ASSOCIATION OF PUBLIC & LAND-GRANT UNIVERSITIES

August 1, 2016

Mr. Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave., SW
Room 6W232B
Washington, DC 20202

Re: Docket ID ED-2015-OPE-0103, Borrower Defense to Repayment Regulations

The Association of Public and Land-grant Universities (APLU) appreciates the opportunity to comment in response to the Department of Education's proposed rule on Borrower Defense to Repayment (BDR).

APLU is a research, policy, and advocacy organization representing 236 public research universities, land-grant institutions, state university systems, and affiliated organizations. Founded in 1887, APLU is North America's oldest higher education association with member institutions in all 50 states, the District of Columbia, four U.S. territories, Canada, and Mexico. Annually, member campuses enroll 4.7 million undergraduates and 1.3 million graduate students, award 1.2 million degrees, employ 1.2 million faculty and staff, and conduct $42.7 billion in university-based research.

We wholeheartedly agree with Secretary King's statement that "all students who are defrauded deserve an efficient, transparent, and fair path to the relief they are owed, and the schools should be held responsible for their actions." Strengthening BDR is critical to provide recourse for harmed students and for holding institutions accountable. APLU supports the Department of Education taking action to improve BDR regulations. However, as outlined below, changes in the proposed regulations are necessary to prevent unintended consequences.

While it helps students and facilitates the government's response to fraud, BDR is inherently reactive in nature. By the time a meritorious claim is filed, students have already been harmed. Individual students suffer most acutely from fraud, but public confidence in the entire higher education system and in the federal financial aid system are also weakened each time a student is taken advantage of by unscrupulous actors and federal dollars must be deployed.

We hope policymakers recognize it would be much more effective for the federal government to have and to abide by strong policies that would prevent schools like Corinthian from receiving Title IV funding in the first place. Institutions that are chronically terrible performers and burden students with debt without improving their career and life prospects should be identified and subjected to greater scrutiny and the looming specter of sanctions, including the potential loss of access to federal financial aid. Though attempts to recover sums from the institutions that defrauded students are creditable, students can never truly be made whole again given loss of time, effort, and money. Hence, BDR should be a last resort.

The costly consequences of the Corinthian Colleges collapse strengthen the imperative for the U.S. Department of Education and Congress, through the reauthorization of the Higher Education Act, to adopt appropriate, proactive institutional accountability measures. In addition to strengthening BDR regulations, further action needed to protect students and taxpayers includes reforming and strengthening the cohort default rate test for Title IV eligibility as APLU has proposed, closing the 90/10 loophole, and ensuring accreditors are focused on outcomes as part of a risk-based review.

The Corinthian case, which involved falsified job placement rates, also highlights the need for Congress to lift the ban on student–level data so the federal government can comprehensively and accurately report on employment outcomes of students by institutions and academic programs. Data provided by the federal government would be free of institutional bias.

Strengthening BDR is understandably necessary to ensure students have appropriate recourse when defrauded. We agree the Department should take regulatory action. If not done carefully though, BDR could have significant repercussions throughout higher education, including public universities. APLU is greatly concerned that the proposed rule, as presently drafted, grants the Department too much authority, first, to forgive and repay debt to students based upon ambiguous definitions of the kind of conduct which would give rise to a meritorious claim and, then, to impose reimbursement obligations on institutions of higher education with little or no notice or opportunity to be heard.

In addition, we are concerned that loose and ambiguous definitions of the types of misconduct that could trigger BDR will attract complaints that adversely affect reputable institutions and distract the Department from addressing bad behavior by institutions that are the real source of the problems the Department now seeks to address. The potential need for institutions to defend themselves against ill-founded charges and to limit the reputational damage caused by such charges underscores the need for the Department to clearly articulate procedural protections for institutions. This would enable institutions to have notice, access to evidence, and an opportunity to rebut claims.

While we wholeheartedly agree with the Department's stated objectives, the regulations need improvement to protect the interests of students, legitimate colleges and universities, and the federal government. APLU strongly believes all parties share common interests and this balance can be achieved in the final rule if the Department makes appropriate changes. We urge that in a final rule the Department limit the scope of the regulation to plain cases of fraud and material misrepresentations, that it more clearly and accurately define what constitutes a contract with students for these purposes, and ensure fair procedural protections for institutions.

Overly Broad Scope

APLU is concerned the proposed regulations are not narrowly tailored to achieve the Department's stated objectives without the potential for significant unintended consequences.

