Comments from the Student Borrower Protection Center
to the Department of Education re:
Intent to Establish Negotiated Rulemaking Committee:
Title IV of the Higher Education Act of 1965, as amended (HEA)
Docket ID: ED-2021-OPE-0077

July 1, 2021

The Student Borrower Protection Center ("SBPC") submits the following comments to address the U.S. Department of Education's notice of intent to establish negotiated rulemaking committees to prepare proposed regulations for programs authorized under title IV of the Higher Education Act of 1965, as amended ("HEA"). The SBPC is a national nonprofit organization working to address the mounting burden of student debt on borrowers, families, communities, and our nation.

The following comments are informed by the experiences of our team which is largely composed of former officials from the Consumer Financial Protection Bureau who served as regulators for the student loan industry over the past decade.[1]

As these comments discuss in more detail below, the Biden Administration must use all of the tools in its toolbox, including administrative and subregulatory action, as well as rulemaking, to deliver on the promises already made to student loan borrowers under the law. The HEA holds the potential to lift the burden of student debt off of the shoulders of tens of millions of people, yet administrations of both parties have repeatedly failed to deliver.

I. <u>The Student Debt Crisis is a Consumer Protection Crisis</u>

The SBPC encourages the Department of Education ("the Department" or "ED") to approach the student debt crisis from a consumer protection perspective. In particular, ED and its Office of Federal Student Aid ("FSA") must wield the awesome power vested in the Department as one of the largest holders of consumer debt in the world, working to improve the welfare of tens of millions of people with student debt.

Unfortunately, ED has historically behaved more like Wells Fargo than a branch of the United States government. Specifically, the regulatory and subregulatory decisions made by the Department and FSA over the past three decades continue to drive the widening gap between student loan borrowers' rights under the HEA and borrowers' experiences struggling to repay these debts.

When millions of families lost their homes to foreclosure more than a decade ago, advocates warned of a startlingly similar gap between homeowners rights and their lived experiences.

[1] https://protectborrowers.org/who-we-are/our-team/

Congress and the Obama Administration made broad claims about Americans' rights to mortgage modification and foreclosure mitigation—promises that proved illusory as the biggest creditors in the mortgage industry ramped up the foreclosure machine and kicked millions of families out of their homes.

Similarly, the HEA makes bold promises to Americans with student debt—the promise of a monthly student loan payment that will never be "unaffordable,"[2] the promise of loan forgiveness for workers who serve for a decade,[3] the promise of debt cancellation for those who become Totally and Permanently Disabled,[4] the promise that student loan payments will never be a life-long burden for low-income people,[5] and the promise that the government will discharge debts for those who have been defrauded by a predatory school and those who have faced a school closure.[6]

Yet each day, we are met with new evidence that the student loan system is unable to meet the promises made to student loan borrowers and our country. For example, this year alone:

- The Government Accountability Office found that the Public Service Loan Forgiveness (PSLF) program, which was established nearly fourteen years ago, has only cancelled the loans of 124 members of the military, even as hundreds of thousands of borrowers have served.[7]

- The National Consumer Law Center received data through FOIA showing that, as of January 2021, only 32 borrowers had successfully navigated the income-driven repayment (IDR) plans and received cancellation, out of more than 4 million with decades-old debts.[8]

- The government has identified more than 500,000 people with disabilities who are eligible to have their debts immediately cancelled based on data provided by the Social Security Administration to the Department.[9] Instead, they face the looming prospect of

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[2] See, e.g., 20 U.S.C. 1098e
[3] 20 U.S.C. 1087e(m)
[4] 20 U.S.C. 1087
[5] See, e.g., 20 U.S.C. 1087e(d)(D)
[6] 20 USC 1087e
[7] See Government Accountability Office, *Public Service Loan Forgiveness* (2021); https://www.gao.gov/products/gao-21-65?utm_medium=social. See also Consumer Financial Protection Bureau, *Remarks of CFPB Student Loan Ombudsman Seth Frotman before the Judge Advocate General School* (2017); https://files.consumerfinance.gov/f/documents/201710_cfpb_Frotman-Remarks-JAG-School.pdf. ("....more than 200,000 servicemembers collectively owe more than $2.9 billion in student debt.").
[8] NCLC & SBPC, Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt (March 2021), https://www.nclc.org/uncategorized/new-government-data-exposes-complete-failure-of-education-departments-income-driven-repayment-program.html.
[9] National Consumer Law Center and Student Defense et. al, *Letter to Secretary Cardona on Total and Permanent Disability Discharge* (2021),

another student loan bill.

