Congress of the United States

Washington, D.C. 20515

August 12, 2022

Docket # (ED-2021-OPE-0077-1350)

Delivered via E-Mail

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

Dear Secretary Cardona:

We are extremely disappointed that you failed to heed to multiple requests to extend the comment period for this misguided Notice of Proposed Rule Making (NPRM).[1] Nevertheless, we write to urge you to withdraw it and instead work with Congress on meaningful student aid reforms.

The Department of Education's (Department) continued disregard for Congress and the American taxpayer is wholly unacceptable. For example, on July 12, 2022, we wrote to you asking that the Department extend the comment period for this NPRM. The extension was requested because the NPRM proposes sweeping changes to federal student loan programs which are estimated to cost taxpayers at least $85.1 billion over the next decade.[2] When using the more realistic assumptions regarding the Public Service Loan Forgiveness program (PSLF), this proposal is more likely to cost nearly $120 billion.[3] Allowing only 30 days for the public to comment on a rule of such magnitude is beyond the pale, and also inconsistent with the President Clinton's Executive Order 12866, which calls for a 60-day comment period for rules with such a high price tag.

The lack of consideration for the American public's input does not end there. The Department goes on to assert in the NPRM that it now also has the power of the purse. The Department claims the authority to spend $85.1 billion, without Congressional authorization, by stating that it does not believe Congress "intended to limit the cost of those programs through the types of operational and administrative barriers the Department is proposing to remove in this notice of proposed rulemaking."[4]

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[1] Docket # (ED-2021-OPE-0077)
[2] 87 FR 41881
[3] 87 FR 41881, Note: This substitutes the baseline take-up rate used in the cost estimate for Public Service Loan Forgiveness (PSLF) and subsequently in the sum of estimated costs for the NPRM with the Department's alternate assumptions PSLF estimate in the sum of estimated costs for the NPRM.
[4] 87 FR 41881

Congress did not give the Department a blank check to spend federal taxpayer dollars ad infinitum. In fact, in *West Virginia vs. the Environmental Protection Agency,* the U.S. Supreme Court recently made it abundantly clear that "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'"[5] Further, the court stated, "the agency must point to 'clear congressional authorization' for the authority it claims."[6]

In this case, the Department lacks a clear authorization from Congress. The enabling statutes for the changes being made do not give the Department a clear authorization to make changes of this magnitude, or to spend $85.1 billion without Congressional approval. In the last decade, there have only been two stand-alone laws passed that affected the terms, conditions, and eligibility of student loan programs.[7] Neither give the Department clear authorization to rewrite student loan programs. Subsequently, Congress has acted to alter the terms, conditions, and eligibility for student loan programs predominantly via appropriations bills. [8] For example, Congress took action to address eligibility issues in the existing PSLF program by authorizing the Temporary Expanded Public Service Loan Forgiveness program (TEPSLF) and the creation of cancer treatment deferment in 2018.[9] If Congress had given the Department the authority it claims in these rules, why were all these changes done through legislation?[10]

Rather than work with Congress, the Department, through this NPRM, brazenly seeks to enact Democrats' wish list of policies through executive fiat.[11] This is especially true for the two most costly provisions of the NPRM—the changes to borrower defense and PSLF programs.

Borrower Defense

Borrower defense to repayment (BDR) is a regulation that mimics the legislative and regulatory history at play in the *West Virginia* case. A long unchanged statute was invoked by an agency as "authority" to institute a complex regulatory scheme to achieve Presidential priorities, which was reregulated from administration to administration creating a game of regulatory ping-pong.

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[5] *West Virginia v. E.P.A.,* 597 US __ (2022).
[6] *Id., at 19.*
[7] The Bipartisan Student Loan Certainty Act of 2013 (PL 113-82) and the Federal Perkins Loan Extension Act of 2015 (PL 114-105)
[8] Other appropriations provisions include the explicit elimination of the Subsidized Usage Limit Applies (SULA) regulations in 2020 (PL 116-260) and waiving Cohort Default Rate to enable students to continue borrowing (PL 116-94 and PL 117-103).
[9] PL. 115-141 and PL 115-245
[10] Additionally, some other laws have made tangential changes to the student loan programs. For example, the National Atmospheric Administration's Commissioned Officer Corps Amendments Act of 2020 (PL 116-259) expanded student loans eligibility for national guard duty forbearance to this group. Finally, emergency CARES Act (PL 116-136) student loan provisions due to the COVID-19 were temporary and not further extended by Congress.
[11] See S. 867 and S. 1203 of 116th Congress

BDR was put into law in 1993 and regulated for the first time in 1995 and the statutory language has not changed since.[12] The original 1995 regulation did not qualify as an economically significant regulation under Executive Order 12866, meaning the administration estimated the cost was under $100 million annually.[13] In the first 20 years of the program, prior to the 2016 regulations, only 59 borrower defense claims were filed.[14]

The regulations for BDR remained untouched until 2016 when the Obama administration made changes as part of its policy priorities around consumer protection of students from proprietary institutions, with an estimated cost of $2 billion.[15] After the 2016 rule was finalized, borrower defense claims poured in. The Department has received 495,407 borrower defense claims as of June 2022.[16] Now the Department's new BDR proposal included in the NPRM is estimated to cost $20 billion.[17]

The only statutory authority that the Department cites for the proposed BDR regulations is 20 U.S.C. §1087(e)(h), which has remained unchanged since its creation in 1993. It states:

