



February 16, 2021

The Honorable Philip Rosenfelt
Acting Secretary
Department of Education
400 Maryland Avenue, SW
Washington, DC
20202

Dear Acting Secretary Rosenfelt,

We write today to highlight the ongoing lack of assistance during the COVID-19 pandemic for millions of federal student loan borrowers owing on so-called “commercial FFELP” loans and to call for immediate action to remedy issues past and present that have unduly harmed these borrowers.

Since last March, legislative and executive action has provided most federal student loan borrowers relief from payments, interest charges, and collections.¹ However, 8.2 million federal borrowers have been cut out of this relief because their loans are not owned by the Department of Education.² Among these are 6.1 million borrowers who owe on \$160 billion in federal student loan debt originated under the now-discontinued Federal Family Education Loan Program (FFELP)—debts owned by private third parties such as banks and guarantee agencies.³ These borrowers’ cumulative balance is larger than the entire private student loan market,⁴ larger than the payday loan market,⁵ and larger than the total outstanding balance of past-due medical debt in the U.S.⁶

Even before COVID, the outlook for these loans’ successful repayment was dimming: the rate at which commercial FFELP loans are being paid down has decreased every year for which data are available,⁷ and bonds backed by these loans recently had to extend their maturity by as

¹ FAQs: *Student Loan Repayment During COVID-19*, Student Borrower Prot. Ctr (July 14, 2020), <https://protectborrowers.org/faqs-student-loan-repayment-during-covid-19/>.

² Press Release, U.S. Sen. Comm. on Health Educ. Labor & Pensions, Democratic Colleagues Urge DeVos to Help 8.2 Million Federal Student Loan Borrowers Currently Unable to Access Relief (Oct. 21, 2020), <https://www.help.senate.gov/ranking/newsroom/press/murray-democratic-colleagues-urge-devos-to-help-82-million-federal-student-loan-borrowers-currently-unable-to-access-relief>.

³ SBPC calculations based on U.S. Dep’t of Educ., Off. of Fed. Student Aid, *Federal Student Loan Portfolio: Portfolio by Loan Status*, <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfoliobyLoanStatus.xls>.

⁴ Student Borrower Prot. Ctr, *Private Student Lending* (Apr. 2020), https://protectborrowers.org/wp-content/uploads/2020/04/PSL-Report_042020.pdf.

⁵ Off. of the Comptroller of the Currency, *Comptroller of the Currency Supports CFPB Proposed Rule on Short-Term Small-Dollar Lending* (Feb. 11, 2019), <https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-14.html>.

⁶ Gallup, *The U.S. Healthcare Health Crisis* (2019), <https://news.gallup.com/poll/248081/westhealth-gallup-us-healthcare-cost-crisis.aspx#ite-248093>.

⁷ SBPC calculations based on Off. of Fed. Student Aid, *supra* note 3.

much as 54 years to avoid default.⁸ By that time, some of the borrowers paying on the federal student loans underlying the bonds will be well over 100 years old.⁹ In short, while FFELP loan origination may have ended in 2010, neither these debts nor the borrowers struggling to pay them down are going to simply disappear as a matter of concern for policymakers.¹⁰

Any discussion of these borrowers and recommendations for bringing about the relief they deserve during COVID must begin with an acknowledgement of the manifestly arbitrary and unfair path by which these borrowers arrived at their current position.¹¹ All FFELP loans were originally owned by private creditors and guaranteed by the government, but a substantial portion of these loans were purchased by the Department of Education (ED) outright as part of a bailout of the student loan industry during the last financial crisis.¹²

Now, those FFELP borrowers whose loans happen to have been purchased by ED (so-called “ED-held FFELP” borrowers) have been covered during COVID by federal student loan relief.¹³ In contrast, those FFELP borrowers whose loans happen not to have been purchased by ED (referred to as “commercial FFELP” borrowers) have gone wholly ignored by both the legislative and executive actions during the pandemic.¹⁴

As this letter describes in detail, commercial FFELP borrowers face immediate, measurable financial costs due to this government inaction. The effects of the financial hardship these borrowers face may contribute to lasting financial insecurity for them and their families. Further, borrowers feeling this financial strain acutely have expressed frustration and anger that they have been ignored by policymakers throughout the pandemic. Taken together, the short-term and long-term financial effects of federal nonintervention on behalf of commercial FFELP borrowers make a clear case for the following immediate executive actions described in detail below:

- Create a clear path for all commercial FFELP borrowers to take advantage of the payment pause without penalty.

