 2014 rule to the alternative left behind by Secretary DeVos – no rule at all. However, we recommend that more data points be added to reporting requirements, such as a cohort default rate, and including students who did not complete their degrees. Furthermore, if an institution's eligibility for Title IV funds is revoked, there should be full debt relief and restoration of aid eligibility for students who enrolled in the affected programs.

## BORROWER DEFENSE

Borrower defense to repayment has been one of the biggest regulatory success of the Obama era – but one that has seen numerous setbacks under Secretary DeVos. We are pleased to see the recent repeal of the partial-relief formula, and the approval of some ITT Tech. These actions are an important first step to making these defrauded students whole, but more must be done to deliver on the promise of borrower defense.

The 2016 rule included important provisions lacking in the 2019 re-write. First, the 2016 banned the use of forced arbitration clauses that force students to sign away their legal rights, just to attend school. While the 2016 rule fell short of a blanket ban on arbitration clauses, even a partial policy serves an important purpose. Such provisions do more than harm students' ability to get fair legal representation and file class actions; they also serve to cloud patterns of potential abuse by institutions and prevent state and federal regulators from intervening early. In a similar vein, the 2019 rule's provision to evaluate student claims as individuals, rather than a class, serves to shield servicers and for-profit college owners. In crafting a new 2021 rule through negotiated rulemaking, priority should be given to simplifying and automating the process for students, providing stronger financial safeguards to head off sudden institutional collapses, and allowing the use of blanket discharges for closed institutions.

In closing, on behalf of our faculty and the students we serve, thank you for your work to reform student lending to be more fair and equitable for borrowers. In light of the pandemic and weighing the long-term injustice of the student debt crisis, your intervention and collaboration with stakeholders is more needed than ever. We look forward to continuing working with the Department on these and other important issues.

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