Berkeley Law | Center for Consumer Law & Economic Justice

Center for Consumer Law &
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**Submitted via Regulations.gov**

Richard Blasen
Office of Postsecondary Education
400 Maryland Ave. SW
Washington, DC 20202

**Re: Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, Docket No. ED-2023-OPE-0004**

Dear Mr. Blasen,

The UC Berkeley Center for Consumer Law and Economic Justice at the University of California, Berkeley, School of Law, and Amanda Prasuhn, the Director of Public Interest Financial Support at Berkeley Law's Financial Aid Office, submit these comments in response to the Department's request for comment on its proposed revisions to the regulations governing Income-Driven Repayment (IDR) plans, to be enacted at 34 U.S.C §§ 685.102, 685.208, 685.209, 685.210, 685.211, and 685.221.[1]

The Center for Consumer Law & Economic Justice works to establish equity and fairness in the marketplace. We believe that building economic justice means developing and enforcing laws that fight fraud and deception, that protect low-income communities and communities of color, and that promote financial security and empowerment. Through research, advocacy, policy, and teaching, the Center strives to apply robust consumer protection laws in places, and among people, where those laws have not been used before, and to create a society in which economic, racial, and social justice are available to all. The Center has conducted significant advocacy related to student loans, including publishing a recent research memorandum on regulations of predatory higher education loan products and filing an amicus brief in support of the Biden Administration's plan to cancel student loan debt in *Biden v. Nebraska.*

Berkeley Law's Financial Aid Office helps a diverse population of prospective, current, and graduated law students obtain institutional, private, state, and federal student aid to fund their legal education. The Financial Aid Office counsels students on loan repayment and forgiveness strategies and works with them to enroll in IDR plans and make progress toward Public Service Loan Forgiveness (PSLF). Berkeley Law's Financial Aid Office also offers a Loan Repayment Assistance Program (LRAP) to graduated law students working in public interest careers, helping students navigate and fund loan repayment for up to 10 years after graduating. The Director of Public Interest Financial Support oversees LRAP, counsels all students and graduates interested in IDR and PSLF, helps students troubleshoot problems with these federal programs, and shares information about changes to the federal student loan landscape.

[1] Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (Dep't of Educ. Jan. 11, 2023).

## I. Introduction

As a public law school, Berkeley Law is strongly committed to educating the next generation of lawyers engaged in public interest and social justice legal work. Berkeley Law School Dean Erwin Chemerinsky has explained that "[o]ne of the defining characteristics of Berkeley Law is its public mission. Integral to this goal is supporting our graduates working in public interest after law school."[2] One way Berkeley Law supports public interest legal careers is through its LRAP, which is one of the best of its kind. Berkeley Law's LRAP has one of the lowest out-of-pocket contribution formulas of any law school, including private law schools; compared with most other schools, Berkeley Law serves more graduates and graduates spend less of their own money on their student loans.[3] According to a recent survey of Berkeley Law school alumni who have participated in LRAP, more than eighty percent work in governments or non-profit organizations.[4]

The Center for Consumer Law and Economic Justice and the Financial Aid Office share the law school's broad commitment to service in the public interest. At the Center, we emphasize building skills, opportunities, and pathways for students to engage with consumer protection law. We routinely work with law students through pro bono projects, research, and events that highlight current and cutting-edge issues in consumer protection, including student debt. At the Financial Aid Office, we help students to obtain grants, fellowships, and scholarships based on merit and/or need, as well as an array of federal and private student loans. Together, we to provide timely and relevant information about student loans and the law school's support for public interest law students. For example, together with the Financial Aid Office, the Center prepared a consumer protection guide for student loan borrowers affected by the COVID-19 pandemic.[5] Center staff, affiliated faculty, and the Financial Aid Office also presented a session on the current student debt crisis at the law school's alumni weekend this past fall.[6]

The Center and the Financial Aid Office are keenly aware of the impact of student debt on students and alumni. The students with whom the Center works, and from whom the Financial Aid Office frequently hears, regularly express concern about the (un)affordability of law school, the burdensome student debt they carry, and how their loans may affect their ability to fulfill their dreams of a careers protecting vulnerable communities, promoting economic justice, or otherwise serving the public interest.

