

U.S. Department of Education  
Office of Management  
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ATTN: FOIA Appeals Office

*VIA ELECTRONIC MAIL*

January 21, 2015

Re: Appeal from Denial of Fee Waiver, Request No. 15-00417-F

Dear FOIA Public Liaison Officer:

This appeal of a fee waiver denial is submitted pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A), and the Department of Education's implementing regulations, 34 C.F.R. §§ 5.33 and 5.40. For the reasons that follow, we respectfully submit that our fee waiver request should be granted in full.

### **I. Background and Procedural History**

On December 5, 2014 the New York Legal Assistance Group (NYLAG) submitted a FOIA request to the Department, seeking the release of records related to borrower defenses to the repayment of student loans under programs administered by the Department. In connection with this request, NYLAG submitted a fee waiver application on the grounds that disclosure would significantly contribute to public understanding of the Department of Education's administration of the trillion-dollar federal student loan program. The application explained, *inter alia*, that NYLAG would share the requested records to other member organizations of a coalition "dedicated to investigating [the] practices of proprietary schools that may harm students." (FOIA Req. 4.) The application elaborated that NYLAG and its coalition members "disseminate information to the public through their websites and by the production of special reports." (*Id.* at 5.) Finally, because of NYLAG's status as a nonprofit organization, disclosure would not serve commercial interests.

The Department acknowledged NYLAG's FOIA request on December 8, 2014 and assigned the request tracking number #15-00417-F. On December 18, 2014, the Department transmitted a

letter via electronic mail to NYLAG, indicating the denial of a separate fee waiver in connection with a third-party request for unrelated records — request #15-00418-F. On January 6, 2015, the Department sent NYLAG a letter corresponding to NYLAG’s own request, denying our fee waiver application. According to the Department, “justification has not been provided to explain how copies of the requested records would contribute any new significant information to the public’s understanding of the Department’s operations. You have also not provided any evidence demonstrating public interest in the documents.”

We timely submit this appeal<sup>1</sup> and respectfully request that the Department grant our fee waiver application, as the records sought will contribute considerably to public understanding of a matter of great public concern, and will serve no commercial interests.

## **II. NYLAG’s Request and the Department’s Governing Regulations**

NYLAG’s request seeks the release of information concerning the Secretary’s implementation and interpretation of statutory and regulatory provisions regarding borrower defenses to the repayment of student loans under the Direct Loan and FFEL Programs.<sup>2</sup>

More specifically, NYLAG has requested thirteen categories of disclosures, each of which would contribute to much-needed public understanding of the Department’s implementation and interpretation of the statutory and regulatory provisions concerning borrower defenses to repayment of federal student loans. For example,<sup>3</sup> we have requested disclosure of the Department’s guidance to various entities that adjudicate borrower defenses on how to adjudicate those defenses (Requests #1 and #2); and the Department’s guidance on how those entities should report information to the Department regarding asserted defenses. To understand the extent to which defenses have been asserted and resolved, we have sought data regarding the adjudication of defenses by various entities (Request #4), and regarding the Department’s own Default Resolution Group (Request #5). To understand the substance of the Department’s prior

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<sup>1</sup> The Department’s January 6, 2015 letter triggered the 35-calendar-day deadline for submitting this appeal, *i.e.* February 10, 2015. *See* 34 C.F.R. § 5.40(b). In any event, this appeal is also timely based on the December 18, 2014 date of the misdirected letter regarding request #15-00418-F, as the appeal is submitted by January 22, 2015.

<sup>2</sup> As set forth in the FOIA request, “borrower defenses to the repayment of student loans” refers to federal borrowers’ right to assert defenses to the repayment of their student loans based on “any act or omission of the school attended by the student that would give rise to a cause of action against the school.” *See, e.g.*, 34 C.F.R. § 685.206(c).