- The Department acknowledged a backlog of nearly 150,000 applications for PSLF—borrowers who may be forced to pay a student loan bill as they remain stuck in the government's red tape.[10]

- The Department also acknowledged a backlog of more than 100,000 applications for Borrower Defense discharges—the number of unprocessed claims for debt relief due to fraud by a school have climbed by more than 20,000 during the first months of the Biden administration.[11]

II. The Student Debt Crisis is a Civil Rights Crisis

There is a robust and growing body of evidence that shows the far-reaching economic effects of student debt across borrowers' financial lives.[12] It also shows that these effects are not shared equally; the student debt crisis is a civil rights crisis.[13]

The cancellation of student debt is a matter of equity as much as it is a matter of justice. Borrowers of color take on more debt, struggle to repay these debts at higher rates, disproportionately default on federal student loans, and—as a consequence of the regulatory and subregulatory decisions made over the course of decades—are disproportionately crushed by the government's debt collection machine.[14]

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https://www.nclc.org/images/pdf/student_loans/TPD_Regs_Ltr.pdf; See also Social Security Administration Office of the Inspector General, *Social Security Administration Beneficiaries Eligible for Total and Permanent Disability Federal Student Loan Discharge* (November 2020), https://oig.ssa.gov/sites/default/files/audit/summary/pdf/A-06-17-50281Summary.pdf.

[10] https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-06-14/federal-student-aid-posts-two-new-quarterly-portfolio-reports-fsa-data-center-and-highlights-recent-changes-public-service-loan-forgiveness-ea-id-general-21-40

[11] https://studentaid.gov/data-center/student/loan-forgiveness/borrower-defense-data

[12] See, e.g., William Elliot & Melinda Lewis, *Student Debt Effects on Financial Well-Being: Research and Policy Implications*, 29 J. Econ. Surveys 614 (2015), http://onlinelibrary.wiley.com/doi/10.1111/joes.12124/full (finding that student loan debt can delay asset accumulation for years and can decrease a family's net worth by 63 percent); Daniela Kraiem, *The Cost of Opportunity: Student Debt and Social Mobility*, 48 Suffolk U. L. Rev. 689, 699 (2015) ("Students with unmanageable debt are more likely to be low-income, female, black, and have dependent members such as children or elderly parents."); William Elliot & Melinda Lewis, *Student Loans Are Widening The Wealth Gap: Time To Focus On Equity* 7, Assets & Educ. Initiative, Univ. Of Kan., (2013), http://aedi.ssw.umich.edu/sites/default/files/publications/publication-cd-reportsr1.pdf ("However, despite our collective belief in an American dream of equitable opportunities for all, higher education today increasingly reinforces patterns of relative privilege, particularly as students rely more and more on student loans to finance college access.").

[13] See, e.g., Student Borrower Protection Center, *Disparate Debts: How Student Loans Drive Racial Inequality Across Cities* (2020), https://protectborrowers.org/disparate-debts/; See also, Welbeck, Katherine, *Race: Examining Legal Remedies for Disparate Student Debt Outcomes*, Consumer Finance Law Quarterly Report (2020); https://ssrn.com/abstract=3712516.

[14] *Id.*

III. The Student Debt Crisis is a Crisis Caused by the Government's Broken Promises

This research also shows the myriad ways that the government has broken its promises to student loan borrowers. For example, millions of low-income people default on student loans, despite a right to affordable payments.[15] Millions of older people remain trapped in decades-old debt, despite promises to deliver debt relief.[16] Students, taxpayers, and the entire higher education sector continue to pay the price for our decade-long failure to deal with the collapse of Corinthian Colleges, Inc., ITT Technical Institute, and other large predatory for-profit colleges.[17]

For every single student loan borrower with a loan made, insured, or guaranteed under the HEA, the Department has the authority to fix these issues through administrative action, or administrative action paired with a rulemaking.[18]

IV. A Rulemaking Agenda that Centers Student Loan Borrowers

The SBPC's recommendation is a simple one: the Department needs to deliver for student loan borrowers before it throws them back into the badly broken student loan system.[19] This means taking the necessary action to cancel debts to the maximum extent allowable under law: cancelling $50,000 in student debt for all borrowers, but also delivering on the promise to cancel all debt owed by low-income people, by public service workers who have served for a decade or more, by people who are totally and permanently disabled, by people who have been defrauded by predatory schools, and many others.

The Department's rulemaking agenda must be informed by, and fill in the gaps remaining after, a robust, comprehensive effort is undertaken to deliver immediate debt relief to borrowers. This regulatory effort should address the underlying flaws in the student loan system that continue to drive the student debt crisis.

