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

Re: Department of Education; Notice of Proposed Rulemaking

Docket ID ED–2015–OPE–0103

July 19, 2016

Dear Ms. Gaina:

Let me introduce myself to you and the committee. I am in my fifth decade of life, on my 30th year of being a trial attorney in Michigan, and a school owner the last 18 years. My spouse left dentistry to make a difference in our community by owning and operating a cosmetology school. Our first school was in an area of Michigan, just northeast of Detroit, where the medium income is 50% at or below the poverty levels. She started with two employees and we now have close to 80. We do not consider our school to be a "For Profit School" but a "Tax Paying School".

But thank you for allowing us the opportunity to comment on the proposed Borrower Defense to Repayment (DTR) regulation. We understand that as a direct result of major school closings like Corinthian College and more than 12,000 students filing for their federal loans be discharged, the U.S. Department of Education (USDE) has opted to formalize a process that will allow student borrowers to claim that the government cannot collect on their federal loans due to the "acts and omissions" of the institution they attended as evaluated under state law. I agree that students who are victims of predatory higher education recruiting tactics should be indemnified and protected; however, the regulations should be narrowly tailored to affect this change without hampering the efforts of the good industry players.

My family and I would like to submit comments on the following six topics:

1. **New federal standard creates overly complex system with unfair risks to schools (§ 685.222)—**While the existing basis for Defense to Repayment only requires a claim based on state law, the proposed standard creates an overly complex federal standard, requiring the questionably low threshold of preponderance of evidence. However, our biggest concern is that the new definition does not require the intent of the institution to mislead, without which a school could be punished for an innocent mistake. Further, the new rule would provide that a simple, unintended omission from a school representative may become a substantial misrepresentation as determined by the Department. This new standard is vague and will cause significant liabilities for schools

that are trying their best to provide a quality education to their students. I argued for years, in the presence of a jury, that the preponderance standard is not a high threshold but just slightly more evidence than not. The so called "a slight tip of the scales in favor of the proponent". In a business filled with oversight and regulations like what we encounter with the DOE, mistakes can be made. We have had a nearly perfect track record. Yet this will make running a business very, very difficult. We also serve a segment of society that really needs vocational training. Our Paul Mitchell graduates are doing very well financially and I know this as my family also owns a salon. In fact, we intend to open a chain of salons but we have to be able to train our students with all we can give them. We CANNOT be bogged down with regulations. In part, we are part of the billion-dollar beauty industry and it ALL starts in the school. We agree that a prospective student should have access to all of the information necessary to make an informed decision, but if a representative overlooks one element in a laundry list of topics to discuss the school should not be penalized, especially when the materials are available otherwise.

2. **The adjudication process creates a conflict of interest within the USDE (§ 685.206)—** There is a lack of checks and balances for resolving a claim and determining whether a borrower's debt should be forgiven. The new regulation includes provisions for USDE to assign one of its own employees to advocate on behalf of the individual or the group of students, and it has given itself authority to create the groups as well. The group can even include borrowers that have not filed a claim. This raises a number of concerns, one of which is that the USDE will also be responsible for both defending and adjudicating the claims in these cases, which creates a conflict of interest without a proper check on the system from an uninterested party. In my world, the APPEARANCE OF IMPROPRIETY is the standard for deciding if our ethics rules are violated. I don't see how this provision would pass constitutional muster. Seems that this alone would lend itself to a constitutional challenge. Further, while the educational institution will be provided notice of the fact-finding process, and will be allowed to submit evidence disputing any claim, the exact procedures of how and what may be disputed are not provided in the regulation. This adds unnecessary vagueness to the process that will impact significant portions of the educational industry.

3. **Recovery of forgiven debt process remains undefined (§ 685.222)—**Under the proposed regulation, there will be an onerous mechanism for recovering forgiven debt. When debts are forgiven for an individual borrower USDE will have the authority to initiate a proceeding against the responsible institution to pursue repayment of the forgiven debt. This process is also not explained in the proposed regulation and will therefore cause uncertainty and confusion.

However, if the forgiven debt is part of group relief, liability will automatically be assigned to the institution without any further ability to dispute the claims. That is patently unfair to school owners, given the same concerns outlined above.