<sup>3</sup> We refer the Department to NYLAG’s December 5, 2014 FOIA request for a full description of each request.

communications (if any) directly with the public regarding these issues, we have requested the Department's guidance to the public regarding the assertion of defenses (Request #3) and records of the Federal Student Loan Ombudsman regarding communications with borrowers about school-based defenses (Request #6). Similarly, we have requested records of Department-approved or -created letters used by loan servicers to inform borrowers about borrower defenses to repayment (Request #7), to further understand the Department's positions regarding borrowers' rights. To understand the details of administrative proceedings to adjudicate defenses to repayment, and the consequences of denials, we have requested records of the administrative fora in which such requests are decided, and the Department's own actions in response to borrowers' asserted defenses (Requests #8, #9, and #10). We have also requested records, including any summary or tabulation, of the total number of loans that have been discharged or cancelled (Requests #11 and #12), and the estimates of the allowance for subsidy attributable to cancellation, discharge and other write-offs (Request #13) to understand the prevalence of borrower defenses; borrowers' likelihood of success; and the economic impact of any asserted defenses on the Department's overall loan portfolio.

As elaborated below, each of NYLAG's requests merits a full fee waiver pursuant to the Department's regulations, which provide for a fee waiver when:

- (1) Disclosure of the requested information is **in the public interest** because it is likely to contribute significantly to public understanding of the operations or activities of the government; and
- (2) Disclosure of the information is **not primarily in the commercial interest** of the requester.

34 C.F.R. § 5.33(a) (emphasis added).

As to the first, "public interest" prong, "the Department considers the following factors:

- (1) Whether the subject of the request specifically concerns identifiable operations or activities of the government.
- (2) Whether the disclosable portions of the requested information will be meaningfully informative in relation to the subject matter of the request.
- (3) The disclosure's contribution to public understanding of government operations, i.e., the understanding of the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA request as well as the intention and demonstrated ability to disseminate the information to the public).

- (4) The significance of the disclosure’s contribution to public understanding of government operations or activities, i.e., the public’s understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

*Id.* § 5.33(b). With regard to the second, “non-commercial interest” prong, the Department considers:

- (1) The existence of the requester’s commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure.
- (2) If a commercial interest is identified, whether the commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

*Id.* § 5.33(c).

### **III. NYLAG’s Request Merits a Full Fee Waiver**

#### **A. The Public Has a Compelling Interest in the Requested Information**

Contrary to the assertions in the Department’s denial letter, the information NYLAG seeks will substantially enhance the understanding of the public at large regarding a topic that is poorly understood: how, and under what circumstances, the Department provides relief to borrowers who incurred federal student loan debts as a result of the abusive conduct of higher-education institutions, particularly for-profit institutions.

Public scrutiny of for-profit institutions of higher education has rightfully increased in recent years, commensurate with both rising enrollment in such institutions,<sup>4</sup> and the magnitude of these institutions’ unfair and deceptive business practices.<sup>5</sup> For example, the Department is

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<sup>4</sup> Thirteen percent of college students in the United States are enrolled in a for-profit school. *See* Press Release, U.S. Dep’t of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014), <http://www.ed.gov/news/press-releases/obama-administration-takes-action-protect-americans-predatory-poor-performing-ca>.

<sup>5</sup> In a 2012 report totaling thousands of pages, the Senate Committee on Health, Education, Labor, and Pensions found that many for-profit colleges falsify their job placement data, fail to disclose to students the schools’ lack of programmatic accreditation, and prioritize maximizing enrollment over student success. *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 112th Cong. (July 30, 2012), <http://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf>. In response to the tremendous impact of these schools’ business practices on not only the schools’ students,

currently involved in unwinding Corinthian Colleges, the largest chain of for-profit schools in the country. Prior to the Department's intervention, the Attorneys General of California, Massachusetts, and Wisconsin had taken action on behalf of more than one-third of the 72,000 students enrolled at Corinthian nationwide, to remedy Corinthian's alleged misrepresentations to students, and false and predatory advertising.<sup>6</sup> Corinthian is merely one of countless institutions engaged in misleading practices for which state and federal authorities have taken enforcement actions in the last four years to obtain redress on behalf of students.<sup>7</sup>