A. ED Must Keep President Bident's Promise to Deliver an Income-Driven Repayment Plan that Works for Borrowers

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[15] See, e.g., Government Accountability Office, *Federal Student Loans: Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options* (2015), https://www.gao.gov/products/gao-15-663. ("While defaulted loans are not eligible for IBR until they are rehabilitated, Treasury also found that an estimated 70 percent of borrowers with defaulted loans met the income requirements for IBR.")
[16] See, e.g., Student Borrower Protection Center, *Delivering on Debt Relief* (November 2020), https://protectborrowers.org/wp-content/uploads/2020/12/Delivering-on-Debt-Relief.pdf
[17] *Id.*
[18] For a more complete discussion of the specific administrative actions necessary to provide relief to borrowers, advocates, experts, and scholars contributed to a volume of working papers in November 2020 entitled *Delivering on Debt Relief: Proposals, Ideas, and Actions to Cancel Student Debt on Day One and Beyond*. This compendium is enclosed with this comment letter. See, Appendix. Student Borrower Protection Center, *Delivering on Debt Relief* (November 2020).
[19] Student Borrower Protection Center et. al., *Over 125 Organizations Call on President Biden to Extend Student Loan Payment Pause* (June 2021), https://protectborrowers.org/Payment-Pause-Letter/.

On the regulatory front, most importantly, the Department must deliver on President Biden's promise to make sure student loan payments are affordable for all student loan borrowers, particularly lower income borrowers, by creating an IDR plan that does not suffer from its predecessors' deep flaws, and grapples with the fact that more than 4 million people continue to repay student debt that is more than two decades old.[20] IDR must present borrowers with a single option that addresses each of shortcomings of the current choices—a clear alternative with no tricks, traps, or "trade-offs" will allow borrowers to step away from legacy options and dramatically reduce so-called "complexity" in the student loan system.

To illustrate this point, consider the fate of Income-Sensitive Repayment ("ISR") in the Federal Family Education Loan program. When Income-Based Repayment came online in 2009, the limited use case for ISR disappeared, as did enrollment in the program.[21] **ED does not need Congress to overhaul the HEA to achieve the same result—the Department just needs to make borrowers an offer that everyone will take.**

This requires ED to use rulemaking to address the amount of income protected before payments are required, the runaway interest charges that routinely deter people from enrolling or persisting in IDR, the incredible administrative burden placed on economically vulnerable borrowers, and many other obvious shortcomings in the program design.[22] The full implementation of the FUTURE Act should be treated as part and parcel of this effort—lowering administrative barriers is critical at every step.

As part of any comprehensive IDR rulemaking, ED must center both of IDR's twin goals—the immediate promise of affordable loan payments and the commitment to provide a path to debt cancellation for all borrowers who remain in debt and experience financial hardship for an

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[20] U.S. Department of Education, *Education Department Responses to Data Request by Senator Warren* (April 2, 2021); https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response%20to%20Sen%20Warren%20-%204-8-21.pdf

[21] Although there is no comprehensive data available about the marketwide utilization of income-sensitive repayment, Education Department administrative data reveals that, with respect to FFEL loans held by the Department, the volume of loans enrolled in income sensitive repayment was approximately $110 million in 2016, or ½ of 1% of the loan volume enrolled in Income-Based Repayment. By the second quarter of 2021, the volume of loans enrolled in ISR had fallen to approximately $30 million, or less than 1/7th of 1% of the loan volume enrolled in IBR. See, U.S. Department of Education, *Federal Student Aid Data Center, Student Aid Portfolio: Portfolio by Repayment Plan* (accessed on July 1, 2021); https://studentaid.gov/sites/default/files/fsawg/datacenter/library/DLPortfoliobyRepaymentPlan.xls.

[22] For a complete discussion of the barriers and limitations affecting IDR, see National Consumer Law Center and Student Borrower Protection Center, *New Government Data Exposes Complete Failure of Education Department's Income-Driven Repayment Program* (2021); https://www.nclc.org/uncategorized/new-government-data-exposes-complete-failure-of-education-departments-income-driven-repayment-program.html. For an example of how to approach reforming these aspects of a modernized, borrower-centered IDR scheme, see Center for Responsible Lending and National Consumer Law Center, *New CRL, NCLC Report Proposes Roadmap for Student Borrowers to Survive the COVID Debt Crisis* (November 2020); https://www.responsiblelending.org/media/new-crl-nclc-report-proposes-roadmap-student-borrowers-survive-covid-debt-crisis

extended period.[23] As part of this effort, equity and justice should motivate the Department to grant credit to all borrowers for their time spent in repayment, regardless of the repayment plan selected or the use of deferment or forbearance. There is a growing body of evidence that loan servicers steer borrowers away from plans that qualify for loan forgiveness and into forbearance, in some cases for years.[24] To remedy these abuses and address the systemic issues identified with the Department's early design and implementation of income-contingent repayment, the Department should amend its regulations to count time in repayment when considering eligibility for IDR forgiveness, regardless of payment plan or loan status. Further, to maximize the number of borrowers who obtain relief through this policy change, the Department should create a maximum loan term and cancel all debts that exceed this term, regardless of past IDR enrollment.