⁸ Cezary Podkul, *A Borrower Will Be 114 When Bonds Backed by Her Student Loans Mature*, Wall St. J. (Jan. 7, 2020), <https://www.wsj.com/articles/a-borrower-will-be-114-when-bonds-backed-by-her-student-loans-mature-11578393002>.

⁹ *Id.*

¹⁰ See, e.g., Student Borrower Prot. Ctr., *Broken Promises: How the Department of Education's Failures and Industry's Abuses Deny FFEL Borrowers Public Service Loan Forgiveness* (Dec. 2020), https://protectborrowers.org/wp-content/uploads/2020/12/BrokenPromises_FFEL.pdf.

¹¹ Note also that the process by which many federal student loan borrowers came to borrow FFELP loans as opposed to Direct Loans was also frequently arbitrary, as it depended in part on which of the two programs (FFELP or Direct) the school that the student attended happened to participate in. See Cong. Rsrch. Serv., R40122, *Federal Student Loans Made Under the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program: Terms and Conditions for Borrowers* (June 22, 2015), <https://www.everycrsreport.com/reports/R40122.html> (“For the nearly two decades that both the FFEL and DL programs were in operation, [institutions of higher education] were able to participate in the program of their choice.”).

¹² Julie Margetta Morgan, Roosevelt Inst., *Who Pays? How Industry Insiders Rig the Student Loan System—and How to Stop It* (2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Who-Pays-Insiders-Rig-Student-Loan-System-201806.pdf>.

¹³ *FAQs: Student Loan Repayment During COVID-19*, Student Borrower Prot. Ctr., *supra* note 1.

¹⁴ Tariq Habash, *The CARES Act Leaves Behind Millions of Student Loan Borrowers*, Student Borrower Prot. Ctr. (Mar. 27, 2020), <https://protectborrowers.org/the-cares-act-leaves-behind-millions-of-student-loan-borrowers/>.

- Recognize and remedy the wide breadth of policy errors and industry abuses that commercial FFELP borrowers have had to endure over time.
- Immediately halt all collections by guaranty agencies and pursue administrative action for the Secretary of Education to acquire all defaulted commercial FFELP loans.

I. Commercial FFELP Borrowers Face Immediate, Measurable Financial Costs Due to Government Inaction

As the pandemic and its economic fallout have worsened and as policymakers have failed to provide commercial FFELP borrowers badly needed relief, these borrowers have struggled. Over 1.2 million borrowers owing over \$41 billion in commercial FFELP loans—more than a quarter of these loans that are outstanding—are currently in an interest-accruing forbearance or in default.¹⁵ Immediate, measurable financial costs are mounting due to this inaction. For example:

- **A typical commercial FFELP borrower will have paid nearly \$6,000 more than a borrower with a loan owned by the Department of Education by the fall.** The average monthly payment on a commercial FFELP loan is \$300, implying that the typical commercial FFELP borrower will soon have paid \$3,300 in federal student loan bills since the passage of the CARES Act last March while other federal student loan borrowers will not have had to make a single payment or worry about the weight of accruing interest.¹⁶ By the time Biden administration’s current payment pause expires in September, this payment burden will have amounted to \$5,700.
- **Commercial FFELP borrowers will pay thousands of dollars more for the same amount of loan forgiveness.** Borrowers with both ED-held and commercial FFELP loans are eligible for income-based repayment (IBR), a federal student loan repayment plan that sets FFELP borrowers’ monthly student loan bill at 15 percent of their discretionary income and offers loan forgiveness after 25 years of qualifying payments.¹⁷ However, while commercial FFELP borrowers will have to continue paying on these loans to make progress toward IBR forgiveness during COVID, the terms of the CARES Act and subsequent administrative student loan relief dictate that ED-held FFELP borrowers in IBR will get credit toward forgiveness even in months when their payments are paused—that is, when their payment obligation is \$0.¹⁸ As a consequence, a commercial FFELP borrower with a moderate income would have to pay hundreds or

¹⁵ SBPC calculations based on Off. of Fed. Student Aid, *supra* note 3.

¹⁶ SBPC estimate based on Fed. Res., Survey of Consumer Finances, <https://www.federalreserve.gov/econres/scfindex.htm> (last accessed Feb. 13, 2021). These calculations assume similarity in average monthly student payment obligations across varieties of federal student loans.