IDR plans are a lifesaver for Berkeley Law student borrowers interested in public service careers. IDR plans can enable borrowers to reduce their monthly loan payments from $2,000 to $3,000 under the standard 10-year repayment plan to a vastly more affordable $0 to $500. In most cases, Berkeley Law graduates must enroll in an IDR plan to be eligible for LRAP

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[2] Andrew Cohen, *Public Interest Booster: Berkeley Law Further Improves Its Loan Repayment Assistance Program*, Berkeley Law (Nov. 15, 2022), https://perma.cc/JP2X-KBW8.
[3] *Id.*
[4] Berkeley Law Financial Aid Office, *LRAP Survey Report* 19 (2022) ("2022 LRAP Survey"), https://perma.cc/BB63-SGUP.
[5] *Issue II: Student Loans & COVID-19*, Berkeley Ctr. For Consumer L. & Econ. Just. (Aug. 11, 2021), https://perma.cc/UA5M-T2UV.
[6] *See* 2022 Schedule of Events: Alumni Reunion Weekend, *Berkeley Law* (Oct. 1, 2023), https://perma.cc/3AYA-NZGN ("CLE: Student Loans and Debt Cancellation: What Just Happened?").

assistance. Indeed, over 80 percent of current borrowers receiving LRAP assistance from Berkeley Law are enrolled in IDR plans.[7] Yet even if they were not receiving LRAP support, 61 percent of current borrowers report that they would have enrolled in an IDR plan anyway.[8] Absent students' ability to enroll in IDR plans, Berkeley Law likely would not have nearly as many graduates working in meaningful, high-impact, and desperately needed public service legal jobs.

The Department's proposed regulations will vastly improve the current IDR plans and make it possible for more law students to participate in public service careers. In particular, we applaud the Department's efforts to address negative amortization in repayment calculations by giving borrowers the option to pursue lower-paying public service careers without being penalized by having their interest climb exponentially.

Overall, we strongly support the Department's proposed rulemaking. The additional recommendations we offer are designed to further support law student borrowers like those we work with every day.

## II. Discretionary Income Threshold and Payment Amounts

We strongly support the Department's proposal to revise 34 C.F.R. § 685.209 to increase the amount of discretionary income exempt from the calculations in the Revised Pay As You Earn (REPAYE) Plan to 225 percent of the federal poverty guideline.[9] Although current plans are intended to provide borrowers with affordable monthly payments, even ten percent of a borrower's discretionary income under the existing guidelines can result in unaffordable payment amounts. With rising cost-of-living due to inflation since the COVID-19 pandemic, student loan payments have become more difficult for borrowers to manage. As borrowers prepare for the likely wind-down of the over three-year-long moratorium on student loan payments, borrowers need options to help ease them back into repayment and avoid default. A higher discretionary income threshold will provide borrowers with a sorely needed cushion to manage their payments.

We also support the reduced percentage of discretionary income used to calculate a borrower's monthly payments for those borrowers paying back undergraduate loans. However, we urge the Department to also update its Loan Simulator tool on the Federal Student Aid website accordingly so that borrowers can readily determine what share of their discretionary income they will need to pay if they have both undergraduate and graduate loans. Currently, the tool fails to recognize the differences between the Income-Based Repayment (IBR) and Pay As You Earn (PAYE) and REPAYE plans for older (before July 1, 2014) borrowers, which can cause confusion for borrowers. Once the Department completes its revision of the REPAYE plan, Federal Student Aid should adjust the tool to account for a borrower's share of undergraduate and graduate loans and for when the borrower first borrowed loans. Borrowers

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[7] 2022 LRAP Survey, *supra* note 4, at 7.
[8] *Id.* at 8.
[9] *See* 88 Fed. Reg. at 1900-02.

need accurate information and easy-to-use tools to help them decide which repayment options are best for them.

## III. Borrower Eligibility for IDR Plans

We also support the Department's proposal to phase out the Pay As You Earn (PAYE) plan and the Income-Contingent Repayment (ICR) plans through amendments to 34 C.F.R. § 685.209(c).[10] For future borrowers, having only the IBR or REPAYE plans to choose from will simplify repayment. We do recommend that, for all borrowers—existing and future—the Department clearly and concisely communicate the technical details of each IDR plan. The Department should also revamp the Loan Simulator tool discussed above to offer fewer IDR options for borrowers whose first loan disbursement occurs once the new rule is in effect.

## IV. Monthly Payment Amounts

We strongly support the Department's proposal to amend 34 C.F.R. § 685.209 to enable borrowers to have more affordable monthly payments under the new REPAYE plan by increasing the protected income threshold and decreasing the share of discretionary income for borrowers with undergraduate loans.[11] Many Berkeley Law alumni who are enrolled in the PAYE plan and receive financial support through LRAP still find that their monthly payments are too expensive. Particularly for graduates who are living in areas with high costs-of-living, such as Berkeley and the rest of the San Francisco Bay Area, regular household expenses like housing, food, and transportation consume a significant portion of public interest lawyers' take-home salaries. That leaves little to cover student loan expenses at the end of each month. Even with the support of LRAP, our graduates often still struggle to make their loan payments on time. One Berkeley Law graduate, "Helen,"[12] was required to make $300 monthly loan payments under the PAYE IDR plan. Since Helen only received $1,400 in take-home pay, even the lower PAYE monthly payment amount amounted to a significant share of her fixed monthly expenses. The Department's proposed increase in protected income and reduction in the share of discretionary income required for monthly payments will allow more Berkeley Law graduates like Helen to make their loan payments on time and focus on other expenses.