B. ED Must Fix the Broken Student Loan System and Protect Borrowers from Predatory Schools

Beyond the regulatory actions described above, the Department should pursue a robust agenda to fix the badly broken student loan system and protect students, student loan borrowers, and taxpayers from predatory schools. These actions should include:

Discharging Debts for Borrowers Defrauded by For-Profit Schools and Holding Predatory Schools Accountable. The SBPC was pleased to join with 36 other organizations to share priorities to rein in abuses by predatory schools and protect students, student loan borrowers, and taxpayers.[25] The actions called for in this coalition letter include the restoration of for-profit college students' access to justice by banning the use of forced arbitration clauses and class action waivers in for-profit college enrollment agreements—a priority that will have an immediate deterrent effect on abuses by bad actor schools.

Restoring the Promise of Public Service Loan Forgiveness. Across the student loan system, borrowers are asked to pay a heavy price when administrative burdens, government mismanagement, and industry abuses conspire to deny them their rights under the law.[26] No place is this more visible than in the collapse of the PSLF program.[27] As called for by a broad

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[23] 20 U.S.C. 1087e; The Education Department should note that the Higher Education Act itself is quite sparse in its authorization to create an income-contingent repayment scheme, but offers specificity with respect to both of these goals. It is inappropriate and inconsistent with congressional intent to give primacy to short-term. payment relief at the expense of total debt relief in the long term.
[24] See, e.g. New York v. Pa. Higher Educ. Assistance Agency, No. 1:19-cv-09155 (S.D.N.Y. Oct. 3, 2019); Consumer Fin. Prot. Bureau v. Navient Corp., No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017).
[25] See *The Institute for College Access and Success* (TICAS), *37 Organizations Share Priorities for Negotiated Rulemaking* (July 1, 2021).
[26] See, e.g., Consumer Financial Protection Bureau, *Supervisory Highlights: Summer 2021* (June 2021), https://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-issue-24-summer-2021/.
[27] For further discussion of the collapse of PSLF, see, e.g., *Student Borrower Protection Center and American Federation of Teachers*, SBPC and AFT Investigation on Mismanagement and Abuse on Scandal-Plagued Public Service Loan Forgiveness Program (accessed July 1, 2021);

coalition of labor unions, consumer advocates, civil rights, student groups, organizations representing people of faith, military and veterans' organizations, Members of Congress, and many others, the Department must first take administrative action to cancel all student loan debt owed by public service workers who have served for a decade or more.[28] Once this action is completed, the Department should rewrite the rules for the PSLF program to ensure all future borrowers are able to access this critical consumer protection. The SBPC agrees with public comments offered by American Federation of Teachers and National Education Association—rulemaking to restore the PSLF program need not be a top priority, if administrative action to deliver debt relief is undertaken immediately.

Protecting Borrowers in Default. Under current regulations, the programs available to help borrowers in default are not sufficient to ensure that defaulting on one's student loans do not result in financial devastation for borrowers. The Department has the authority to, and the opportunity now through rulemaking, to create additional pathways for borrowers to exit default. In particular, the Department could utilize the authority in 20 USC 1087e(d)(5) to create a pathway out of default by placing borrowers who default into an IDR plan.[29] We join with the National Consumer Law Center in calling for the Department to provide defaulted borrowers with more pathways for getting out of default as is allowed under the HEA.

Protecting Borrowers with Disabilities. ED must address the serious flaws in the Total and Permanent Disability Discharge (TPD) program, in part, by ensuring the government automatically cancels student debts owed by people eligible by virtue of their disability status with the Social Security Administration and the Department of Veterans Affairs. Beyond these reforms, the program itself should undergo a top-to-bottom overhaul to better reflect the needs and experiences of people with disabilities.