¹⁷ *Income-Driven Repayment Plans*, Fed. Student Aid, <https://studentaid.gov/manage-loans/repayment/plans/income-driven>.

¹⁸ *FAQs: Student Loan Repayment During COVID-19*, Student Borrower Prot. Ctr., *supra* note 1.

thousands of dollars during COVID to stay on track for eventual loan forgiveness while a peer with ED-held FFELP loans would not.¹⁹

- **Debt collectors have collected or seized more than \$100 million during the COVID-19 pandemic from defaulted borrowers, including tens of millions in garnished wages and public benefits.** The lack of student loan protections during COVID has opened the most vulnerable commercial FFELP borrowers up to abuse by a debt collection industry that has hardly slowed down its work during the pandemic. There are currently 830,000 borrowers in default on over \$24 billion in commercial FFELP loans.²⁰ And while collections on defaulted debt have been paused for federal student loan borrowers whose debts are owned by ED, new data reveal that Guaranty Agencies (GAs)—the hybrid insurers, servicers, and debt collectors at the heart of the commercial FFELP market²¹—have taken in over \$100 million from borrowers through the Treasury Offset Program, administrative wage garnishment, and ostensibly “voluntary” payments made by borrowers since the start of COVID.²² Moreover, available data reveal stark regional disparities in whether and to what extent GAs have chosen to engage in involuntary collections—garnishing wages and seizing government payments such as tax refunds and social security checks.²³

¹⁹ For example, consider two borrowers who both earn the median household income in the U.S.—\$68,703. Fed. Res. Bank of St. Louis, Real Median Household Income in the United States, 1984-2019, <https://fred.stlouisfed.org/series/MEHOINUSA672N>. One borrower has commercial FFELP loans while one has ED-held FFELP loans, but both borrowers have been pursuing loan forgiveness through IBR and had made the same number of qualifying payments toward forgiveness when COVID started. If the ongoing pandemic-related student loan pause expires at its currently slated end-date of September 30th, 2021, the ED-held FFELP borrower will at that time have earned 19 qualifying payments toward IBR forgiveness since March 2020 without paying a single penny. Meanwhile, the commercial FFELP borrower would have had to pay over \$8,000 over the period to earn the same number of qualifying payments toward forgiveness. Based on SBPC calculations from *Income-Driven Repayment Plans*, Fed. Student Aid, *supra* note 17. Should the two borrowers continue on their parallel paths after COVID and secure relief in the same month in the future, the commercial FFELP borrower will have paid \$8,000 more to earn the same benefit. If the Biden administration extends student loan borrower relief again past September while retaining this disparity for commercial FFELP borrowers, the difference in the cost of forgiveness will only grow larger.

²⁰ SBPC calculations based on Off. of Fed. Student Aid, *supra* note 3.

²¹ Mike Pierce, *What it means to be a student loan service: Guaranty Agency edition* (Mar. 29, 2019), <https://protectborrowers.org/what-it-means-to-be-a-student-loan-servicer-guaranty-agency-edition/>.

²² SBPC calculations based on *FFEL Program Lender and Guaranty Agency Reports*, Fed. Student Aid, <https://studentaid.gov/data-center/lender-guaranty>. Student Borrower Prot. Ctr., Payments to Guaranty Agencies during COVID: Cumulative Voluntary Payments since March, <https://public.tableau.com/profile/ben.kaufman4147#!/vizhome/GAfortableauFebruary2021/Dashboard1> Note that voluntary payments to Guaranty Agencies necessarily amount to payments by borrowers that have not consolidated or rehabilitated their loans out of default through federally available programs. See *Getting Out of Default*, Fed. Student Aid, <https://studentaid.gov/manage-loans/default/get-out>. Instead, these are payments solicited by Guaranty Agencies during a pandemic—a time when borrowers are likely to be undergoing unique economic hardship.

²³ For example, while Texas’s guaranty agency has taken in well over \$15 million from defaulted commercial FFELP borrowers through administrative wage garnishment since the end of March, several state GAs—including those of Utah, New Hampshire, Michigan, Oklahoma, New Mexico, and Louisiana—have all collected less than \$100,000 since March by the same method. Based on SBPC calculations from *FFEL Program Lender and Guaranty Agency Reports*, Fed. Student Aid, *supra* note 22. This disparity cannot be explained away by differences in population; Michigan, for example, has roughly a third of the population of Texas, but has collected far less than a third through its guaranty agency during COVID. See U.S. Census Bureau, Evaluation Estimates (2020), <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates.html>. In turn, while defaulted borrowers whose loans happen to have been owned by ED have been granted protections regardless of where in the country they reside, borrowers with commercial FFELP loans could be made the targets of the student debt collection machine even during a pandemic solely as a function of the state they lived in when they went to college. See *FFEL Program Lender and Guaranty Agency Reports*, Fed. Student Aid, *supra* note 22.