However, we recommend that the Department revise its proposed rule to implement a cap on the monthly payment amount under the new REPAYE plan. Currently, the IBR and PAYE plans have functional "caps" on monthly payment amounts by requiring borrowers to demonstrate a "partial financial hardship." As a result of these caps, a borrower's monthly payment under the IBR or PAYE plans can never be higher than it would be under the standard 10-year repayment plan. All IDR plans are intended to be affordable; accordingly, monthly payment amounts under REPAYE should also have a cap. If a borrower's monthly payment under REPAYE is higher than it would be under the standard plan, the borrower should be placed back under the standard plan.

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[10] 88 Fed. Reg. at 1901.
[11] 88 Fed. Reg. at 1901-05.
[12] We describe Berkeley Law graduates with fictionalized names to preserve their anonymity.

## V. Expanded Interest Benefits

We support the expanded interest benefit for the new REPAYE plan, which will entail revising 34 C.F.R. § 685.209(h) to provide that no interest will be charged to a borrower's account each month after the borrower's payment is applied.[13] In our experience, borrowers are often deterred from pursuing more affordable IDR options because they fear that their loans will negatively amortize—that is, their loan balances will increase as a result of interest accruing even while they are making regular payments. The burden posed by negatively amortizing interest affects Berkeley Law graduates who are repaying their loans under existing IDR plans. Since there are currently no or minimal negative amortization protections or interest subsidies, graduates can see their loans grow by tens of thousands of dollars each year under the existing IDR plans. One recent graduate, "Joseph," initially borrowed $250,000 in student loans, but as a result of negative amortization, his loans have grown to over $360,000 with many more years still to go before he becomes eligible for Public Service Law Forgiveness (PSLF).

Student loans with negative amortization also can drive law students' career choices. Law school alums often must make choices immediately upon graduation about their long-term career plans in order to manage their student loan debt. Graduates can either pursue a high-paying private law firm jobs to pay off their loans quickly, or they can go into lower-paying public interest jobs and, if eligible, seek PSLF after ten years. Some borrowers intending to pursue public interest jobs ultimately forgo their dreams because of the amount of interest that will negatively amortize under the IDR plans that are eligible for PSLF. And for borrowers who do make the choice to go into public interest jobs, they must stay within the Department's narrow definition of "public service" under PSLF for at least 10 years; for example, they are barred from working in private "low bono" plaintiffs' firms. The more those borrowers' loans grow, the fewer career choices they have until they can successfully obtain loan forgiveness.

The Department's expanded interest benefit in the new REPAYE plan will help minimize this problem, prevent outrageous loan growth, and give borrowers—especially professional school borrowers with high loan debts—more flexibility to navigate loan repayment and forgiveness. In turn, the proposed benefit expansion will help make impactful public interest careers possible for many more law school graduates. No negative amortization also means borrowers will have an easier time taking out mortgages to purchase homes. As it stands, high—and growing—student loan balances are a major obstacle for young people who wish to purchase homes, one of the most important pathways to wealth and stability in our economy.[14] Also, many graduates must procure extensive letters for their mortgage lenders from the Financial Aid Office that explain the intricacies of IDR and PSLF and why their loan balances are growing. Reducing the burden of spiraling student loan interest will help lower loan balances overall, make it easier for borrowers to obtain mortgages, and ultimately make homeownership possible for many borrowers.

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[13] 88 Fed. Reg. at 1905.

[14] *See* Daniel A. Collier & Dan Fitzpatrick, *Jubilee & Jubilation: An Examination of the Relationship Between Public Service Loan Forgiveness and Measures of Well-Being* 9 (2022), https://perma.cc/9KWD-5XCA (finding that borrowers in repayment were less likely to own a home than those whose students loans were forgiven under the Public Service Loan Forgiveness Program); Alvaro Mezza et al., *Student Loans and Homeownership*, 38 J. Lab. Econ. 215, 253 (2020), https://perma.cc/2LXC-RF5K (finding that increased student debt lowers the homeownership rate among young people).

## VI. Deferment and Forbearance Credit

We support the Department's proposal to amend 34 C.F.R. § 685.209(k) to provide credit toward IDR forgiveness for borrowers during deferment and forbearance periods.[15] The IDR rules should align with the Department's concurrent final regulations governing the PSLF program, effective July 1, 2023, which also count certain periods of deferment and forbearance toward PSLF qualification.[16] We additionally recommend that the Department allow borrowers to consolidate their loans at any point without forcing them to restart the full payment period before the Department will forgive their IDR loans, either twenty to twenty-five years normally or ten years under PSLF. Borrowers are often unaware of the benefits of loan consolidation benefits until well into their repayment periods. Also, certain unforeseen changes in loan policies, like the Department's limited PSLF Waiver, can render consolidation more beneficial to borrowers. Borrowers should not be penalized for making sound financial decisions around consolidation.

