

Congress of the United States

Washington, D.C. 20515

February 10, 2023

Docket # (ED-2023-OPE-0004)

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 encourage you to withdraw the latest radical proposal put forth by your Department and work with Congress on meaningful and sustainable student loan reforms. This proposed regulation, formally known as *Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program* (RIN 1840-AD81), would turn a safety-net for low-income federal student loan borrowers into an unsustainable transfer of wealth from hardworking taxpayers to college-educated individuals.

We agree that the complicated maze of repayment programs has made it difficult for borrowers to navigate the best option to suit their situation and therefore has often failed the lowest-income borrowers or borrowers with degrees that did not live up to promised returns. We would welcome the opportunity to engage in reforming the current program. However, telling student loan borrowers that they can expect to pay back only a fraction of what they owe undercuts the legislative intent of the Direct Loan program and the basic social contract of borrowing. Future loans to future students depend on current students paying on current loans. Without this, the entire system is in jeopardy.

This proposal ultimately turns the Direct Loan program, which provides millions of Americans with the opportunity to move up the economic ladder, into an untargeted grant. This is a drastic shift in policy which you do not have the legal authority to make.¹ Further, the \$138 billion cost estimate for the proposed rule has been widely dismissed by student loan and federal budget experts as unrealistically low.² Finally, despite proposing to change the fundamental nature of a

¹ Gillen (2022) <https://www.mindingthecampus.org/2022/09/29/bidens-new-student-loan-repayment-plan-would-ruin-student-lending/>

² <https://budgetmodel.wharton.upenn.edu/issues/2023/1/30/budgetary-cost-of-proposed-income-driven-repayment;>
<https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/>

longstanding program, you have refused to allow Congress and the American people more than 30 days to review this highly complex and costly proposal.³

Cost Estimate

As a result of this rule, borrowing the maximum loan amount will have zero marginal effect on a borrower's repayment amounts, yet the Department of Education (Department) made no attempt to quantify the proposal's behavioral effects on borrowers. This is irresponsible. It is well-documented that graduate student loan borrowers in some fields have already learned that they can take unlimited loans with no consequences on their life-time repayment total under an income-driven repayment plan. In fact, institutions encourage some graduate borrowers to take loans the school knows the borrower will not have to repay.⁴ Any reasonable cost estimate of this proposal would apply the borrowing behavioral changes, even in the form of ranges, from the past decade in the graduate education space to all new undergraduate loans.⁵

This administration is also keen on providing uncapped subsidies to the most educated Americans. In particular, it magnifies the amount of taxpayer dollars going to individuals who earn law, medicine, and other professional graduate degrees. According to a former economist in the Obama administration, the new definition of discretionary income alone would increase subsidies for borrowers with advanced degrees by three-fold.⁶ There may be disagreement about the federal government's role in promoting economic mobility, but we can all agree that the federal government should not "pay twice as much to subsidize the rent of a Columbia graduate student than it will for a low-income individual under the Section 8 housing voucher program."⁷ An honest assessment of the costs and benefits of this program associated with graduate students is conspicuously absent.⁸

The Government Accountability Office (GAO) provides further evidence of why there is little confidence in the proposed rule's cost estimate. In a Summer 2022 report, GAO found that the Department had underestimated the cost of the Direct Loan program by \$311 billion.⁹ The

³ <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408809>

⁴ Dylan Matthews, How Georgetown Law gets Uncle Sam to pay its students' bills, August 9, 2013. Washington Post.

⁵ These include quantifying the costs associated with allowing loan dollars to be used on non-tuition expenses; the interaction with uncapped borrowing for graduate students and parents of undergraduates through the PLUS program; the incentives for institutions of higher education to raise their tuition, as well as other components of students' cost of attendance for undergraduate and graduate degree programs; the incentives for students who otherwise pay for their education using resources other than loans, and those who would already borrow to borrow more than they otherwise would; and the expectation for students that loans borrowed from taxpayers do not have to be repaid.

⁶ Looney (2022) <https://www.brookings.edu/opinions/bidens-income-driven-repayment-plan-would-turn-student-loans-into-untargeted-grants/>

⁷ Ibid.

⁸ At the very least, the Department should provide estimates for the benefits provided to borrowers with graduate Stafford loans and Grad PLUS loans; the estimated forgiveness for borrowers enrolled in PSLF eligible programs disaggregated by income quintile; the share of borrowers' loans that were borrowed for graduate school that are estimated to be discharged under the proposed plan; and the expected cost associated with discharging the debt of graduate borrowers.