II. The Effects of This Financial Hardship May Drive Lasting Financial Insecurity for Borrowers and their Families

As described above, by virtue of federal inaction to assist borrowers who owe commercial FFELP loans, these borrowers are projected to pay thousands of dollars in unnecessary student loan costs during the pandemic. However, it would be a mistake to consider these costs in isolation. Should this lack of aid continue, its ripple effects across commercial FFELP borrowers' financial lives will continue to compound:

- **Struggling commercial FFELP borrowers will face consequences in every area of their financial lives.** For borrowers who are struggling financially from the pandemic and its economic fallout, needing to allocate \$300 per month toward student loans could mean not being able to afford basic life expenses. One in nine Americans is food insecure;²⁴ the \$5,700 that the typical commercial FFELP borrower will have put toward these loans from March 2020 through September 2021 could have paid for more than 12 trips to the grocery store for the average family of four.²⁵ One in three renters has reported housing insecurity since the start of the pandemic;²⁶ those \$5,700 in student loan payments could have covered over four months of rent for the median two-bedroom apartment in the U.S., allowing many borrowers to stave off eviction.²⁷ More than 60 percent of Americans have been at risk of utility shut offs during COVID;²⁸ the amount a commercial FFELP borrower will pay on FFELP loans would cover over 13 months of the average utility bill.²⁹ The list of financial risks for commercial FFELP borrowers due to their still having to make student loan payments goes on, and it includes the possibility of not being able to cover a healthcare deductible if they, like millions of others, should contract the coronavirus.³⁰ But instead of relief, financially strapped borrowers have received only more student loan bills.
- **Commercial FFELP borrowers will face unique costs and long-term financial hardship for additional expenses that other borrowers will be spared.** As they continue to make payments that peers with other varieties of federal student loans are excused from, commercial FFELP borrowers are left with negative consequences that ripple across their financial lives. These repercussions include the loss of an opportunity

²⁴ U.S. Dep't of Ag., Household Food Security in the United States in 2019 (Sep't 2020), <https://www.ers.usda.gov/publications/pub-details/?pubid=99281>.

²⁵ SBPC calculations based on Bureau of Labor Statistics, Table 3444, Consumer units of four people by income before taxes (2018-2019), <https://www.bls.gov/cex/2019/CrossTabs/sizbyinc/xfour.PDF>. Assumes two trips to the grocery store per month.

²⁶ Press Release, Nat'l Low Income Hous. Coalition, Pandemic Widens Housing Security Disparities (Sep't 8, 2020), <https://nlihc.org/resource/pandemic-widens-housing-security-disparities>.

²⁷ SBPC calculations based on Sydney Temple, *America's 2020 Rental Market in Review: Did Renters Pay More During Pandemic?*, Rentable Blog (Dec. 29, 2020), <https://www.rentable.co/blog/annual-rent-report/>; see also Eviction Lab, *Eviction Tracking*, <https://evictionlab.org/eviction-tracking>.

²⁸ Press Release, Nat'l Energy Assistance Dirs. Assoc., Summary of State Utility Shut-Off Moratoriums Due to Covid-19 (Oct. 19, 2020), <https://neada.org/utilityshutoffsuspensions/>.

²⁹ SBPC calculations based on Bureau of Labor Statistics, *supra* note 25.

³⁰ *How Much Does Individual Health Insurance Cost?*, eHealth, <https://www.ehealthinsurance.com/resources/individual-and-family/how-much-does-individual-health-insurance-cost> (last updated Nov. 24, 2020).

for borrowers to pay their way out of higher-interest debts. Consider two identical borrowers, one with commercial FFELP loans and one with ED-held FFELP loans. Like many, these two borrowers may have an outstanding balance on a high-interest credit card. However, with payments paused during COVID, the ED-held FFELP borrower could use the freed up monthly \$300 to pay down the credit card balance. Meanwhile, the commercial FFELP borrower may be stuck making only the minimum payment. If the two borrowers follow this course of action while both owing the national average balance of \$5,313,³¹ the ED-held FFELP borrower will emerge at the scheduled end of the payment pause in September 2021 having already paid off the entire credit card balance, while the commercial FFELP borrower would have barely made a dent, still owing \$5,026.³² Paying down the remainder of that balance while continuing to make only the minimum payment would take the commercial FFELP borrower several additional years and require paying an added \$17,105 in interest beyond the interest expense incurred by the ED-held FFELP borrower.³³

