NEW YORKERS FOR RESPONSIBLE LENDING

TESTIMONY FOR A PUBLIC HEARING ON:

PRACTICES OF THE STUDENT LOAN INDUSTRY

PRESENTED BEFORE:

ASSEMBLY STANDING COMMITTEE ON BANKS
ASSEMBLY STANDING COMMITTEE ON CONSUMER AFFAIRS AND PROTECTION

PRESENTED BY:

EVAN DENERSTEIN
MOBILIZATION FOR JUSTICE, INC.

November 27, 2018

I. Introduction

This testimony is submitted on behalf of New Yorkers for Responsible Lending (NYRL), a 164-member coalition that promotes access to fair and affordable financial services and the preservation of assets for all New Yorkers and their communities. NYRL members represent community development financial institutions, community-based organizations, affordable housing groups, consumer advocacy groups, and advocates for seniors, legal services organizations, housing counselors, community reinvestment, fair lending, and labor groups.

Mobilization for Justice (formerly MFY Legal Services), which is a member of NYRL, envisions a society in which there is equal justice for all. Our mission is to achieve social justice, prioritizing the needs of people who are low-income, disenfranchised or have disabilities. We do this through providing the highest quality direct civil legal assistance, providing community education, entering into partnerships, engaging in policy advocacy, and bringing impact litigation. We assist more than 12,000 New Yorkers each year, benefitting over 25,000. MFJ's Consumer Rights Project provides advice, counsel and representation to low-income New Yorkers on consumer problems, including issues related to student loans and for-profit colleges.

NYRL is grateful to Assemblymember Zebrowski and Assemblymember Titone, and all members of Assembly Standing Committee on Banks and the Assembly Standing Committee on Consumer Affairs Protection, for the opportunity to discuss student loans and the student loan servicing industry. NYRL has supported prior legislative and Executive Budge proposals to require student loan servicers to be licensed by the Department of Financial Services and set further standards and regulations for this industry. Over the past two legislative sessions, memoranda of support have been submitted by several of our members and other advocacy organizations, including: AARP; Brooklyn Volunteer Lawyers Project; American Debt Resources, Inc.; CAMBA; Center for Independence of the Disabled, NY; Center for Responsible Lending; the Civil Service Bar Association; District Counsel 37 (DC37); Empire Justice Center; HomeSmartNY; La Fuerza Unida; the Legal Aid Society; MFJ; New York Legal Assistance Group; New York Public Interest Research Group (NYPIRG); New York State United Teachers (NYSUT); Pratt Area Community Council, Inc. dba IMPACCT Brooklyn; Queens Volunteer Lawyers Project; Urban Justice Center; and Young Invincibles.

Based on the experience of NYRL members, student loan debt is one the most common sources of financial instability for New York residents. It is also our experience that many of the hardships created by student loan debt are unnecessary and could be eliminated by policies that ensure borrowers receive and have access to accurate information about their loans, and that require borrowers to be informed of the repayment and forgiveness options that best suit their needs.

New York State has a long tradition of leading the way on consumer protection, and student loan servicing is an issue that is ripe for state action. The nation faces a crisis right now, as more than 44 million Americans owe more than $1.4 trillion in student loan debt and more than $165 billion of that debt is more than 90 days in default.[1] In New York alone, student loan debt more than doubled during the last decade, growing to $82 billion, with an average outstanding balance of $32,000.[2] Student loan servicers, who are the primary links between lenders and borrowers, often have the power to either help borrowers remain current on their accounts or allow them to fall into default. Precisely because of this essential role, and the reasons listed below, we must ensure basic rights for borrowers repaying student loans.

II. New York Student Loan Borrowers are Harmed by Inadequate Loan Servicing

Studies show that servicers routinely fail to tell borrowers about available relief, including income-driven repayment plans and disability discharges, and instead allow borrowers to fall into default, resulting in garnishment, tax seizures, and other hardships. Also, borrowers report that servicers provide inaccurate information or actively obstruct relief when they apply for an income-driven payment program, instead pushing them into temporary forbearance and deferment options, which ultimately work against the borrowers' best interests.