C. Building a More Inclusive Negotiating Table

Across these topics, to write better rules, ED needs a better negotiating table. That means participation by borrowers, advocates, and experts that can represent the lived experiences of student loan borrowers and provide a deep understanding of how the current system has failed. ED must commit to seating a cross-section of experts and advocates with deep knowledge of each topic on the agenda to ensure each affected constituency has effective representation. This would be a marked departure from the historical norm of providing a single seat to a single "advocate," expected to serve as a counterweight to school and industry negotiators. In no place is this better illustrated than with the TPD program, where the last rulemaking was undertaken

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https://protectborrowers.org/sbpc-and-aft-investigation-on-mismanagement-and-abuse-on-scandal-plagued-public-service-loan-forgiveness-program/

[28] See, e.g., Equal Justice Works and Student Borrower Protection Center, et., al., *Advocates Call on the Secretary of Education to Cancel Student Debt for All Public Service Workers with 10 or More Years of Service* (2021), https://protectborrowers.org/sbpc-and-aft-investigation-on-mismanagement-and-abuse-on-scandal-plagued-public-service-loan-forgiveness-program/.

[29] 20 USC 1087e(d)(5)

with no representation from the disability community. However, this general observation holds true across topics.

V A Path Forward

The Department faces enormous challenges in the weeks and months ahead, including the prospect of negotiating new rules in the closing months of a global pandemic and an uneven economic recovery that continues to place extraordinary economic pressure on people with student debt—all while potentially resuming student loan payments for 40 million people.

In closing, the Department should commit to approaching these many commitments in phases, rather than attempting to take on these efforts simultaneously. ED should commit to keeping student loan payments paused while using all available legal and administrative avenues to take pressure off of borrowers and the student loan system, and use this opportunity to write and implement rules that allow us to build back better. Student loan borrowers deserve nothing less.

Thank you for your consideration of these comments. If you have any questions please contact Mike Pierce (mike@protectborrowers.org).

DELIVERING ON DEBT RELIEF

Proposals, Ideas, and Actions to Cancel Student Debt on Day One and Beyond

November 2020

STUDENT BORROWER PROTECTION CENTER

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ABOUT THE STUDENT BORROWER PROTECTION CENTER

The Student Borrower Protection Center is a nonprofit organization focused on alleviating the burden of student debt for millions of Americans. The SBPC engages in advocacy, policymaking, and litigation strategy to rein in industry abuses, protect borrowers' rights, and advance economic opportunity for the next generation of students.

ABOUT DEMOS

Demos is a dynamic "think-and-do" tank that powers the movement for a just, inclusive, multiracial democracy. Through cutting-edge policy research, inspiring litigation, and deep relationships with grassroots organizations, Demos champions solutions that will create a democracy and economy rooted in racial equity.

ABOUT THE STUDENT LOAN LAW INITIATIVE

The Student Loan Law Initiative is a partnership between the Student Borrower Protection Center and the University of California, Irvine School of Law to develop a body of rigorous research around how to address the student loan crisis.

CONTRIBUTING ORGANIZATIONS

Authors who contributed articles to this paper series hail from a diverse array of advocacy organizations and academic institutions. Authors are not speaking on behalf of their institutions, nor do authors necessarily endorse any piece in the compendium aside from their own.

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Foreword

By Seth Frotman,[1] Dalié Jiménez,[2] and Jonathan Glater[3]

As of the date this compendium was published, the nation's outstanding cumulative student debt burden stands at $1.7 trillion, collectively shouldered by 45 million Americans.[4] This burden continues to rise unchecked—in only four short years, outstanding student debt is estimated to reach nearly $2 trillion.[5]

This looming cloud of student debt casts a growing shadow over our communities and our country. Research increasingly shows the ripple effects of student debt on households, cities, and the economy at large.[6] We also know that the burden of student debt is not shouldered equally and only serves to further entrench widespread racial, gender, and wealth disparities.[7] In particular, Black borrowers have disproportionately borne the brunt of

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[4] *See Consumer Credit - G.19*, Fed. Res. Bd. (Nov. 6, 2020), https://www.federalreserve.gov/releases/g19/current/default.htm; *Federal Student Loan Portfolio by Borrower Age*, Fed. Student Aid, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/Portfolio-by-Age.xls (last accessed Nov. 13, 2020).

[5] *See* Robert Hiltonsmith, Demos, At What Cost? How Student Debt Reduces Lifetime Wealth (2013), https://www.demos.org/sites/default/files/publications/AtWhatCost.pdf.