- **While other borrowers enjoy the compound benefits of saving, commercial FFELP borrowers will fall further behind.** Needing to continue paying on federal student loans during COVID robs commercial FFELP borrowers of a key wealth-building opportunity available to other federal student loan borrowers. For example, an ED-held FFELP borrower may choose to invest the paused student loan payments in a retirement account while the commercial FFELP borrower remains required to cover the monthly student loan bill. An ED-held FFELP borrower who simply allocated the paused student loan payment into an S&P 500 tracker each month since March would have seen an over 21 percent return on investment through the start of February 2021, generating almost \$4,000 of wealth on only \$3,300 in contributions.³⁴ The commercial FFELP borrower, meanwhile, would have simply paid \$3,300 to a student loan company over the same period. Even if the ED-held FFELP borrower's \$4,000 generates only a much more modest 5 percent annual rate of return for the next 20 years, that borrower will have over \$10,605 to enjoy. These lost savings are just one more example of the lasting and likely permanent effects of the expenses commercial FFELP borrowers are now required to bear.

Research shows that in the last recession, those who did not receive household debt relief took almost four more years to recover with regard to consumer spending, home prices, and employment than those who did.³⁵ The unique costs being imposed on commercial FFELP borrowers are likely to leave them with a similarly rocky and elongated path to relief from COVID.

³¹ Stefan Lembo Stolba, *Experian 2020 Consumer Credit Review*, Experian (Jan. 4, 2021), <https://www.experian.com/blogs/ask-experian/consumer-credit-review/>.

³² SBPC calculations. Assumes a starting credit card balance of \$5,313 at an interest rate of 20.5 percent and minimum payments at the greater of \$50 or two percent of the borrower's outstanding balance. See *id.*

³³ SBPC calculations, see *id.*

³⁴ SBPC calculations based on *SPDR S&P 500 ETF Trust (SPY)*, Yahoo! Fin., <https://finance.yahoo.com/quote/SPY/history/> (last visited Feb. 12, 2021) (containing data through 2/8/2021).

³⁵ Tomasz Piskorski & Amit Seru, *Debt Relief and Slow Recovery: A Decade after Lehman* (Dec. 1, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303411.

III. Borrowers Feel this Financial Strain Acutely and Express Frustration and Anger That They Have Been Ignored by Policymakers Throughout the Pandemic

Underlying these statistics are the millions of borrowers struggling to make ends meet during a pandemic all while being denied relief due to no fault of their own decision-making. The following are only a small sample of the narratives of FFELP borrowers who have recently reached out to the Consumer Financial Protection Bureau for help grappling with the weight of these loans during COVID:

- “Due to covid I am not working I haven’t received unemployment although I’ve been trying for over 4 months now. I have begged them in multiple emails and explained my situation since XXXX and now they said theres no forbearance left and if Im late they will immediately report to my credit so I use much needed funds to pay. Please help. **In this time with no income and being unable to work due to being immunocompromised I am shocked that a company is this heartless.**”³⁶
- “I have FFELP loans serviced by Navient and owned by Navient Federal Loan trust. It is my understanding that these are federal loans, but I was told by Navient on XX/XX/2020 that I did not qualify for the interest waiver due to COVID because they are not owned by the Ed Dept. . . . **I had no idea mine were not education dept loans until now.** It says on Navients website that all federal loan interest rates are set by Congress but mine are still showing 3-7 %. I don’t know who to reach out to. Both my husband and I have huge student loan balances . . . **and both of us have had our hours cut in half due to the virus.**”³⁷
- “I was laid off work due to . . . mandatory office closure for the coronavirus. I received an automated email stating to go to StudentAid.gov and apply for Income-Based Repayment plan, which I did. **It also stated if I have any questions, several ways were listed on how to contact them. I tried them all.** I went to the app and tried using online tools to defer, but a pop up stated it was unavailable and needed to call. I called, and the message said the office was shut down, no way to leave a message. I tried their website, also ran into the same issues. I tried to email, but a pop up stated it was also not available. I tried live chat, it stated no one was available. Finally, I went to their social media site, and saw that I was not alone. Hundreds of comments were showing that they too could not get a hold of [my servicer], and were getting no responses. I left a comment, and was told to [direct] message them. . . . I tried again Sunday, on Monday, and Tuesday. No replies. . . . **Then I was billed my full amount, debited right from my checking account yesterday. . . . I have no income at the moment** and they are not helping me during these financially difficult times.”³⁸

³⁶ *Consumer Complaint 3787868*, Consumer Fin. Prot. Bureau (Aug. 10, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3787868> (emphasis added).