⁹ GAO Report. Student Loans: Education Has Increased Federal Cost Estimates of Direct Loans by Billions Due to Programmatic and Other Changes. July 28, 2022. GAO-22-105365.

underestimates were largely due to a lack of accounting for behavioral effects associated with income-driven repayment plans. Further, this was the second GAO report to raise this concern.¹⁰

Legal Authority

None of the statutory changes to federal student loans in the last 30 years are related to the provisions the proposed rule would supposedly implement, raising questions about the impetus for and timing of this proposed rule. The income contingent repayment plan was added to the *Higher Education Act of 1965* (HEA) by the *Omnibus Reconciliation Act of 1993*.¹¹ The two subsections of statute that govern the repayment plan both reside in section 455.¹² In subparagraph (d)(1)(D), the statutory language has been amended to allow graduate PLUS loan borrowers to participate in the income contingent repayment plan while continuing to bar parent PLUS borrowers from participating.¹³ In subsection (e) the language has remained largely unchanged, with two exceptions. First, an amendment in the *College Cost Reduction and Access Act of 2007* added to the list of loan statuses that count toward the maximum repayment period.¹⁴ Second, an amendment made in 2019 by the *FUTURE Act* improved the procedure through which a borrower's income data from the Internal Revenue Service can be shared with the Department.¹⁵

The Biden administration's go it alone attitude on student loan repayment and forgiveness flies in the face of the Constitution, which vests all legislative power in Congress.¹⁶ The Supreme Court made it abundantly clear in *West Virginia vs. the Environmental Protection Agency* 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.’”¹⁷ Further, the court stated, “the agency must point to ‘clear congressional authorization’ for the authority it claims.”¹⁸

There has been no attempt by the Biden administration to sit down at the table with elected representatives of the people to negotiate changes to this program in spite of Congress's repeated attempts to do just that. The year before President Biden assumed office, there were substantive bipartisan negotiations occurring in the Senate on these provisions that were ultimately scuttled by the COVID-19 pandemic. Last Congress, Ranking Member Richard Burr and Ranking Member, now Chairwoman, Virginia Foxx made public entreaties to Secretary Cardona to come to the negotiating table on student loans.¹⁹

¹⁰ GAO. Federal Student Loans: Education Needs to Improve Its Income-Driven Repayment Plan Estimates. November 15, 2016. GAO-17-22.

¹¹ (PL 103-66); 20 U.S.C. 1087e(d)(1)(D) and 20 U.S.C. 1087e(e)

¹² 20 U.S.C. 1087e

¹³ 20 U.S.C. 1087e(d)(1)(D)

¹⁴ 20 U.S.C. 1087e(e); (PL 110-84)

¹⁵ (PL 116-91)

¹⁶ U.S. Const. art. I, § 1.

¹⁷ *West Virginia v. E.P.A.*, 597 US ___ (2022).

¹⁸ *Id.*, at 19.

¹⁹ Ranking Member Richard Burr. Opening Statement. Nomination of Miguel Cardona to serve as Secretary of Education, U.S. Senate Committee on Health, Education, Labor & Pensions. February 3, 2021; Chairwoman Virginia Foxx. A Conversation with Rep. Virginia Foxx (R-NC) on the Republican Vision for Higher Education Policy. American Enterprise Institute. September 13, 2022.

It is our belief there is no clear congressional authorization for this proposed rule. Members of the President's own party believe that amending the HEA is necessary to enact a repayment plan that is more generous than the current plan. For example, the *Affordable Loans for Any Student Act* was introduced by Senator Merkley in the last three Congresses and by Representative DeLauro in the last two Congresses. Even those legislative proposals were not as generous of a discount on student loans as you now propose.

In your proposed rule, the Department claims authority to provide a 40 percent discount to student loan borrowers through the new income contingent repayment program compared to the current plan.²⁰ Analysts at the Brookings Institution and the Urban Institute suggest that the discount will be 50 percent or more.²¹ Whatever the discount amounts to, the Constitution states that only Congress has the power of the purse.²² Clearly, Congress did not and would not authorize the Secretary to write off half of the \$1.6 trillion student loan portfolio with the stroke of a pen because we know our constituents are the ones ultimately responsible for paying for it, including those who never stepped foot on a college campus.

Since 1993, the income contingent repayment plan has included a "calculation of balance due" that includes "unpaid principal, any accrued interest, and any fees such as late charges, assessed on such loan."²³ Flying in the face of the law, the proposed rule plans to "not charge any remaining accrued interest each month after applying a borrower's payment." This amendment to the existing regulation comes with a \$15 billion price tag according to the Department.²⁴ Relatedly, the statute for the income contingent repayment plan specifically states, "The Secretary may promulgate regulations limiting the amount of interest that may be capitalized on such loan, and the timing of any such capitalization."²⁵ It is clear that Congress intended to provide the administration with specific flexibility regarding regulations on capitalization, but explicitly did not provide flexibility on interest accrual in this particular repayment plan.

Subsequently, *The College Cost Reduction and Access Act of 2007* created a separate income based repayment plan that explicitly called for the Secretary to pay for any interest accrued on subsidized loans for up to three years if the interest due was not paid each month.²⁶ More recently, the *Bipartisan Student Loan Certainty Act of 2013* set annual interest rates for loans at the 10-year Treasury note plus a percentage rate which varies depending upon the type of loan.²⁷ If Congress wanted the Secretary not to charge interest or to pay a borrower's interest, the statute would say so.