## VII. Treatment of Income and Loan Debt for Married Borrowers

To ensure that payments are affordable, married borrowers need to have the option to file separately. We welcome the Department's proposal to amend 34 C.F.R. § 685.209(e) to revise the terms of the REPAYE plan in order to exclude spousal income for borrowers who are married and filing separately.[17] This revision would allow REPAYE borrowers to file their income taxes separately in order to have just their own incomes used to determine their payment amounts. Right now, REPAYE is one of the only plans that does not take into account a borrower's tax filing status. As a result, married borrowers are often dissuaded from selecting the REPAYE plan even when it could be more beneficial to them, because a REPAYE plan can cause them higher monthly payments. Borrowers can see their payments jump up by over $1,000 per month if they file taxes jointly, which causes monthly payments to become unaffordable for many married borrowers.

We support the proposed revamped REPAYE plan because it would benefit older, married borrowers who are not eligible for the PAYE pan. One Berkeley Law graduate, "Carla," first took out loans before October 1, 2007. Because she is an older borrower, Carla is ineligible for PAYE, which has lower monthly payments based on ten percent of her discretionary income. Nor is Carla eligible for the IBR plan for new borrowers. Instead, her only options are to enroll in either the original IBR plan, with payments based on fifteen percent of her discretionary income, or in the existing REPAYE plan. Although REPAYE as it currently stands offers payments based on ten percent of a borrower's discretionary income, its terms prohibit married borrowers from filing taxes separately to allow for smaller monthly payments. Therefore, even though the REPAYE plan bases payments on a smaller amount of discretionary income on paper, in practice, for older borrowers, the IBR plan often results in smaller monthly payments for borrowers who are married and file taxes jointly. The existing IDR options for older, married

[15] 88 Fed. Reg. at 1906.
[16] Institutional Eligibility Under the Higher Education At of 1965, as amended; Student Assistance General Provisions; Federal Perkins Loan Program; Federal Family Education Loan Program; and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 65904, 65974-75 (Dep't of Educ. Nov. 1, 2022).
[17] 88 Fed. Reg. at 1907.

borrowers are still often unaffordable. The new REPAYE plan will provide these older borrowers who are ineligible for the PAYE plan with more options for lower monthly payments. It will also afford them the ability to file taxes separately so their payments are based solely on their own income.

## VIII. Automatic Enrollment in an IDR Plan

Finally, we support the proposed revisions to 34 C.F.R. § 685.209(m) that would allow automatic enrollment of a borrower into the IDR plan that produces the lowest monthly payments for which the borrower is eligible.[18] We strongly endorse an auto-renewal option for the IDR plans. Many Berkeley Law graduates have become ineligible for an IDR plan and were re-directed into an unaffordable standard repayment plan because they forgot to renew their IDR plan on time. Auto-renewal will allow borrowers to remain on an affordable payment plan with fewer administrative obstacles. The Department should create an appropriate and feasible mechanism to allow borrowers to share their tax data on file with the Internal Revenue Service with the Department, and it should advertise its auto-enrollment option to borrowers.[19]

Further, we recommend that the Department adopt auto-enrollment into an IDR-plan, perhaps the revised REPAYE plan under consideration, as the default, rather than enrolling borrowers in the standard 10-year plan if they do not affirmatively choose otherwise. Such an auto-enrollment would result in more affordable payments for borrowers. Moreover, with the proposed interest benefit discussed above, borrowers would not see their loans negatively amortize. Borrowers would therefore have the choice to pay off their loans more aggressively under the standard plan or pay a more affordable monthly payment under an IDR plan.

## IX. Conclusion

Public interest lawyers are critical advocates for economic, social, and racial justice for consumers, workers, and members of vulnerable and marginalized groups. Yet all too often, insurmountable student loan debt is a barrier for graduates from Berkeley Law and other law schools to embark on these careers in the public and non-profit sectors. The Department's proposal to expand and simplify the IDR plans offers a meaningful positive step forward to making a career in public service not only possible, but a reality. Accordingly, we recommend that the Department adopt the proposed regulations and consider our additional suggestions to further strengthen the IDR rules.

Thank you for the opportunity to comment. Please contact us if you have any questions regarding these comments.

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[18] 88 Fed. Reg. at 1910.
[19] *See* 88 Fed. Reg. at 1911.

Sincerely,

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