³⁷ *Consumer Complaint 3580183*, Consumer Fin. Prot. Bureau (Mar. 25, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3580183> (emphasis added).

³⁸ *Consumer Complaint 3581789*, Consumer Fin. Prot. Bureau (Mar. 26, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3581789> (emphasis added).

- “In early XXXX . . . I submitted my application (online) for an income-driven-repayment plan to one of my student loan servicers (Nelnet) ; not only did I complete the necessary form but as a follow up I called [N]elnet to make sure that they received and approved the INCOME DRIVEN REPAYMENT PLAN for one year. Despite my meticulous care in this area —Nelnet just recently sent me a harrassing email erroneously stating that I am currently 15 days past due . . . They have harrassed me in this manner before ——and along with the current stresses due to covid-19 and trying to keep body and soul together by buying food and paying rent ——there unnecessary and frivolous harrassment is **starting to adversely effect my mental and physical health and well being** (I am currently XXXX years old) ”³⁹
- “I was temporally laid off from my job because we closed for 7 weeks. Under the federal law, ALL student loan payments were put on hold, this includes 0 % interest. . . I have recently gotten letters from Allied Interstate demanding payment on my student loans. Today I got a hefty envelope from them stating if I don't repay my loan, in full, they will start to garnish my wages!!! **How is this legal??? How are they allowed to harass people about their student loans when there is a law in place the no payments are due!!** This needs to be addressed!! Up until XXXX, when the Act took place, I paid my loan every month on time! PLEASE HELP!!”⁴⁰
- “**Due to Covid-19 I have lost my income** . . . my shop was forced to close due to the statewide shutdown on XX/XX/XXXX. I immediately applied for AES 's " disaster forbearance ", and was given confirmation of receipt of my message on XX/XX/XXXX. Since then, **I have received only " past due " notices**. I have applied again and again through their system, each time only receiving confirmation of receipt, and then more past due notices and instructions on how to apply for the forbearance, for which I've applied multiple times. When I try to follow up on that I get nothing. They also note that they are reporting my delinquency to credit agencies every month.”⁴¹

The distinction between commercial and ED-held FFELP borrowers and the disparity across their levels of hardship during COVID serves as yet another reminder of the tendency for the student loan industry to receive generous aid in times of crisis while borrowers are left to struggle.⁴²

As mentioned above, the notion of “commercial” and “ED-held” FFELP loans arose during the last financial crisis when the federal government bought swaths of privately held FFELP loans

³⁹ *Consumer Complaint 3846466*, Consumer Fin. Prot. Bureau (Sept. 12, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3846466> (emphasis added).

⁴⁰ *Consumer Complaint 4008326*, Consumer Fin. Prot. Bureau (Dec. 13, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/4008326> (emphasis added).

⁴¹ *Consumer Complaint 3619550*, Consumer Fin. Prot. Bureau (Apr. 23, 2020), <https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3619550> (emphasis added).

⁴² Ben Kaufman, *Washington Delivered COVID Aid to the Private Student Loan Industry. It's Time to Protect Borrowers.*, Student Borrower Prot. Ctr. (Jan. 26, 2021), <https://protectborrowers.org/washington-delivered-covid-aid-to-the-private-student-loan-industry-its-time-for-borrowers-to-get-a-turn-at-relief/>.

from Wall Street banks in a last-ditch effort to prop up the student loan system.⁴³ While this bailout offered hundreds of billions of dollars' worth of taxpayer-funded relief for some of the largest financial institutions in the world, it did nothing to help borrowers dealing with the same financial crisis. Worse, the millions of people left with their debts on bank balances sheets have found in subsequent years that their level of safety as borrowers has been left to the whims of Wall Street, leading consumers to lose out on key repayment protections,⁴⁴ servicemembers to have their rights violated,⁴⁵ teachers to be ripped off by their creditors,⁴⁶ public servants to have promises of loan forgiveness broken,⁴⁷ and even taxpayers to be fleeced by the student loan industry.⁴⁸

That sad legacy carries on today.

