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May 27, 2022

Attorney General Merrick Garland  
U.S. Department of Justice  
950 Pennsylvania Avenue, Northwest  
Washington, D.C. 20530

Dear Attorney General Garland:

We are concerned that the Department of Justice is not adequately protecting its independence, or the rule of law, regarding the Department of Education's recent efforts to revise the much-litigated rules on borrower defense to repayment.<sup>1</sup> Congress empowered the Secretary of Education to specify which acts or omissions of an educational institution a student borrower may assert as a defense to repayment of an educational loan, and we support protecting student borrowers from injurious misconduct in this manner.<sup>2</sup> But the Department of Education is contemplating regulatory changes that are inconsistent with both the Department of Justice's fundamental commitments and its representations in court over the past decade in litigation.<sup>3</sup> We ask that you direct the Department of Justice to participate actively in the interagency review process for proposed and final regulations in order to protect the public from improper rulemaking and insulate the Department of Justice from institutional harm.<sup>4</sup>

You declared that the Department of Justice plays an important role in American government. As you explained in your initial address to Department employees, the Department must "adhere to the rule of law" and stated that this is "[t]he only way [the Department] can succeed and retain

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<sup>1</sup> According to publicly available information, the Department of Education's borrower to defense repayment rule is pending in the Office of Management and Budget for review (RIN: 1840-AD53). The current rules appear at 34 C.F.R. pt. 685.

<sup>2</sup> 20 U.S.C. § 1087e(h).

<sup>3</sup> See, e.g., *New York Legal Assistance Group v. DeVos*, 527 F. Supp. 3d 593 (S.D.N.Y. 2021), *appeal pending*, No. 21-888 (2d Cir.) (litigation over 2019 regulations); *California Ass'n of Private Postsecondary Schools v. DeVos*, 436 F. Supp. 3d 333 (D.D.C. 2020) (litigation over 2016 regulations); *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018) (litigation over rescission of 2016 regulations).

<sup>4</sup> See, e.g., Executive Order 12,866, §§ 6-7 (Sept. 30, 1993).

the trust of the American people.”<sup>5</sup> The Department, as you put it, must act with independence and integrity and through fairness and impartiality, in both substance and procedure.<sup>6</sup>

The Department of Education’s recent efforts to revise the rules regarding borrower defense-to-repayment test the Department of Justice’s dedication to these principles in several ways.

First, the Department of Education is contemplating regulatory changes that are inconsistent with the norms of due process which are foundational to the rule of law. The Department of Education’s most recent proposal would eliminate many of the procedural protections for educational institutions implemented in the 2019 borrower defense to repayment regulation. Such actions will revert to processes that deprive educational institutions of fair and egalitarian opportunities to be heard before the Department of Education renders an adverse decision, even as these regulations attempt to shift the financial burden of loan discharges to participating institutions.<sup>7</sup> These processes have even fewer procedural safeguards than previous regulations issued by the Department of Education in 2016.

These proposed regulations contravene any conceivable norms of due process. As the Acting Solicitor General wrote last year to the Supreme Court, “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>8</sup> We are concerned that the Department of Education’s contemplated regulations do not provide adequate opportunities for institutions to be heard in a meaningful way. The Department of Justice already made that point in its defense of the 2019 version of the borrower defense regulations and its rebuke of the lack of protections provided in the 2016 regulations.<sup>9</sup> The Department of Justice should not allow proposed regulations to proceed through interagency review if protections for due process are not protected.

Second, the Department of Education is contemplating imposing financial consequences on conduct which pre-dates the proposed regulations, even if the loans are disbursed after the

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<sup>5</sup> See Attorney General Merrick Garland Addresses the 115,000 Employees of the Department of Justice on His First Day (Mar. 11, 2021), *available at* <https://www.justice.gov/opa/speech/attorney-general-merrick-garland-addresses-115000-employees-department-justice-his-first>.

<sup>6</sup> See, e.g., Attorney General Merrick B. Garland Delivers Remarks at the National Organization of Black Law Enforcement Executives (NOBLE) 2022 Winter CEO Symposium (Mar. 18, 2022), *available at* <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-national-organization-black-law>.

<sup>7</sup> See, e.g., U.S. Dep’t of Education, Office of Postsecondary Education, Proposed Regulatory Text for Issue Papers #6, 7, and 8: Borrower Defense to Repayment, *available at* <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html> (Affordability and Student Loans Committee Meetings, Session 3, Materials).