[6] *See* Alvaro Mezza et al., *Can Student Loan Debt Explain Low Homeownership Rates for Young Adults?*, Consumer & Cmty. Context, Jan. 2019, at 2, 5; Hiltonsmith, *supra* note 5; Fed. Res. Bd., Consumer & Cmty. Context, Jan. 2019, https://www.federalreserve.gov/publications/files/consumer-community-context-201901.pdf; Bina Shrimal, Jacob DuMez, and Sarika Abbi, *At What Cost? Student Loan Debt in the Bay Area*, San Francisco Office of Financial Empowerment (Apr. 2019), https://www.frbsf.org/community-development/files/student-loan-debt-in-the-bay-area.pdf; Joelle Scally and Zayne Abdessalam, *Student Loan Borrowing Across NYC Neighborhoods*, Fed. Res. Bank of NY and N.Y.C. Dep't. of Consumer Affairs (Dec. 2017), https://www.newyorkfed.org/medialibrary/media/outreach-and-education/community-development/credit-conditions/student-loan-borrowing-nyc-neighborhoods.pdf; Riley Griffin, *The Student Loan Debt Crisis Is About to Get Worse*, Bloomberg (Oct. 17, 2018), https://www.bloomberg.com/news/articles/2018-10-17/the-student-loan-debt-crisis-is-about-to-get-worse ("Fed Chairman Jerome Powell[:] . . . . 'You do stand to see longer-term negative effects on people who can't pay off their student loans. It hurts their credit rating; it impacts the entire half of their economic life. As this goes on, and as student loans continue to grow and become larger and larger, then it absolutely could hold back growth.'").

[7] *See* Dalié Jiménez & Jonathan Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 Harv. C.R.-C.L. L. Rev. 131, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475224&dgcid=ejournal_htmlemail_education:law:ejournal_abstractlink; Dalié Jiménez, Professor of Law, U.C. Irvine Sch. of L., Written Testimony Before the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law (June 25, 2019), https://www.law.uci.edu/news/in-the-news/2019/Jimenez-testimony.pdf; *Disparate Debts: How Student Loans Drive Racial Inequality Across American Cities*, Student Borrower Prot. Ctr. (2020), https://protectborrowers.org/wp-

the student debt crisis—recent research shows that the median Black borrower still owes 95 percent of their original student loan balance 20 years after graduation and Black borrowers also experience default at significantly higher rates.[8]

Now, as the nation grapples with another recession before millions of families have recovered from the last one, student debt threatens to add kerosene to the fire of the ongoing economic fallout from COVID-19.[9]

Yet, armed with the benefit of hindsight and buoyed by the possibilities afforded by a new administration, we recognize that we can and must act. In 58 days, President Biden will take office with the tools needed to take immediate action to eliminate this burden for tens of millions of people who have been needlessly forced to bear its brunt.

In order to understand the need for such relief, we must first understand how we got here. The trillion-dollar policy failure we face today compounded over decades as the country slashed public investment in higher education and already-struggling American families were forced to borrow to compensate.[10]

As the country replaced grant funding to support access to higher education with the availability of debt, Congress enacted multiple legislative interventions intended to serve as a critical safeguard against growing student loan balances.[11] Across the ideological spectrum, policymakers agreed that when we collectively shifted the risk of higher education onto the backs of tens of millions of our citizens, there must be strong safety valves

content/uploads/2020/06/SBPC-Disparate-Debts.pdf; Kevin Miller, Am. Ass'n of Univ. Women, Deeper in Debt: Women and Student Loans (2017), https://www.aauw.org/research/deeper-in-debt.

[8] Stalling Dreams: How Student Debt is Disrupting Life Chances and Widening the Racial Wealth Gap, Inst. on Assets and Social Policy (Sept. 2019) https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf. Further, Black borrowers disproportionately experience default—Black borrowers with a Bachelor's degree default at rates 5 times greater than their white peers and Black BA graduates are even more likely to default than white borrowers who do not graduate. The looming student loan default crisis is worse than we thought, Judith Scott-Clayton, Brookings Institute (Jan. 11, 2018), https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/.

[9] *See, e.g.*, Alana Semuels, *The Never-Ending Foreclosure*, The Atlantic (Dec. 1, 2017), https://www.theatlantic.com/business/archive/2017/12/the-neverending-foreclosure/547181/; Annie Nova, *Many Americans Say Their Financial Situation Is Worse Since the Great Recession*, CNBC (Oct. 11, 2019), https://www.cnbc.com/2019/10/11/many-americans-are-still-struggling-from-the-great-recession.html.

[10] *See* Seth Frotman, *Broken Promises: How Debt-financed Higher Education Rewrote America's Social Contract and Fueled a Quiet Crisis*, 2018 Utah L. Rev. 811, 820 (2018), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1172&context=ulr.

[11] *See, e.g.*, 20 U.S.C. §§ 1087(a) (total and permanent disability discharge), 1087(c)(1) (closed school discharge); 1087(c) (false certification), 1098ee (protections in case of national emergency); *see also* Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 Stan. L. Rev. 1093, 1104 (2019).

to serve as a counterweight.[12] By design, those safeguards contemplated the cancellation of debt for millions of borrowers.