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but also the education sector and overall economy, the media has closely chronicled the for-profit school sector's abuses and the effect on students. *See, e.g.*, Editorial, *Lessons of a For-Profit College Collapse*, N.Y. Times, July 8, 2014, <http://www.nytimes.com/2014/07/09/opinion/lessons-of-a-for-profit-college-collapse.html>; Editorial, *Reining in Predatory Schools*, N.Y. Times, Apr. 16, 2014, <http://www.nytimes.com/2014/04/17/opinion/reining-in-predatory-schools.html>; Editorial, *Closer Scrutiny of For-Profit Schools*, N.Y. Times, Aug. 3, 2012, <http://www.nytimes.com/2012/08/04/opinion/closer-scrutiny-of-for-profit-schools.html>.

<sup>6</sup> Press Release, State of California Dep't of Justice, Office of the Att'y Gen., Attorney General Kamala D. Harris Seeks Immediate Halt to Corinthian Colleges' False Advertising to California Students (June 27, 2014), <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-seeks-immediate-halt-corinthian-colleges%E2%80%99-false>; First Am. Compl., *California v. Heald Coll., LLC*, No. CGC-13-534793 (Super. Ct. Feb. 19, 2014), <http://oag.ca.gov/sites/all/files/agweb/pdfs/consumers/first-amended-complaint.pdf>; Compl., *Massachusetts v. Corinthian Coll., Inc.*, No. 14-1093 (Super. Ct. Apr. 3, 2014), <http://www.mass.gov/ago/docs/press/2014/everest-complaint.pdf>; Compl., *Wisconsin v. Corinthian Coll., Inc.*, No. 2014-CX-00006 (Cir. Ct. Oct. 27, 2014), <http://www.doj.state.wi.us/sites/default/files/2014-news/complaint-corinthian-colleges-20141027.pdf>.

<sup>7</sup> *See, e.g.*, Press Release, U.S. Dep't of Justice, For-Profit College Kaplan To Refund Federal Financial Aid Under Settlement With United States (Jan. 5, 2015), <http://www.justice.gov/usao-wdtx/pr/profit-college-kaplan-refund-federal-financial-aid-under-settlement-united-states>; Press Release, Office of Minn. Att'y Gen., Minnesota Attorney General Lori Swanson Files Lawsuit Against Minnesota School of Business and Globe University (July 22, 2014), <http://www.ag.state.mn.us/Office/PressRelease/20140722SchoolofBusiness.asp>; Assurance of Voluntary Compliance, *Iowa v. Bridgepoint Educ., Inc.* (May 15, 2014), [http://www.state.ia.us/government/ag/latest\\_news/releases/may\\_2014/Ashford\\_AVC.pdf](http://www.state.ia.us/government/ag/latest_news/releases/may_2014/Ashford_AVC.pdf); *New Mexico v. ITT Educ. Servs., Inc.*, No. D-202-CV-201401604 (Dist. Ct. Feb. 27, 2014); Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces Groundbreaking \$10.25 Million Dollar Settlement With For-Profit Education Company That Inflated Job Placement Rates To Attract Students (Aug. 19, 2013) (*Career Education Corp.*), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-groundbreaking-1025-million-dollar-settlement-profit>; Compl., *Massachusetts v. Career Inst., LLC*, No. 13-4128H (Super. Ct. Nov. 21, 2013), <http://www.mass.gov/ago/docs/press/2013/aci-complaint.pdf>; Press Release, U.S. Dep't of Justice, United States Intervenes in Suit Against American Commercial College Inc. Alleging False Claims Act Violations (Feb. 28, 2012), <http://www.justice.gov/opa/pr/united-states-intervenes-suit-against-american-commercial-college-inc-alleging-false-claims>; Press Release, U.S. Dep't of Justice, U.S. Files Complaint Against Education Management Corp. Alleging False Claims Act Violations (Aug. 8, 2011),