> "BORROWER DEFENSES. – Notwithstanding any other provision of State or Federal law, the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part…"

This general grant of authority cannot be interpreted to give the Department the authority to restructure a program completely, creating costs of over $20 billion. In *West Virginia*, the Court held under a body of law known as the "major questions doctrine," that, given "both separation of powers principles and a practical understanding of legislative intent" the court is "reluctant to read into an ambiguous statutory text the delegation claimed to be lurking there."[18] In fact, the Court reiterated that "Congress [does not] typically use oblique or elliptical language to

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[12] PL 103-66; 60 FR 37768; 34 CFR 685.206(c); the Federal Register posting and the short comment period on the regulation which occurred after Executive Order 12866 suggests that the cost of the regulation was not over $100 million.
[13] The Federal Register posting and the 30 day comment period on the regulation occurred after Executive Order 12866.
[14] House Education and Labor Committee, Full Committee Hearing: Examining the Education Department's Implementation of Borrower Defense." December 12, 2019. Retrieved on August 8, 2022 from https://www.c-span.org/video/?467233-1/house-hearing-student-loan-debt-forgiveness, see 53:20.
[15] In 2016, the Federal Register posting (81 FR 39329) notes a low impact scenario cost estimate of $199 million per year. To make the 2016 estimate comparable with the 10-year estimate featured in the new proposed rule (87 FR 41881), it was multiplied by 10.
[16] Federal Student Aid Data Center, Borrower Defense to Repayment Loan Forgiveness Data, June 2022, Retrieved August 10, 2022 from https://studentaid.gov/data-center/student/loan-forgiveness/borrower-defense-data.
[17] 87 FR 41881
[18] *West Virginia v. E.P.A.*, 597 US __ (2022)., at 19.

empower an agency to make a 'radical or fundamental change' to a statutory scheme."[19] The Court concluded that the agency must point to "clear congressional authorization for the power it claims."[20]
Here, the Department is also writing a rule where there is no congressional authorization. Specifically, the statutory language referenced above is minimal and does not provide wide-ranging authorities. Moreover, the NPRM features similar provisions included in partisan legislation that Congress has failed to consider, signaling that Congress believes it needs to pass such changes to BDR before they can be implemented.[21]

Public Service Loan Forgiveness

Similarly, the Department reads nonexistent statutory authority into law in its bid to restructure the PSLF program. These changes are projected to cost at least $26 billion. While the Department pretends to know what Congress intended for the PSLF program, Ranking Member Burr was an active member of the Senate HELP Committee which authored the program. Ironically, at the very time that the Senate HELP Democratic majority pushed for the inclusion of the PSLF program HELP Republicans pointed out time and time again that the program was a bill of empty promises. This is because the program, as Democrats designed it, ensured that few borrowers would ever qualify. The Congressional Budget Office (CBO), which scored the program as a pittance due to similar assumptions that few borrowers would ever qualify for forgiveness, made the same point.

As the Department points out in the NPRM, the statute clearly "provides forgiveness of the remaining balance due on an eligible non-defaulted Federal Direct Loan after the borrower has made 120 monthly payments on the eligible Federal Direct Loan while the borrower is employed full-time in a public service job."[22] The statute outlines the qualifying repayment plans and defines a "public service job."[23]

At the time, CBO even issued a plain language description of the program as part of the official score. It also described the program was intended for Direct Loan borrowers working full-time in public-sector jobs who were making monthly payments specifically through an income-contingent repayment plan.[24] CBO concluded the program would save the government money.[25] The restrictive requirements of the program were not a secret to Congress, especially not to Democrats. In fact, Congress recently addressed this issue in 2018 when it established the

[19] *Id.*, at 18.
[20] *Id.*, at 19.
[21] S. 867 of 116th
[22] 87 FR 41881
[23] 20 U.S.C. 1087e(m)
[24]Congressional Budget Office Cost Estimate, H.R. 2669, College Cost Reduction and Access Act of 2007, June 25, 2007, Retrieved August 10, 2022 from https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/costestimate/hr26691.pdf. (PL 110-84)
[25] 87 FR 41881

TEPSLF program. This program was provided with a discrete pot of $700 million in appropriated funds to assist borrowers who were not able to meet the requirements of the longstanding law.[26]

In 2019, Democrats determined not enough borrowers who applied for the TEPSLF program received forgiveness. Therefore, they began to draft and introduce legislation to scale back drastically the statutory rules and remove requirements. As with BDR, many changes proposed in partisan legislation are similar to the ones included in the NPRM.[27] However, Congress could not come to an agreement and legislation was never passed. Accordingly, the Department should not be making such radical and fundamental changes to this statutory scheme.

Conclusion

The Department does not have the statutory authority to promulgate the NPRM, especially with regard to BDR and PSLF. Since the publication of the NPRM, the Supreme Court rendered its decision in *West Virginia*, which concluded that an agency "must point to 'clear congressional authorization' for the power it claims."

After reviewing this NPRM, it is clear that the Department does not have a choice but to rescind its proposal and work with Congress on meaningful changes. The Department simply does not have the authority to create a convoluted and costly framework that Congress did not authorize.

Sincerely,

Richard Burr
Ranking Member
U.S. Senate Committee on Health, Education, Labor and Pensions

Virginia Foxx
Ranking Member
U.S. House Committee on Education and Labor

[26] PL 115-141, § 315
[27] S. 1203 of 116th