Congress gave the executive branch the authority to implement broad-based cancellation when necessary.[13] Additionally, Congress established specific, targeted relief designed to eliminate the burden of student loan debt for cohorts of borrowers facing specific forms of distress.[14] Cumulatively, Congress intended for tens of millions of borrowers to receive relief if the system failed. Lawmakers promised relief for borrowers defrauded by predatory schools.[15] They guaranteed a clean slate for those whose financial hardship has spanned decades[16] and for those who pass up private sector wages to serve our country or our local communities.[17] They told borrowers that they would not have to fear forces totally out of their control, like an unexpected school closure[18] or the onset of a permanent disability.[19]

Unfortunately, these safety valves have failed.

Millions of borrowers have been denied access to the very programs and protections Congress intended to serve as a critical backstop against the most significant risks of our debt-fueled higher education system. We have seen this failure in the hundreds of thousands of borrowers defrauded by predatory schools and languishing in an administrative limbo as officials of both parties fail to cancel their debts.[20] We have seen these failures in the

[12] *See, e.g.*, 153 Cong. Rec. S9536 (daily ed. July 19, 2007), https://www.govinfo.gov/content/pkg/CREC-2007-07-19/html/CREC-2007-07-19-pt1-PgS9534.htm (discussion on the House floor of the passage of public service loan forgiveness)

[13] *See, e.g.*, Luke Herrine, An Administrative Path to Student Debt Cancellation (2019), https://greatdemocracyinitiative.org/wp-content/uploads/2019/12/HerrineStudentDebtJubilee_FINAL.pdf; Letter from Eileen Connor et al., Legal Servs. Ctr. of Harv. L. Sch., to Senator Warren (Jan. 13, 2020), https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf.

[14] *See supra* note 10.

[15] *See* Toby Merrill & Eileen Connor, *Relief for Borrowers with a Defense to Repayment*, *infra* at 45; Rye Salerno & Erik Manukyan, *Relief for Borrowers with a Disqualifying Status*, *infra* at 134.

[16] See Persis Yu, *Relief for Borrowers in Income-Driven Repayment*, *infra* at 74.

[17] See Michael Pierce & Rebecca Maurer, *Relief for Public Service Workers*, *infra* at 27.

[18] *See* Robyn Smith, *Relief for Borrowers Whose Schools Closed*, *infra* at 112.

[19] See John Whitelaw & Bethany Lilly, *Relief for Borrowers with Disabilities*, *infra* at 94.

[20] *See, e.g.*, Order, *Sweet v. DeVos*, No. 19-cv-03674-WHA (N.D. Cal. Oct. 19, 2020) (order denying class settlement, to resume discovery, and to show cause) ("By September, 139,021 applications [for loan discharge for defrauded borrowers] awaited review. That count rose to 158,110 by the end of December, and to 179,377 by the end of March 2019. By June 2019, borrowers had filed 272,721 applications and 210,168 languished. *For eighteen months*, from June 2018 until December 2019 . . . the Secretary issued no decisions at all.") (emphasis in original).

current administration's rejection of 98 percent of public service workers seeking the debt relief they were promised.[21] We have seen these failures in the denial of loan discharges for borrowers with total and permanent disabilities and the subsequent seizure of their disability benefits.[22] The safeguards intended to protect against the worst outcomes are instead perpetuating them.

Years of indifference and apathy by policymakers and public officials have allowed the harms of student debt to fester. There has been unconscionable reticence to provide lawfully available protections by the very policymakers who sit atop the system they helped break.

We can do better. Without a single new act of Congress, the President has the power to execute these laws as they were intended and to pry open the safety valves designed to protect borrowers. Each of the key levers for debt relief under current law is available to provide overdue, immediate relief to millions of people with student debt.

But to do so, we must first recognize that previous attempts to mitigate the student debt crisis lacked the borrower-centered legal framework to end it.

The Student Loan Law Initiative's (SLLI) sole purpose is to fill this gap. In 2018, the Student Borrower Protection Center and the U.C. Irvine School of Law launched SLLI to reimagine the role law can play in improving student loan borrowers' lives.[23] SLLI is leading the research and scholarship necessary to ensure the law becomes a constant and driving force in improving the lives for those whose only "mistake" was taking on debt to pursue the American Dream.

And this work has begun in earnest.

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[21] *See Keeping the Promise of Public Service Loan Forgiveness*, Student Borrower Prot. Ctr. (Dec. 2018), https://protectborrowers.org/wp-content/uploads/2018/12/SBPC-AFT-PSLF-Investigation.pdf ("[T]his first round of denials is just the beginning. To the millions of dedicated public service workers who have spent years relying on the promise of the PSLF program, these rejections are an ominous foreshadowing of their financial futures. In effect, Washington has told these borrowers that their shot at economic stability will be denied when their turn comes.").