Responding to public concern over Corinthian’s near collapse, and the Department’s oversight of Corinthian-operated schools (and other for-profit schools), Department Under Secretary Ted Mitchell has given several media interviews to explain the Department’s position that its recent actions to facilitate Corinthian’s sale will assist Corinthian students.<sup>8</sup> But although the public has increasingly gained important information regarding the predatory business practices at for-profit institutions of higher education, there is a gaping hole in the public’s understanding: what actions the Department will take to provide relief to student loan borrowers who attended such schools, through the defense to repayment provisions codified in the Higher Education Act and its implementation regulations. In short, NYLAG’s FOIA request, regarding borrower defenses to repayment, seeks to close that gap in public understanding. As thirteen U.S. Senators recently expressed in a letter to the Secretary, the process for asserting a defense remains “far from clear.”<sup>9</sup>

Public interest in the Department’s implementation and interpretation of the statute and regulation regarding borrower defenses extends well beyond the interest of student loan borrowers who may have the right to assert such defenses. As the thirteen Senators explained last month, the public has a fundamental right to know whether, when “colleges fail to hold up their end of the bargain – if they break the law in ways that bear on their students’ educational experience or finances – students [will] literally be stuck paying the price.”<sup>10</sup> The increasingly large amount of student loan debt owned or guaranteed by the federal government is a matter of growing public focus and discussion in the media, as is the Department’s continuing practice of permitting unscrupulous for-profit schools to operate, largely at taxpayers’ expense, without recouping funds from those schools.<sup>11</sup> Public awareness of the Department’s actions on borrower

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<http://www.justice.gov/opa/pr/us-files-complaint-against-education-management-corp-alleging-false-claims-act-violations>.

<sup>8</sup> See, e.g., Paul Fain, *Best of a Bad Situation?*, Inside Higher Ed, Dec. 9, 2014, <https://www.insidehighered.com/news/2014/12/09/feds-respond-criticism-bid-ecmc-buy-most-corinthian>; Danielle Douglas-Gabriel, *Why the Obama Administration Is Letting a Debt Collector Run Failing For-Profit Schools*, Wash. Post, Dec. 23, 2014, <http://www.washingtonpost.com/news/business/wp/2014/12/23/why-the-obama-administration-is-letting-a-debt-collector-run-failing-for-profit-schools>.

<sup>9</sup> Letter from Senator Elizabeth Warren et al. to Sec’y Arne Duncan (Dec. 9, 2014), <http://www.warren.senate.gov/files/documents/2014%2012%2009%20Corinthian%20Letter.pdf>.

<sup>10</sup> *Id.* As explained below, see *infra* Section III.A.2, NYLAG’s FOIA request seeks records separate and apart from those the Senators have requested.

<sup>11</sup> See, e.g., Annamaria Andriotis & Alan Zibel, *CFPB Official Speaks Loudly on Student Loans*, Wall St. J., Dec. 3, 2014, <http://www.wsj.com/articles/cfpbs-ombudsman-speaks-loudly-on-student-loans->

defenses to repayment is both currently lacking and essential to a complete picture of the consequences to both students and the taxpayers of the Department's oversight of the for-profit school sector.

Thus, there is no question that the general topic of federal student loan debt and the Department of Education's oversight of the program, including its oversight of institutions participating in the program, is a matter of great public interest. This context bears directly on the public interest value of NYLAG's request for records, which, for the reasons set forth below, satisfies each of the Department's four factors for determining that disclosure of the requested information serves the public interest.

### *1. The Request Concerns Government Operations and Activities*

There can be no dispute that each aspect of NYLAG's request involves information regarding "identifiable operations and activities of the government." See 34 C.F.R. § 5.33(b)(1).

Each category seeks records regarding discrete aspects of the Department's administration of the FFEL and Direct Loan programs. On its face, most paragraphs of the request seek information directly about the conduct of the Department (or about the U.S. Department of the Treasury, to the extent such records are in the Department's possession).

The fact that the Department has delegated certain aspects of loan servicing or collection to entities such as guaranty agencies, Private Collection Agencies, and Title IV Additional Servicers, does not change the fact that the request concerns government operations within the meaning of FOIA.<sup>12</sup> First, NYLAG's request seeks specific information regarding the Department's own instructions to such entities. (*E.g.*, Requests #1–3, 7.) Second, NYLAG seeks information regarding proceedings conducted by such entities on the Department's behalf pursuant to statutory or regulatory mandates. See, *e.g.*, *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (reversing denial of fee waiver for FOIA request regarding certain non-government entities pertinent to government operations).

