

January 18, 2023

The Honorable Miguel Cardona  
 Secretary of Education  
 U.S. Department of Education  
 400 Maryland Avenue, SW  
 Washington, DC 20202  
 Via <https://www.federalregister.gov>

Dear Secretary Cardona:

This is a comment on the U.S. Department of Education’s proposed regulations under the title, “Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program,” Docket ID ED-2023-OPE-0004.

The Department of Education is right to express interest in determining how to minimize default while incentivizing borrowers to repay their student loans. Yet, the proposed regulations largely do not incentivize borrowers to repay their student loans. Instead, they incentivize a large proportion of borrowers to choose an income-driven repayment plan with monthly payments of \$0.

We agree that eliminating the psychological impact of interest accrual when a borrower makes a loan payment is likely to have a positive effect on the decision not to default. Yet, the other main changes in the proposed regulations incentivize borrowers to make lower payments than they could actually afford. Our concerns are provided below.

1. The “REPAYE” plan regulations in § 685.209 would increase the amount of discretionary income exempted from the calculation of payments to 225 percent of the poverty guideline, or \$30,600. For borrowers aged 22-31, \$30,600 is at about the 65th percentile in individual earnings (including adults without college). For income percentiles see the Income Percentile Calculator by Age at <https://personalfinancedata.com>, yielding the following table:

Age	Percentile at \$30,600
22	89.2
23	82.1
24	75.8
25	66.2
26	62.6
27	59.4
28	56.3
29	54.0
30	52.6
31	50.7

Even at age 31—a common age at ten years after receiving a bachelor’s degree—adults earning \$30,600 are earning above the national median for their age. Yet all borrowers who are earning up to this amount will enjoy \$0 payments. Significant numbers of borrowers will have \$0 payments for one or more years after graduation, even when their income is substantially above the national median for their age.

What proportions of borrowers at these ages will have \$0 or very low payments for some, most, or all ten years after graduation? It appears that data are available on earnings by age among people with bachelor's degrees, via the Current Population Survey conducted by the Bureau of Census for the Bureau of Labor Statistics and via the Survey of Consumer Finances from the Federal Reserve. Such data would enable the department to determine how many borrowers are likely to choose REPAYE because of an overwhelmingly clear reduction in payment amounts. Yet the department's impact analysis for the proposed regulation purports not to be able to predict how many borrowers will move into the REPAYE plan. The NPRM admits, "The impact of borrowers switching into IDR plans from non-IDR plans is also a potential factor that we do not estimate here. We have limited information on these borrowers' income and family profiles in repayment."

Since the department has not calculated the number of borrowers who will choose REPAYE and have payments of \$0 or near \$0, and this number could be quite substantial, the department's estimate of financial impact is likely to undercount losses to the American taxpayer substantially. Additionally, the department declined to take into account the additional "people [who] may be willing to take on student loan debt with the safety net of the more generous IDR plan" (87 FR at 1920).<sup>1</sup> Because the Department did not reckon with these large losses, it did not have occasion to determine whether the benefits it claims from the regulation are worth those losses. The failure to ask and reasonably answer this question is arbitrary and capricious.

2. Regarding undergraduate borrowers whose payments would be cut in half to 5 percent of their discretionary income under § 685.209, the department argues for "greater parity" between graduate and undergraduate borrowers. The department reasons that "a payment rate equal to 5 percent of discretionary income would allow a single borrower with only undergraduate loans up to \$75,500 in 2016 income to receive benefits" from choosing REPAYE instead of a different plan, and that this amount is near the \$80,000 break-even point for graduate borrowers (based on median graduate debt).

Setting graduate debt as the norm and applying the situation of graduate debt to undergraduate debt, however, is arbitrary and capricious. The department provides no reason to set graduate debt as a norm. Indeed, undergraduate debt is by far the norm, and the department could just as easily have changed the parameters of graduate debt to match undergraduate debt.

3. REPAYE is intended to be an alternative plan for borrowers with trouble paying the full amount of their debt rather than the plan that a majority of borrowers choose. Congress designed such income-based repayment plans to be for exceptional circumstances—cases where borrowers have at least a partial financial hardship (see 87 FR at 1896; 20 U.S.C. § 1098e). In addition to the incentives above showing that a large proportion of borrowers will choose REPAYE to pay \$0 or near \$0, we note that the \$75,500 level of individual income (the apparent break-even point for undergraduate borrowers under the proposed regulations) represents more than the median *household* income for 40 States (including adults without college) (see <https://worldpopulationreview.com/state-rankings/median-household-income-by-state>). Even excluding adults without college from such figures, it is clear that a very large

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<sup>1</sup> Furthermore, citing various omissions, one analyst has calculated a ten-year cost of between \$824 billion and \$1.14 trillion (<https://www.studentloanplanner.com/new-repaye-plan-ten-year-cost/>), in sharp contrast to the figure in the NPRM.

proportion of borrowers who could afford their full payments will instead choose REPAYE to reduce their payments.

Congress intended REPAYE to apply only in exceptional circumstances, not as a matter of course. Its application only in exceptional circumstances is an important part of the goal Congress set for the program. A program that applies in the ordinary course would raise far different policy considerations, ones that Congress when it enacted the statute did not engage, as it amounts to wholesale or near-wholesale federal subsidization of higher education at the cost of taxpayers (including those who do not attend college or who pay for college out of their own resources). The Department's failure to take into account Congress's desire for a program just for exceptional circumstances is arbitrary and capricious.

4. It is true that many borrowers would benefit from early forgiveness under the proposed change to § 685.209(k)(3), forgiving all remaining debt after 10 years for borrowers whose original total Direct Loan principal balance was less than or equal to \$12,000 (with the time to forgiveness increasing by one year for each additional \$1,000). Easing the burden of making payments, however, stands in contrast with the department's responsibility to try to collect all debts. The Federal Claims Collection Act, 31 U.S.C. § 3711, et seq., obligates agencies to "try to collect a claim of the United States Government for money . . . arising out of the activities of, or referred to, the agency" (31 U.S.C. § 3711(a)(1)). Furthermore, by controlling regulation, the Secretary is directed to "aggressively collect all debts" and is delegated limited compromise and settlement authority (see 31 CFR 901.1(a); see also 31 U.S.C. § 3711(a)(2); 31 CFR 902.2, 902.3, 902.4.) The department has failed to take this mission into account or to explain why any benefits the proposal would achieve are worth the costs to its effectiveness in achieving this mission; its failure renders the regulation arbitrary and capricious.

Indeed, borrowers with lower initial balances are, nearly by definition, exactly those who are most able to repay the full amounts of their debt. Accordingly, there is no rational basis for simply canceling their debt after 10 years.

Furthermore, the proposed regulations here make no distinction among borrowers with full ability to pay their debt after 10 years, those with partial ability to pay their debt after 10 years, and those with substantial inability to pay the full amount of their debt after 10 years. Since the department will have access to the income of all REPAYE borrowers, the department could easily determine who has a continuing ability to pay some or all of his or her remaining debt. Simply cutting off payments at 10 years (or additional years ahead of the existing cutoffs), accordingly, is arbitrary and capricious.

Thank you for considering these concerns.

Respectfully submitted,

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