<sup>8</sup> Brief for the Federal Respondents in Opposition, at 17, *Serrano v. U.S. Customs and Border Protection, et al.*, 2021 WL 1026157 (S. Ct. Mar. 2021) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted)).

<sup>9</sup> Defendants’ Memorandum of Law in Support of Summary Judgment, at 16-17, *New York Legal Assistance Group v. DeVos*, 527 F. Supp. 3d 593 (S.D.N.Y. 2021), *appeal pending*, No. 21-888 (2d Cir.) (litigation over 2019 regulations, in which the Department of Justice contrasted the 2019 regulations with the 2016 version that parallels and goes beyond the Department of Education’s current proposal, observing that unlike the 2016 regulations, the 2019 regulations “also included the interests of taxpayers who otherwise would bear the cost of approvals of borrower defense to repayment discharges [and] the interests of institutions in being able to respond to claims”).

regulations' effective date. That constitutes impermissible retroactive regulation without authorization from Congress.<sup>10</sup>

Third, the Department of Education is exploring expensive regulatory changes which would further burden taxpayers without meaningful analysis demonstrating such a need. In its defense of the 2019 regulations, the Department of Justice observed that the 2016 regulations were "indisputably expensive" whereas the 2019 regulations "extensively document" savings to the taxpayer.<sup>11</sup> The Department of Education has not released any meaningful predictions regarding the cost to taxpayers of its contemplated regulations, which emulate the 2016 regulations in this respect. That deficiency, should it continue without correction, would place the Department of Justice in the untenable position of having to defend in litigation what it already has called "indisputably expensive" processes without anything approaching "extensive" documentation of costs. The Department of Justice must not allow itself to be placed in this position.

Finally, the Department of Education is contemplating regulatory changes that defy decades of history. The contemplated regulations would provide loan discharges to borrowers regardless of whether they suffered financial harm from an institution's conduct. Yet the Department of Justice recently defended the 2019 regulations by explaining that the Department of Education always has considered financial harm critical to the amount of relief owed to a borrower.<sup>12</sup> In fact, the Department represented that such reliance on the concept of financial harm was "common sense."<sup>13</sup> The Department of Education's contemplated regulatory changes will put the Department of Justice in the impossible position of defending a regulation that defies "common sense." The Department of Justice should assert itself in the interagency review process to demonstrate its commitment to consistency in the rule of law.

In sum, the Department of Education's recent regulatory efforts regarding borrower defense-to-repayment threaten the Department of Justice's unique role in our government as an arbiter of proper governance. The contemplated regulations undermine the due process norms upon which the Department of Justice rests. They also threaten to undermine the Department of Justice's institutional integrity by placing the Department of Justice in the difficult position of defending views it previously repudiated. We request that the Department of Justice actively participate in the interagency review process to protect both the American people and the Department of Justice as an institution in American public life.

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<sup>10</sup> See *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988).

<sup>11</sup> Defendants' Memorandum of Law in Support of Summary Judgment, at 2, *New York Legal Assistance Group v. DeVos*, 527 F. Supp. 3d 593 (S.D.N.Y. 2021), *appeal pending*, No. 21-888 (2d Cir.); Defendants' Reply Memorandum of Law in Support of Summary Judgment, at 3, *New York Legal Assistance Group v. DeVos*, 527 F. Supp. 3d 593 (S.D.N.Y. 2021), *appeal pending*, No. 21-888 (2d Cir.).

<sup>12</sup> Brief for Defendants-Appellees, at 32-35, *New York Legal Assistance Group v. Cardona*, No. 21-888 (2d Cir. Oct. 20, 2021).

<sup>13</sup> Defendants' Memorandum of Law in Support of Summary Judgment, at 23, *New York Legal Assistance Group v. DeVos*, 527 F. Supp. 3d 593 (S.D.N.Y. 2021), *appeal pending*, No. 21-888 (2d Cir.).

Sincerely,



Virginia Foxx  
Ranking Member



Glenn "GT" Thompson  
Member of Congress



Elise M. Stefanik  
Member of Congress



Rick W. Allen  
Member of Congress



Jim Banks  
Member of Congress



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CC:

Brian Boynton, Principal Deputy Assistant Attorney General, Civil Division, Dep't of Justice  
Hon. Damian Williams, U.S. Attorney, Southern District of New York