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1417651649; Brent Staples, *For-Profit Colleges Under Investigation*, N.Y. Times, July 17, 2014, <http://takingnote.blogs.nytimes.com/2014/07/17/for-profit-colleges-under-investigation>.

<sup>12</sup> Each of these entities may have a role in adjudicating borrower defenses to repayment. See, *e.g.*, 34 C.F.R. §§ 30.24, 30.33, 682.410(b)(5)(ii)(C), 682.410(b), 685.206(c), 685.209; Letter from Senator Elizabeth Warren et al. to Sec'y Arne Duncan (Dec. 9, 2014).

## 2. *The Requested Information Will Shed Important Light on the Department's Implementation of Borrower Defense to Repayment Regulations*

Turning to the next factor, “disclosable portions of the requested information will” undoubtedly “be meaningfully informative in relation to the subject matter of the request.”<sup>13</sup> See 34 C.F.R. § 5.33(b)(2).

As demonstrated by Senator Warren’s letter, the Department has “not yet” disclosed any information to the public regarding any “clear and transparent process for implementing” the borrower defenses to repayment that are an essential part of the “protections” guaranteed borrowers under the law.<sup>14</sup>

Each of NYLAG’s requests is essential to a more complete understanding of the Department’s policies regarding borrower defenses to repayment. For example, Requests #1, 3, 6, and 7 seek records regarding, *inter alia*, the Department’s guidance to servicers and the public about how defenses to repayment can and cannot be asserted. Such records will enable the public to assess the extent to which the Department has implemented the borrower defenses to repayment provision in a manner consistent with the Department’s statutory and regulatory duties. Request #2 seeks records about how the Department obtains information from the various entities that interact with student loan borrowers, and is necessary for the public to determine how likely it is that data in the Department’s possession accurately capture information about student borrowers’ experiences and outcomes. Requests #5, 8, and 9 seek records about proceedings in the various administrative fora in which borrower defenses are adjudicated. Information about proceedings in each of these fora will permit the public to analyze the differences or similarity in the standards applied to borrowers’ defense-to-repayment applications across these fora. The Department’s responses to Requests #4, 10, 11, 12, and 13 are necessary for the public to determine the extent to which borrowers have been able to assert, and succeed in their assertions of, defenses to repayment, and any follow-up enforcement actions by the Department against offending schools. These requests are also essential to a full

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<sup>13</sup>The Department did not deny NYLAG’s fee waiver request on the ground that any responsive records are exempt from disclosure. Because the Department bears the “burden” to make such an assertion, and NYLAG has had no opportunity to rebut such an assertion (which, in any event, would be erroneous), it would be “not . . . [be] proper” for the Department “to deny a fee waiver” on the hypothetical ground that some portion of the requested records is exempt from disclosure. See *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994).

<sup>14</sup> The possibility that the Department may answer the Senators’ questions or disclose to them some documents has no bearing on the merits of NYLAG’s fee waiver. See *infra* Section III.A.4.

understanding of the financial impact of the defense to repayment regulation on the overall federal student loan program, on taxpayers generally, and on for-profit schools whose misconduct is the subject of borrowers' asserted defenses.<sup>15</sup>

Furthermore, to have a meaningful context and points of comparison for understanding the Department's responses and interpreting the data, NYLAG has formulated its requests to obtain information about other statutory discharges that borrowers are entitled to assert. Finally, throughout its requests, NYLAG has sought information about each of the entities that have a role in the defense to repayment process (Private Collection Agencies, Title IV Additional Servicers, Non-Profit Servicers, guarantee agencies, and various Department subdivisions, including the Default Resolution Group and Federal Student Loan Ombudsman). Such information is similarly necessary to understand the Department's implementation of the defense to repayment regulation because each of these entities has a role in the complex federal student loan program advising borrowers, adjudicating requests, collecting and reporting data and borrower information, and providing guidance.