IV. Policy Recommendations

The executive branch has within its power the ability to stop Washington's treatment of these borrowers as invisible and their distress as too complex a problem to solve. We urge the following actions to end the unfortunate history of commercial FFELP borrowers being singled out for a lack of student borrower protection:

- **Create a clear path for all FFELP borrowers to take advantage of the payment pause without penalty.** The vast majority of FFELP borrowers have a right under federal law to consolidate their loans into a federal Direct Loan, making them eligible for pandemic-related protections. However, the design of the student loan system and the financial penalties for borrowers considering or pursuing consolidation can make this a costly proposition. For example, federal law requires borrowers who consolidate to pay a higher interest rate and to forfeit progress toward loan forgiveness under income-based repayment.⁴⁹ Research by both of our organizations demonstrates that some of these barriers are the result of prior administrations' overly narrow interpretation of the Higher Education Act (HEA). ED already has tools at its disposal to remedy this, and it must use them immediately to protect borrowers from all negative consequences associated with consolidation. Under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act), the Secretary of Education can use his authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs."

⁴³ Morgan, *supra* note 12.

⁴⁴ Ombudsman's Office, Consumer Fin. Prot. Bureau, Annual Report to the Director (2015), https://files.consumerfinance.gov/f/201512_cfpb_report_ombudsman-office.pdf.

⁴⁵ U.S. Dep't of Jus., Nearly 78,000 Service Members to Begin Receiving \$60 Million Under Department of Justice Settlement with Navient for Overcharging on Student Loans (May 28, 2015), <https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement>.

⁴⁶ Amended Class Action Complaint, Hyland et al. v. Navient Corporation, No. 1:18-cv-09031 (S.D.N.Y. Jan. 1, 2019), www.pslfsettlement.com/Portals/0/Document%20Files/First%20Amended%20Complaint.pdf?ver=2020-06-16-150656-000.

⁴⁷ Student Borrower Prot. Ctr., Broken Promises, *supra* note 10.

⁴⁸ Stacy Cowley, *Navient, a Student Loan Company, Is Ordered to Repay \$22 Million to the Government*, N.Y. Times (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/business/navient-a-student-loan-company-is-ordered-to-repay-22-million-to-the-government.html>.

⁴⁹ *Student Loan Consolidation*, Fed. Student Aid, <https://studentaid.gov/manage-loans/consolidation>.

This authority along with existing authority under the HEA can be used to ensure that upon consolidation the resulting loan will adopt the same interest rate of the underlying loans after the expiration of any available payment pause and that all qualified payments toward loan forgiveness through IBR remain accounted for.⁵⁰ The Secretary should also ensure that this avenue for consolidation is open to all borrowers with commercial FFELP loans and other federal loans not held by the Department of Education—removing any legacy statutory or regulatory barriers to consolidation.

- **Recognize and remedy the wide breadth of policy errors and industry abuses that commercial FFELP borrowers have had to endure.** Fitting with President Biden’s calls for the nation to “Build Back Better” in response to COVID, any emergency action to strengthen access to consolidation should also free these borrowers from the myriad problems that have plagued the FFEL program for decades. Specifically, consolidations should afford borrowers relief for past errors that have imposed unnecessary loan costs or denied access to debt relief. For example, by continuing to count payments made before consolidation, the Secretary can award credit towards Public Service Loan Forgiveness (PSLF) based on monthly payments made on a FFELP loan—canceling these loans outright where a FFELP borrower has previously made 120 otherwise-qualifying payments.⁵¹ As has been documented at length elsewhere, administrative errors, policy choices, and extensive industry breakdowns have kept commercial FFELP borrowers from securing relief through income-driven repayment,⁵² work in public service jobs,⁵³ and other legal avenues for discharge.⁵⁴ These borrowers need more than a chance to consolidate without losing progress toward forgiveness; they need the government to follow through on promised relief for which these borrowers should have already qualified, but which they have so far been denied through no fault of their own.⁵⁵
- **Immediately halt all collections by guaranty agencies and pursue administrative action for the Secretary of Education to acquire all defaulted commercial FFELP loans.** During the first weeks of the pandemic, the Trump Administration authorized guaranty agencies to halt debt collection and suspend involuntary collection efforts.⁵⁶