For most borrowers, forbearance and deferments are inferior options to enrollment in income-driven plans that cap payments at a modest percentage of income, sometimes with payments as low as $0 per month. Income-driven payments also count towards eventual forgiveness of any remaining debt after 20 or 25 years of payments. Nonetheless, a report by the Consumer Financial Protection Bureau (CFPB) found that borrowers complaints reveal that instead of helping them to enroll in income-driven repayment plans, servicers often steer them towards temporary forbearance and deferment options, which a practice that is more lucrative for servicers, but often detrimental to borrowers.[3] A study by the Government Accountability Office (GAO) found that 70 percent of borrowers in default actually qualified for a lower monthly payment through income-driven repayment plans, yet servicers failed to provide sufficient information for borrowers to enroll.[4] It also found that even when servicers reached out to delinquent borrowers, the information provided was often inconsistent, leading to confusion and substandard solutions to borrowers' problems.[5]

[1] Federal Reserve Bank of New York, Household Debt and Credit Report (Q3 2018), *available at* https://www.newyorkfed.org/microeconomics/hhdc.html

[2] Office of the State Comptroller, Student Loan Debt in New York State, 1, September 2016, *available at* https://www.osc.state.ny.us/reports/highered/student_loan_debt.pdf.

[3] Consumer Financial Protection Bureau, Student Loan Servicing, Analysis of Public Input and Recommendations for Reform, 25, September 2015, *available at* http://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf (hereinafter "Student Loan Servicing").

[4] United States Government Accountability Office, Report to Congress, Federal Student Loans: Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options, 13, August 2015, *available at* https://www.gao.gov/assets/680/672136.pdf.

[5] *Id* at 22.

A recent audit of one of the nation's largest servicers, Navient, by Federal Student Aid (FSA), an office of the U.S. Department of Education, supported these findings.[6] In the audit, in which the FSA listened to calls between Navient and borrowers, it found that Navient representatives often only offered borrowers the option of forbearance, sometimes even when borrowers promised to make a payment within a short amount of time.[7] It also found that Navient sometimes did not offer alternative or beneficial options to borrowers, such as income-driven repayment plans, or ask questions to help determine whether another option would be better for the borrower.[8]

The issue of misinformation provided by servicers has also been brought to light in the past year when the first wave of borrowers became eligible for public service loan forgiveness (PSLF). This program is offered to borrowers who have chosen a career in public service, which grants forgiveness of remaining debt after 10 years of timely, qualifying payments made while working for a government agency or a 501(c)(3) nonprofit organization. This broad range of public servants include nurses, teachers, clinical social workers, and even first responders. Incredibly, the Education Department has denied 99% of the borrowers who have applied for PSLF.[9] The Department has denied approximately 70% of applications because they did not meet the program's requirements, either because they did not have the right type of loans, the right type of employers, or the right type of payment plans.[10] This is often due to confusion and misinformation about how the program works.[11] Many of these borrowers now face the nightmare scenario of being denied after making years of payments that did not qualify, even though they were assured by their servicers that they would.[12]

Borrowers find that loan servicers are unable to provide accurate information or records. Borrowers are sometimes not able to obtain accurate information about their payment history, or access documentation about their loans, including original loan contracts.[13] Indeed, servicers often provide borrowers with conflicting, inconsistent and inaccurate information, and borrowers have difficulty with escalating inquiries or complaints to senior servicing personnel to resolve these issues.[14]

As a result of the problems described above, many borrowers are tricked into paying scam student loan debt relief companies to help with their student loan debt because they don't know where else to turn. In 2015, the NYS Department of Financial Services (DFS) shut down a student debt relief provider that