Another example of the proposed rule attempting to make policy without Congressional authorization is in its treatment of deferment and forbearance. The proposed rule plans to "allow

²⁰ Department of Education, Fact Sheet: Transforming Income Driven Repayment, January 10, 2023.

²¹ Looney, Adam. Biden's Income-Driven Repayment plan would turn student loans into untargeted grants. September 15, 2022. Chingos, Matthew, et al. Few College Students Will Repay Student Loans under the Biden Administration's Proposal. January 2023.

²² U.S. Const. art. I, § 9.

²³ 20 U.S.C. 1087e(e)(5)

²⁴ 88 FR 1894

²⁵ (PL 103-66) and current 20 U.S.C. 1087e(e)(5)

²⁶ (PL 110-84)

²⁷ (PL 113-28)

borrowers to receive credit toward forgiveness for certain periods of deferment or forbearance.”²⁸ Economic hardship deferment was added as a payment toward the forgiveness period for any income contingent repayment plan in the *College Cost Reduction and Access Act of 2007*.²⁹ However, the proposed rule will count multiple other types of deferment as well as forbearances, none of which are mentioned in the income contingent repayment statute.

Conclusion

The Department does not have the statutory authority to promulgate this Notice of Proposed Rulemaking. In order to promulgate this rule, the Department “must point to ‘clear congressional authorization’ for the power it claims.”³⁰ In this case, no such “clear congressional authorization” exists.

In addition, turning student loans into grants for the educated after they leave college is a smack in the face of taxpayers who never borrowed student loans or who have already paid theirs back. A poll just last year showed that public confidence in postsecondary education has dropped 14 points since 2020³¹ and these actions will further undercut America’s confidence in the value of a postsecondary education. The proposal severs any logical connection between the amount an individual pays to an institution to earn a degree and his or her expectations for future earnings.

Simply put, the proposed rule will exacerbate the problems of rising college costs and excessive borrowing.³² Policy experts agree that the vast majority of students will never fully repay their loans under this proposal.³³ Borrowing for college will become the default for every household, including for those who can afford to pay and otherwise would have paid out-of-pocket. This proposal is reckless, fiscally irresponsible, and blatantly illegal and, as such, it should be rescinded.

Sincerely,



Virginia Foxx
Chairwoman
U.S. House Committee on Education
and the Workforce



William Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
Education, Labor and Pensions

²⁸ FR and in 685.209(k)

²⁹ (PL 110-84).

³⁰ *West Virginia v. E.P.A.*, 597 US ___ (2022).

³¹ Karin Fisher. Americans’ Confidence in Higher Ed Drops Sharply. July 26, 2022. Chronicle of Higher Education.

³² Cooper (2023) <https://www.forbes.com/sites/prestoncooper2/2023/01/11/bidens-quiet-student-loan-cancellation-income-driven-repayment-expansion/?sh=d0bae0ff4b0b>

³³ Chingos et. al. (2023) <https://www.urban.org/research/publication/few-college-students-will-repay-student-loans-under-biden-administrations>

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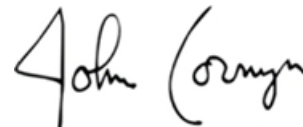
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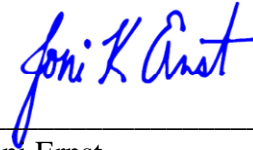
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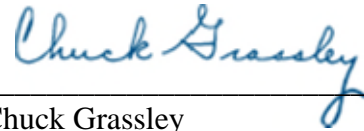
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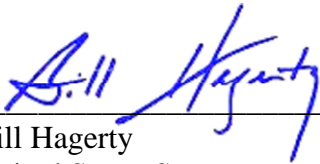
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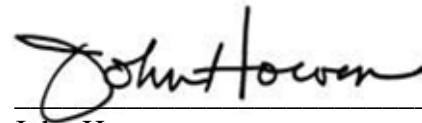
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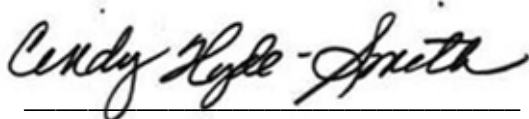
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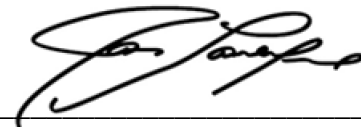
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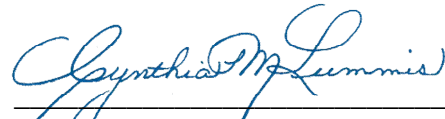
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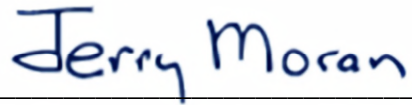
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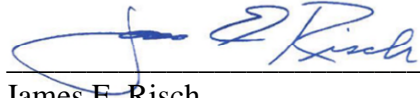
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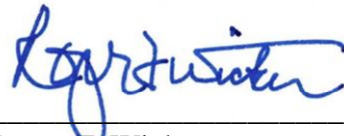
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