NYLAG has plainly demonstrated with far more than "reasonable specificity the link between [our] request and the enhancement of public awareness and understanding of governmental activities" that will result from the Department's disclosures. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009).

### *3. The Information Will Contribute to the Public's Understanding, and NYLAG Will Effectively Disseminate This Information*

As described above, NYLAG's request will contribute to the understanding of the Department's operations by a broad cross-section of the public, including current and former students of for-profit schools,<sup>16</sup> as well as taxpayers at large, all of whom have an interest in being better informed about the Department's management of the trillion dollar federal student loan program, and the Department's attempts to recoup funds disbursed to abusive and predatory institutions participating in the federal student loan program.

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<sup>15</sup> The Department "may initiate an appropriate proceeding to require the school whose act or omission resulted in the borrower's successful defense against repayment of a Direct Loan to pay to the Secretary the amount of the loan to which the defense applies." 34 C.F.R. § 685.206(c)(3).

<sup>16</sup> At least 1.5 million students *currently* attend for-profit schools. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., NCES 2014-083, *The Condition of Education 2014*, at 60 (2014), <http://nces.ed.gov/pubs2014/2014083.pdf>.

NYLAG has the capacity, intention, demonstrated ability, and expertise to disseminate information responsive to this FOIA request to members of the public.

First, as one of New York's largest civil legal service providers, NYLAG annually provides financial counseling<sup>17</sup> and legal assistance at 111 community offices, to more than 90,000 low-income New Yorkers, a large number of whom are student loan borrowers.<sup>18</sup> Further, NYLAG's client base encompasses the demographic that is most likely to be targeted by, and vulnerable to, abusive practices of predatory schools: they are low-income, foreign-born, and/or individuals from minority communities. NYLAG seeks disclosure of records responsive to its FOIA request in order to better counsel thousands of New Yorkers in the coming years about the full range of available options to manage their student loan debt. In the past year alone, NYLAG has counseled 500 individuals about their student loan debt, approximately 300 of whom took on debt in connection with attendance at a for-profit institution. These activities are a wholly sufficient basis for determining that NYLAG's request is in the public interest. *See, e.g., Carney*, 19 F.3d at 814 (“Information need not actually reach a broad cross-section of the public in order to benefit the public at large.”); *Cnty. Legal Servs., Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, 405 F. Supp. 2d 553, 556 (E.D. Pa. 2005) (reversing denial of fee waiver for request that would “interest[]” a “reasonably large segment of Philadelphia’s low- and moderate-income families”).

Second, in addition to enabling NYLAG to better serve its own client base, release of the requested records will allow NYLAG to further the public interest by disseminating not only the documents, but also our analyses of and conclusions about the information therein, with the public, including other advocates who contribute to the public conversation regarding student loan debt. NYLAG is uniquely situated to disseminate this information, and advocate for borrowers nationwide. For example, based on review and analysis of records obtained from a New York state agency, NYLAG submitted testimony as part of the Department's negotiated

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<sup>17</sup> NYLAG's consumer advocacy efforts are in part based on a partnership with New York City Department of Consumer Affairs Office of Financial Empowerment. *See* New York Legal Assistance Group, *Consumer Protection Project*, <http://nylag.org/units/general-legal-services/projects/consumer-protection-project>; *see also* New York Legal Assistance Group, *Legal Assistance on Consumer Debt Matters from NYLAG*, <http://us2.campaign-archive1.com/?u=c02ae2a10914727045a8ebfd3&id=155611750b&e=> (accessed by clicking link to “NYLAG Consumer Debt Matters Newsletters: April, 2014” on *Consumer Protection Project* site).