---

[6] Federal Student Aid, *Navient Use of Forbearance* (May 18, 2017) *available at* https://www.documentcloud.org/documents/5205070-May-2017-FSA-Audit-Report.html.
[7] *Id* at 2.
[8] *Id.*
[9] United States Government Accountability Office, Report to Congressional Requesters, Public Service Loan Forgiveness (September 2018) *available at* https://www.gao.gov/assets/700/694304.pdf.
[10] *Id.*
[11] *Id.*
[12] *See, e.g.*, Turner, Cory, National Public Radio, 'I Am Heartbroken': Your Letters About Public Service Loan Forgiveness (October 18, 2018), *available at* https://www.npr.org/2018/10/18/658447443/i-am-heartbroken-your-letters-about-public-service-loan-forgiveness; Lieber, Ron, New York Times, The Public Student Loan Forgiveness Rescue Hasn't Gone Well So Far (October 17, 2018), *available at* https://www.nytimes.com/2018/10/17/your-money/public-service-loan-forgiveness.html; Lieber, Rob, New York Times, A Student Loan Nightmare: The Teacher in the Wrong Payment Plan (October 27, 2017) *available at* https://www.nytimes.com/2017/10/27/your-money/paying-for-college/student-loan-payments.html?module=inline.
[13] Student Loan Servicing¸ *supra*, at 64-66.
[14] Student Loan Servicing, *supra*, at 69.

charged upfront fees ranging from $99 to $3400 to complete applications that are already free of charge to borrowers.[15] In 2016, the Consumer Financial Protection Bureau halted a similar scam, noting that "[t]hese practices bear a disturbing resemblance to the mortgage crisis where distressed consumers were preyed upon with false promises of relief."[16] As in the mortgage context, such scams would not be as prevalent or successful if student loan servicers were providing accurate information and acting in the best interests of their customers.

Poor student loan servicing disproportionately harms people of color. Analyses have found that Black students graduate with more debt than White students[17] and that this gap continues to increase after graduation.[18] Black and Latino borrowers also encounter higher rates of default on student loans than White borrowers.[19] A study by the Washington Center for Equitable growth found that delinquency on student loans disproportionately affects minority communities.[20] Even after controlling for income, race still has a strong impact on student loan delinquency.[21] And middle-class minorities are hurt the most by student loan delinquency.[22] The Center's Mapping Student Debt Project shows that student debt delinquency tends to be highest in zip codes with high Black and Latino populations.[23] A report by the New York City Department of Consumer Affairs (DCA) found this pattern holds true in New York City neighborhoods.[24]

Inadequate student loan servicing disproportionately affects low-income, disabled, and elderly borrowers. Ignoring the best interests of borrowers is particularly troubling because doing so affects New York's most vulnerable residents. A recent report by the New York City DCA found that higher rates of default and delinquency largely correspond to average neighborhood income.[25] It also found that older borrowers are more likely to be delinquent or in default on their student loans, which can have devastating effects.[26] This can have devastating effects for older and disabled borrowers. A GAO report found that in 2015 the federal government garnished the benefits of 114,000 people age 50 and

---

[15] Department of Financial Services, Press Release, Governor Cuomo Announces Student Loan Debt Relief Provider Will Cease Operations After Misleading and Improper Practices, *available at* http://www.dfs.ny.gov/about/press/pr1507011.htm.
[16] Consumer Financial Protection Bureau, Press Release, CFPB Halts Student Loan Debt Relief Scam, *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-halts-student-loan-debt-relief-scam/.
[17] Judith Scott-Clayton and Jing Li, Black-white disparity in student loan debt more than triples after graduation (Oct. 2016), The Brookings Institute, *available at* https://www.brookings.edu/research/black-white-disparity-in-student-loan-debt-more-thantriples-after-graduation/.
[18] *Id.*
[19] Ben Miller, New Federal Data Show a Student Loan Crisis for African American Borrowers, Center for American Progress (2017), *available* at https://www.americanprogress.org/issues/educationpostsecond-ary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-africanamerican-borrowers/.
[20] Washington Center for Equitable Growth, How the student debt crisis affects African Americans and Latinos, *available at* https://equitablegrowth.org/how-the-student-debt-crisis-affects-african-americans-and-latinos/.
[21] *Id*.
[22] *Id*.
[23] Mapping Student Debt: How the student debt crisis affects African Americans and Latinos, https://mappingstu-dentdebt.org/#/map-2-race.
[24] New York City Department of Consumer Affairs, Student Loan Debt Distress Across NYC Neighborhoods: Identifying Indicators of Vulnerability; *available at* https://www1.nyc.gov/site/dca/media/pr110118-DCA-Report-Examining-Factors-Student-Loan-Distress.page.
[25] New York City Department of Consumer Affairs, Student Loan Borrowing Across NYC Neighborhoods, *available at* https://www1.nyc.gov/site/dca/media/pr121517.page.
[26] *Id* at 15.