Lastly, because USDE assumes the rights of the loan agreement when debt is forgiven the Department is able to seek repayment from principals and affiliates of schools in certain circumstances. With USDE being both the prosecutor and judge, school owners are again in a patently unfair situation.

4. **Overly expansive early warning triggers drive schools from the marketplace (§ 685.171)—**A significant element of the proposed regulations will provide USDE the authority to require a letter of credit (LOC) from an educational institution for at least two new "early warning" triggers of financial stability. With each trigger sufficient to authorize USDE to require a LOC valued at 10% of the previous year's Title IV funding, and are stackable, this new requirement has the potential to create significant financial hardships for many educational institutions. It may even make it impossible for these institutions to continue providing educational services to their students.

   Additionally, we are concerned that some of these new triggers set a lower bar than is currently required, even allowing asserted claims (i.e., a student simply saying they were injured) to be a triggering event, that do more than is necessary to protect the students. If the Department wishes to amend the various thresholds for triggering events, then they should be approached individually in a thoughtful way so as to avoid unintended consequences.

5. **Repayment rate disclosures for for-profit institutions should also be required for non-profit schools (§ 685.41)—**Under the proposed regulation for-profit institutions may be required to disclose a new form of repayment rate in a variety of public materials. It is extremely odd that USDE limits this requirement just to for-profit institutions. It seems this would be just as applicable at non-profit institutions, if USDE's true aim is to protect all students. If non-profit institutions are being good actors in the educational sector, then they should not have any complaint about being burdened with this additional safety measure to protect their students as well.

6. **Mandatory arbitration prohibition and class action waivers will be costly, unnecessarily time consuming, and will hurt students (§ 685.300)—**The new regulations prohibit the use of mandatory arbitration clauses and class action waivers with its students. Prohibiting mandatory arbitration and class action waiver clauses will place an undue burden on schools and hurt students in that: (1) Arbitrations allow for a quicker outcome—lawsuits take more time; (2) Fees and costs associated with arbitration are less expensive than court lawsuits and trials; (3) Arbitration provides

Commented [BM1]: There was some concern on the call about fighting this. It might be something that we leave for individual owners to comment on if they have a concern her, rather than having it come from the whole association.

greater flexibility of process and procedure (parties often select the arbitrator and exercise control over certain aspects of the arbitration procedure); (4) Arbitrators typically have more expertise in the specific subject matter of the dispute than do judges; and (5) A class action lawsuit doesn't truly help the students. In most class actions, members of the class rarely get more than a nominal return for their claim. The only participants that do well are the attorneys involved. Interestingly, in my arbitrations, most of the time the arbitrators awarded more money and/or found "some merit" to a claim than would a jury. I always felt that the aggrieved party did well with arbitration.

7. **Misrepresentation in recruiting.** The misrepresentation standard as it relates to deceptive practices in admissions is also very easy to prove and quite frankly, people just misinterpreted what they are told at times. Schools are well policed in this area already as if a violation occurs, we can lose our federal Title IV Funding. The competition in our business is tough and the last thing we want is for students to get on social media and say the school is misrepresenting itself. This can be devastating to a school. Most vocational schools are showing lower numbers of enrollees and that means we have to do a job second to none in all aspects of our program from admissions to licensure. To allow this vague legal standard would be an open gate to abuses and in an industry, that has only one single purpose, to wit, Cosmetology. We cannot fall back on other programs in our business because we don't have any other programs.

We hope that you will take our comments into consideration while you work to publish the final version of the Borrower Defense to Repayment regulations. We believe that significant revisions are required to prevent unintended consequences from hurting good players in the educational industry. Finally, as an owner, there is tremendous oversight with our State Board of Cosmetology, our accreditation agency, our need to keep a consist composite score (which is our financial strength) and many peripherals like keeping our employees happy, competition among other schools in the industry, employee employment protections both State and Federal, our culture of Paul Mitchell is to be the very best at what we do and to do it consistently. You see, many of us have invested significantly and move at a snail space to go slow and build our businesses the good old American way- with Integrity and passion. Please stop these hindrances. I implore you. I remain…

Sincerely,

Bryan M. Black
Owner 4 Paul Mitchell Schools, Michigan - Florida