For example, the proposed regulations do not provide clarity as to what the Department of Education would deem to constitute a contract between students and institutions, but signals that a very broad interpretation is possible given references to enrollment agreement, catalogs, bulletins, circulars, student handbooks, and school regulations. As a preliminary matter, references to such contracts misapprehend the essentially non-commercial nature of the relationship between student and educator at public institutions.

Setting that aside, the proposed rule on its own terms still presents problems. For example, while no disclaimer should ever excuse an institution from material misrepresentations with intent to defraud students, institutions may explicitly and appropriately note in some materials referenced in the regulations that such materials do not constitute a contract. There is a significant difference between assurances upon which students should reasonably be able to rely, such as fundamental factual representations about accreditation of programs and placement rates, and areas that lie within an academic institution's discretion and expertise, to which the courts regularly give considerable deference. For example, the listing in a catalog of a course offering with a renowned, nationally recognized professor could not reasonably be considered a contract guaranteeing a student an opportunity to enroll in the course, given limits in classroom size and pedagogical factors relating to course curriculum design, which might cause caps on course enrollment.

While this may be an extreme example, there are seemingly no restrictions in the proposed regulations that would prevent the Department from issuing an order of repayment based on a non-material breach. Further, there is no clear indication to students and the general public about the types of claims that are appropriately made and those that are unreasonable or do not reach the threshold the Department will support.

A minor divergence from the terms of a contract should not form the basis of a claim. We urge the Department to set a standard that requires the student to demonstrate the breach was material and deprived the student of the educational benefit.

Similarly, the Department has proposed such a broad definition of "misrepresentation" that seemingly innocent, inadvertent errors could now form the basis of claims against institutions. Borrower defense can be asserted for claims that relate to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided. As education is the core mission of institutions of higher education, claims could seemingly be made with few limits regardless of whether the representation was of a material nature to a student's academic program.

While we do not think the Department intends to encourage immaterial claims and claims of inadvertent errors, the excessive scope of the proposed rule does not clearly articulate the kinds of claims the Department would consider meritorious. This ambiguity encourages the filing of frivolous claims and potentially encourages a new industry of for-profit entities to "help" students file claims. As reported in Inside Higher Education, "some law firms and loan consolidation companies are already trolling for students to file borrower defense claims." Regardless of the ultimate success of these claims, both the Department and institutions can be placed in the untenable position of processing or defending against an inordinate number of claims.

APLU is greatly concerned that students may be preyed upon by unscrupulous businesses seeking to profit off them, which could also leave public universities in a position of having to make significant investments to defend against claims at the cost of our education, research and outreach missions. The Department should include strong measures in a final rule that would deter frivolous claims, including measures that would prevent companies from preying on borrowers they will see as potential customers.

Ambiguous Process with No Established Institutional Rights

If institutions are to bear financial responsibility for judgments made by the Department under BDR claims, they must be afforded the right to notice and an opportunity to defend against such claims. Yet, the proposed rule only alludes to institutions providing evidence. There are no clearly established standards of notice so institutions are aware of claims filed by students nor are there standards in the rule to ensure institutions have access to the evidence forming the basis of the claim. There are also no guaranteed rights of institutions to participate and defend against such claims.

Under the proposed rule, the Department would seemingly have the authority to form groups of borrowers to file claims, assist the group with the presentation of a claim before a Department hearing officer, make a decision on the merits of the claim, award relief, and find an institution liable. Under the proposed rule, this could all occur without a timely notification to the institution of the claim and an opportunity for the institution to examine and provide evidence, and defend. While we doubt such a process is what the Department envisions, fundamental fairness requires the Department clearly articulate a process that appropriately limits its authority to make unilateral decisions on liability without providing notice and an opportunity for institutions to participate and defend against such claims.

The Department should also establish a timeframe in which claims must be filed and decided. By not establishing a statute of limitations on the filing of claims, the Department is not encouraging borrowers to file claims when evidence is most readily available. A statute of limitations timeframe should also recognize, though, that fraud by unscrupulous institutions may not be immediately apparent to students.

APLU appreciates the opportunity to comment and the Department's objectives in providing recourse for students harmed by abusive and fraudulent practices. We strongly believe that with appropriate changes the Department can issue a final rule that accomplishes its goals while minimizing potential for unintended consequences on legitimate colleges and universities.