older, more than half of whom were receiving Social Security disability income.[27] Even though servicers could easily inform these borrowers they may qualify for a discharge of their loans based on disability or an income-driven repayment plan of as little as $0 per month, many recipients of SSR and SSD instead are having 15% of their meager benefits garnished. It is not surprising then that the AARP has identified student loan debt as a "looming threat" to the financial security of retirees in part because of the garnishment of their benefits.[28]

Despite their vital role in the lives of more than 44 million student loan borrowers and in managing over $1.4 trillion dollars in student loans, ***there is currently no federal supervision of student loan servicers' conduct*****.** The Education Department's oversight of student loan servicing consists primarily of programmatic guidance. To the extent it is able to adopt policies that will protect borrowers, the Education Department, under the current administration, has sought to limit borrower protections. In her time as Secretary of Education, Betsy DeVos has rescinded the Obama administration's efforts to set reasonable and consistent standards to protect borrowers.[29] Only three months into her tenure as education secretary, Secretary DeVos withdrew three memos by the former education secretary,[30] which: (1) required servicers to provide borrowers accurate and timely information about their debt;[31] (2) provided economic incentives for servicers to keep all borrowers current and conduct targeted outreach to people at great risk of defaulting on their loans;[32] (3) created a baseline level of service for all borrowers;[33] and (4) required the federal government to consider past performance when handing out new contracts to servicers.[34] In an August 2017 letter to then-acting Director of the CFPB, Richard Cordray, the Department provided notice of its intent to rescind a memorandum of understanding between the agencies regarding sharing information in connection with oversight of student loans.[35] The Department also informed the CFPB that handling of complaints about student loan servicers was outside its jurisdiction.[36]

Further troubling, the Department has sought to shield servicer conduct from scrutiny by state and federal investigators. In December 2017, the Department issued a memorandum claiming that all records held by third-party contractors of the Department, such as servicers, are records of the

---

[27] United States Government Accountability Office, Report to Congress, Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief, 11, December 2016, available at http://www.gao.gov/assets/680/672136.pdf.
[28] Fishel, Daniel, Politico, Why the AARP is worried about student loans, *available at* https://www.politico.com/agenda/story/2018/06/07/student-loans-debt-aarp-000666.
[29] Danielle Douglas-Gabriel, *DeVos Dials Back Consumer Protections for Student Loan Borrowers*, WASHINGTON POST, April 11, 2017, *available at* https://www.washingtonpost.com/news/grade-point/wp/2017/04/11/devos-dials-back-consumer-protections-for-student-loan-borrowers/?utm_term=.105f3416385b.
[30] U.S. Department of Education, Letter from Betsy DeVos to James W. Runcie, April 11, 2017, *available at* https://www2.ed.gov/documents/press-releases/student-loan-servicer-recompete.pdf.
[31] U.S. Department of Education, Memorandum from Ted Mitchell to James W. Runcie, July 20, 2016, *available at* https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf.
[32] *Id*.
[33] *Id*.
[34] U.S. Department of Education, Letter from John B. King, Jr. to James W. Runcie, June 30, 2016, *available at* https://sites.ed.gov/ous/files/2016/06/John-King-servicer-past-performance-memo.pdf.
[35] Letter from Kathleen Smith, Acting Under Secretary, and A. Wayne Johnson, (former) COO of Federal Student Aid to Richard Cordray, Director, Consumer Fin. Prot. Bureau (Aug. 31, 2017), *available at* https://edworkforce.house.gov/uploadedfiles/2017-0901_signed_letter_to_cfpb.pdf
[36] *Id*.

Department, and any request for such records must be made to the Department itself.[37] Thus, any state or federal agency investigating servicer conduct would have to essentially seek the approval of the Department.

Finally, when New Yorkers with student loans are made aware of affordable repayment options, they have more disposable income to support themselves and their families, purchase homes, and to contribute to local and statewide economies.[38]

III. New York Must Enact Legislation to Protect Student Loan Borrowers

Protecting its citizens from all forms of consumer fraud falls squarely within the historic police power reserved to the states. State enforcement agencies have long used this power to protect consumers from unfair, deceptive, and fraudulent practices by financial service companies, debt collectors, and other industries.