<sup>18</sup> *See* New York Legal Assistance Group, *About Us*, <http://nylag.org/about-us>. In addition, NYLAG's class action lawsuits directly benefit an additional 115,000 New Yorkers each year. *Id.* Several of NYLAG's past class action suits, against both unscrupulous corporate entities and against government agencies, were developed in part based on the results of FOIA and other public records requests.

rulemaking process on proposed gainful employment regulations, among other issues.<sup>19</sup> Documents received from New York State and City agencies, including the New York City Department of Consumer Affairs and the New York State Department of Education's Bureau of Proprietary School Supervision, informed the perspective that NYLAG Senior Staff Attorney Eileen Connor brought to the table at the Department's Negotiated Rulemaking sessions on gainful employment in 2013 and 2014,<sup>20</sup> as well as the Department's Servicing Summit on December 1, 2014. NYLAG has also shared information about documents received by NYLAG in response to New York City and New York State freedom of information requests with members of a New York City-based coalition to advocate on behalf of client populations victimized by for-profit schools' deceptive business practices.<sup>21</sup> Based on information received in response to such requests, the coalition has, for example, submitted policy proposals to the New York Governor's Deputy Secretary for Education. NYLAG will engage in similar activities to analyze and disseminate documents responsive to the request currently pending before the Department. NYLAG's capacity and demonstrated past efforts to disseminate such information weigh heavily in favor of NYLAG's fee waiver request. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 115 (D.D.C. 2006) (reversing denial of fee waiver when organization cited "two specific examples" of past efforts to disseminate FOIA records).

Third, NYLAG is also a source of information to members of the general public interested in for-profit schools. NYLAG maintains a website dedicated to for-profit schools, which contains a wide variety of information including news articles in English and Spanish regarding for-profit schools' business practices; a link to a television interview with a NYLAG attorney about for-profit schools; "know your rights" resources on information to consider before enrolling in a for-

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<sup>19</sup> Written Testimony of Eileen Connor and Jennifer Magida, Senior Staff Attorneys at the New York Legal Assistance Group, in Response to the Notice of Establishment of Negotiated Rulemaking Committees and Public Hearings, 78 Fed. Reg. 22467 (Apr. 16, 2013), <http://nylag.org/wp-content/uploads/2013/05/2013.06.04-NYLAG-Testimony-FINAL.pdf>.

<sup>20</sup> *See* U.S. Dep't of Educ., Negotiated Rulemaking 2013-2014 – Gainful Employment, <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainfulemployment.html>.

<sup>21</sup> NYLAG leads this coalition, whose members include not only legal services providers, but also organizations that conduct outreach to vulnerable populations targeted by for-profit schools, such as women in the process of re-entering society following incarceration. These organizations include College & Community Fellowship, Grace Outreach, Credit Where Credit Is Due, New Economy Project, MFY Legal Services, South Brooklyn Legal Services, The Financial Clinic, Legal Services NYC-Bronx, and New York Lawyers for the Public Interest. The coalition periodically shares and receives information with other organizations, such as the U.S. Consumer Financial Protection Bureau and the National Consumer Law Center.

profit school; the aforementioned testimony by NYLAG attorneys in the negotiated rulemaking process based on New York Freedom of Information Law requests; and information for borrowers on possible legal remedies.<sup>22</sup> Between January 14, 2014 and January 13, 2015, NYLAG's For-Profit Schools Project received 1,139 page views from 845 unique visitors. NYLAG's demonstrated commitment to disseminate information and analyses on its website based on responses to past freedom of information requests, combined with NYLAG's respected position among advocates and members of the community, makes it all the "more likely that the interested public w[ill] pay attention to the information [NYLAG] disseminates" on its website from the instant FOIA request. *See Cmty. Legal Servs.*, 405 F. Supp. 2d at 558; *Citizens for Responsibility & Ethics in Wash.*, 481 F. Supp. 2d at 114.

4. *Given Limited Public Awareness of the Department's Implementation of the Defense to Repayment Regulation, the Department's Disclosures Will Significantly Enhance Public Understanding*

As explained throughout this letter, NYLAG seeks information of great concern to a large cross-section of the public — information that is virtually absent from the public domain at present. Accordingly, the "public's understanding of" information regarding the Department's implementation of the borrower defense to repayment regulation "existing prior to the disclosure [will] likely . . . be enhanced significantly by the disclosure." *See* 34 C.F.R. § 5.33(b)(4).