⁵⁰ In particular, the HEROES Act of 2003 grants the Secretary of Education authority to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of” the Higher Education Act in “connection with a . . . national emergency” to ensure “administrative requirements placed on . . . recipients of student financial assistance are minimized . . . to ease the burden on such students and avoid . . . defaults.” 20 U.S.C. § 1098bb (2003); see also Letter from Am. Fed’n of Teachers & Student Borrower Prot. Ctr. to Betsy DeVos, Sec’y, U.S. Dep’t of Educ. (Mar. 19, 2020), <https://protectborrowers.org/wp-content/uploads/2020/03/AFT-SBPC-HEROES-Act-Letter-Final-for-Circulation-1.pdf>.

⁵¹ Student Borrower Prot. Ctr. et al., Delivering on Debt Relief: Proposals, Ideas, and Actions to Cancel Student Debt on Day One and Beyond (Nov. 2020), https://protectborrowers.org/debtreliefreport_lp/.

⁵² Persis Yu, *Relief for Borrowers in Income-Driven Repayment*, in Delivering on Debt Relief: Proposals, Ideas, and Actions to Cancel Student Debt on Day One and Beyond 75 (Nov. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3756511.

⁵³ Student Borrower Prot. Ctr., Broken Promises, *supra* note 10.

⁵⁴ Student Borrower Prot. Ctr. et al., Delivering on Debt Relief, *supra* note 51.

⁵⁵ Yu, *supra* note 52; Student Borrower Prot. Ctr., Broken Promises, *supra* note 10.

⁵⁶ Office of Postsecondary Educ., *Updated Guidance for Interruptions of Study Related to Coronavirus (COVID-19)*, Fed. Student Aid (Apr. 3, 2020), <https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19>.

Yet, as described above, most of the industry did not take these actions, costing borrowers more than \$100 million. The Secretary should amend past guidance to guaranty agencies to compel these companies to halt all collections, including debt collection phone calls, negative credit reporting, and involuntary collections, recognizing the immediate financial harm caused by these efforts. The Secretary also has the clear authority to compel any guaranty agency to "...assign to the Secretary any loan of which it is the holder..." if the Secretary determines it is in the federal government's "fiscal interest" to do so.⁵⁷ The Secretary should pursue all available options to take possession of defaulted commercial FFELP loans, immediately adding these loans to the federal government's student loan portfolio and affording these borrowers all benefits due to any other borrower with a federally held loan, including the suspension of interest and monthly payments.

Today 8.25 million people owe at least one federally guaranteed loan held by a private creditor. As part of any administrative effort to protect borrowers with commercial FFELP loans and other federally guaranteed loans in the short term, the Secretary should develop a comprehensive strategy to rapidly wind down the existence of private creditors in the federal student loan system. This should include working with Congress to obtain comparable authority to the Ensuring Continued Access to Student Loans Act (ECASLA) to allow private lenders to voluntarily return their FFELP loans to the Department, and force FFELP lenders to assign loans back to the Department if the Secretary determines it is in the "federal fiscal interest" of the Department and taxpayers.⁵⁸

The Trump administration exercised executive authority to cancel student loan interest charges and pause loan payments for over 40 million federal student loan borrowers.⁵⁹ The Biden administration can and should use the same tools to finally offer immediate relief to millions of federal student loan borrowers who have been left behind.

Sincerely,

Student Borrower Protection Center
National Consumer Law Center

CC:

Sen. Patty Murray, Chair, Senate Committee on Health, Education, Labor and Pensions
Sen. Richard Burr, Ranking Member, Senate Committee on Health, Education, Labor and Pensions

⁵⁷ 20 USC 1078(c)(8) ("(8) Assignment to protect Federal fiscal interest. If the Secretary determines that the protection of the Federal fiscal interest so requires, a guaranty agency shall assign to the Secretary any loan of which it is the holder and for which the Secretary has made a payment pursuant to paragraph (1) of this subsection.")

⁵⁸ *Supra* note 56.

⁵⁹ Kevin M. Lewis & Edward C. Liu, Cong. Rsch. Serv., LSB10568, The Biden Administration Extends the Pause on Federal Student Loan Payments: Legal Considerations for Congress (2021), <https://www.everycrsreport.com/reports/LSB10568.html>.

Rep. Bobby Scott, Chair, House Committee on Education and Labor
Rep. Virginia Foxx, Ranking Member, House Committee on Education and Labor