The student loan servicing industry wants Secretary DeVos to immunize them from state oversight altogether. In response to this request by the industry, 26 state attorneys general from both red and blue states issued a letter to the Education Department providing in detail why this request clearly exceeds the Department's authority.[39] As stated in the letter, the Department has drawn its regulations under the Higher Education Act narrowly to avoid preemption of state laws.[40] It has done this precisely so that states may fulfill their traditional roles of protecting their citizens from unfair and deceptive practices.[41] For this very reason, *contracts between the Department and its servicers expressly affirm that servicers must comply with state laws and regulations*.[42] Nevertheless, the Education Department issued an interpretation stating that the Higher Education Act preempts state regulation of federal student loan servicers.[43] This argument, however, was rejected in a federal class action against Navient in the Middle District Court of Florida.[44]

The federal government's efforts to block states from policing banks prior to the 2008 financial crisis enabled reckless lending, which ultimately fanned the flames of the mortgage meltdown. New York must not let this happen in the context of student lending.

Other states are already taking action. Connecticut, California, Illinois, and the District of Columbia have stepped up and enacted bills addressing various abuses in student loan servicing that prevent

---

[37] Memorandum from Patrick A. Bradfeld, Director, Federal Student Aid Acquisitions, Dep't of Educ. (Dec. 17, 2017), Dkt. 19-17, Ex. Q, at 2. (Aug. 31, 2017), *available at* https://edworkforce.house.gov/uploaded-files/2017-0901_signed_letter_to_cfpb.pdf
[38] *See* Office of State Comptroller, *supra*, at 9.
[39] Letter from New York State Attorney General Eric Schneiderman, et al. to Secretary of Education Betsy DeVos, October 23, 2017, *available at*: http://www.marylandattorneygeneral.gov/news%20documents/DeVos_10_24_17.pdf.
[40] *Id*.
[41] *Id*.
[42] *See*, *e.g.*, Department Contract with SLM Corporation, June 17, 2009, *available at* https://studentaid.ed.gov/sa/about/data-center/business-info/contracts/loan-servicing.
[43] *Available at* https://www.federalregister.gov/documents/2018/03/12/2018-04924/federal-preemption-and-state-regulation-of-the-department-of-educations-federal-student-loan
[44] *Daniel v Navient Solutions, LLC*, No. 17-cv-2503, Dkt. No. 62 at 5 (M.D. Fla. June 25, 2018).

borrowers from paying off their student loans. Other states, including New Jersey, Maryland, Virginia, Maine, Massachusetts and Washington are also advancing student loan servicing legislation. New York must not be left behind, and indeed should be setting an example for other states.

Finally, in protecting New Yorkers from fraud and deceit by student loan servicers, DFS should not be hamstrung by having to prove that servicers have "knowingly" made a false statement or omission of material fact in connection with any information or reports filed with a governmental agency—a burden of proof generally reserved for criminal prosecutions. The Connecticut Bill of Rights, which has been a model for other states' statutes, does not have this requirement. That burden of proof is also not required in state rules governing mortgage servicing or New York City DCA regulation of debt collectors. This requirement would unnecessarily hamper the ability of DFS to ensure that servicers are providing the Department and other governmental agencies with accurate information.

In light of the national student loan crisis, this is a critical time for New York to take a stand on behalf of student loan borrowers. New York must demonstrate that it is willing to be at the forefront of this fight to protect the rights of student borrowers. Student loans affect the financial wellbeing of millions of New Yorkers. New Yorkers deserve the right to transparent, accurate information about their loans and servicers that act in the best interests of their customers.

Student loan borrowers have basic rights that need to be protected from unfair and deceptive servicing practices, similar to the mortgage servicing protections and standards that homeowners enjoy. In order to protect these rights, New York must fill the void in providing oversight of these unregulated, non-bank entities.

For any questions about this memo in support, please feel free to contact Evan Denerstein at (212) 417-3760 or edenerstein@mfjlegal.org.