First, several U.S. Senators have explained that the "process" for a borrower to assert a defense to repayment based on a school's misconduct is "far from clear."<sup>23</sup> To date, the Department has been at best circumspect in its comments on its implementation of the defense to repayment regulation. As outlined in our underlying FOIA request, the Department has made virtually no public comments regarding its implementation of the borrower defense to repayment regulation, explaining only that "the adjudication of individual claims will provide further explanation of the Secretary's interpretation of the regulatory requirements."<sup>24</sup> Such "further explanation" is precisely what NYLAG's request seeks.

Second, the fact that the Department may answer the Senators' questions or produce some documents does not weaken the merits of NYLAG's fee waiver request. Even if: (1) the

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<sup>22</sup> New York Legal Assistance Group, For-Profit Schools Project, <http://nylag.org/units/special-litigation-unit/for-profit-schools-project>.

<sup>23</sup> Letter from Senator Elizabeth Warren et al. to Sec'y Arne Duncan, at 2 (Dec. 9, 2014).

<sup>24</sup> Notice, 60 Fed. Reg. 37,768, 37,769 (July 17, 1995).

Department were to respond in full to the Senators' pending request, and (2) the Senators were then to disclose the Department's full response to the public — each of which is a purely speculative proposition — those events would not in any way diminish the public's interest in the Department's full response to NYLAG's separate FOIA request. A simple comparison of the Senators' requests (largely in interrogatory form) with NYLAG's requests (for disclosure of records) makes plain that *none* of the Senators' requests fully encompasses *any* of NYLAG's requests. And as explained above, the fact that NYLAG has the “capability to analyze and distribute the information it receives through memoranda, press releases, reports and its website,” means that the Department's response to NYLAG will “*supplement*” any information disclosed to the Senators and “thereby enhance the public's understanding of the issue.” *See Citizens for Responsibility & Ethics in Wash.*, 593 F. Supp. 2d at 272 (emphasis added) (alterations and internal quotation marks omitted).

In short, each of the Department's criteria for assessing the public's interest weighs strongly in favor of granting NYLAG's full fee waiver request.

#### B. NYLAG Has No Commercial Interest

Finally, though not disputed in the Department's fee waiver denial letter, NYLAG has no commercial interest in the subject matter of this request. “Information is commercial if it relates to commerce, trade or profit.” *See VoteHemp, Inc. v. Drug Enforcement Admin.*, 237 F. Supp. 2d 55, 65 (D.D.C. 2002) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285) (9th Cir. 1987)). NYLAG is a 501(c)(3) non-profit organization, whose mission is to “provide[] high quality, *free* civil legal services to low-income New Yorkers who cannot afford attorneys.”<sup>25</sup> Unlike those rare cases in which a non-profit organization may have a commercial interest in the subject of a FOIA request — such as when a non-profit essentially seeks to promote an industry's commercial interests, *see VoteHemp*, 237 F. Supp. 2d at 65 — NYLAG advocates on behalf of its clients to empower them to make informed decisions, including how to manage their debt and how to assert the range of legal remedies available under law to all federal student loan borrowers. *See McClellan*, 835 F.2d at 1285 (requesters satisfied relevant portion of the fee waiver test when responsive records “further[ed] . . . requester[s]' interest in compensation or retribution, but not an interest in commerce, trade, or profit”).

NYLAG's request will provide NYLAG, its clients, and its coalition members no commercial benefit, and we will distribute our analyses of responsive records freely to the public.

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<sup>25</sup> *See* New York Legal Assistance Group, *About Us*, <http://nylag.org/about-us> (emphasis added).

For the reasons articulated above, our fee waiver request clearly meets the public interest and non-commercial interest tests. The information we seek is of significant interest to the public, and we will distribute it widely and with the added value of our analyses. This information will significantly expand the public understanding of the Department's practices, to the benefit of vulnerable students and other interested members of the public at large.

Thank you very much for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Eileen Connor". The signature is fluid and cursive, with a large initial "E" and "C".

Eileen Connor  
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