[22] *See Snapshot of older consumers and student loan debt*, Consumer Fin. Prot. Bureau at 13 (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf ("The number of borrowers age 65 and older who had their Social Security benefits offset to repay a federal student loan increased from about 8,700 to 40,000 borrowers from 2005 to 2015.23 Social Security benefits are the only source of regular retirement income for 69 percent of beneficiaries age 65 and older.") (footnote omitted).

[23] *Student Loan Law Initiative*, UCI Law, https://www.law.uci.edu/centers/slli/ (last accessed Nov. 15, 2020).

In February 2020, SLLI hosted a symposium that drew together practitioners with deep expertise and legal scholars from across the country who shared innovative ideas about how to strengthen the legal framework that underpins the student loan system.[24] Included among the papers presented at this event was an article outlining the administrative authority granted to the Secretary of Education to execute the broad-based cancellation of student debt through one specific provision of the Higher Education Act—the Secretary's authority to "compromise, waive, or release . . . claims" against borrowers.[25] Mere weeks after this symposium, this tactic was reportedly deployed by the Trump Administration in precisely this manner—Secretary DeVos cancelled unpaid student loan interest charges owed by tens of millions of student loan borrowers as part of the Trump Administration's response to the COVID-19 pandemic.[26]

In the months that followed, lawmakers, legal scholars, economists, activists, and advocates have called for the use of this same authority to implement the broad-based cancellation of student debt for 45 million student loan borrowers.[27]

And even as a growing coalition of tireless, fearless individual borrowers and advocates have pushed this effort from the outer limits of possibility onto the President's agenda, we recognize that broad-based student debt cancellation, at the levels proposed, is necessary but not sufficient. We must also ensure that, for the first time, the safety valves established by law serve their intended function. Proposals to eliminate $10,000 in student debt per borrower are a critical first step to advance equity and restore justice. But the work cannot and must not end

[24] *Student Loan Law Initiative (SLLI) Hosts First Student Loan Law Review Symposium*, UCI Law, https://www.law.uci.edu/centers/slli/feb-2020-symposium-main.html.

[25] *See* Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, Buff. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442234; *see also* Dalié Jiménez & Rebecca Maurer, *Student Loan Law Initiative Hosts First Student Loan Law Review Symposium*, Student Borrower Prot. Ctr. (Mar. 24, 2020), https://protectborrowers.org/student-loan-law-initiative-hosts-first-student-loan-law-review-symposium/.

[26] *See* Press Release, U.S. Dep't of Educ., Delivering on President Trump's Promise, Secretary DeVos Suspends Federal Student Loan Payments, Waives Interest During National Emergency (Mar. 20, 2020), https://www.ed.gov/news/press-releases/delivering-president-trumps-promise-secretary-devos-suspends-federal-student-loan-payments-waives-interest-during-national-emergency (announcing student loan interest waived prospectively and retroactively to the date of President Trump's COVID-19 emergency declaration on March 13, 2020); @mstratford, Twitter (Aug. 7, 2020, 7:17 PM), https://twitter.com/mstratford/status/1291921349573738496 (quoting a spokesperson for the U.S. Department of Education as confirming the specific legal authority used for this executive action).

[27] *See, e.g.*, Press Release, Elizabeth Warren, Schumer, Warren: The Next President Can and Should Cancel Up To $50,000 In Student Loan Debt Immediately; Democrats Outline Plan for Immediate Action in 2021 (Sept. 17, 2020), https://www.warren.senate.gov/newsroom/press-releases/schumer-warren-the-next-president-can-and-should-cancel-up-to-50000-in-student-loan-debt-immediately-democrats-outline-plan-for-immediate-action-in-2021; Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt"*, Forbes (Oct. 7, 2020), https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/?sh=75397e4358a7 ("Biden also said, "I'm going to make sure everyone gets $10,000 knocked off of their student debt" in response to economic hardships caused by the pandemic.").

there. We cannot leave behind the public school teacher who took on $60,000 in debt to teach in her hometown but has been denied the promised loan forgiveness. We cannot avoid the veteran who was ripped off by a predatory for-profit school and is now stuck with a six-figure student debt. We cannot neglect the borrower with a permanent disability who has accrued $30,000 in interest on her loans because of the needless procedural hurdles between her and lawful debt relief.

These approaches to debt relief are not mutually exclusive. Rather, as this compendium shows, they are inextricably tied together and all are necessary to rectify the harm imposed upon millions of families.

The following articles provide a blueprint, both independently and collectively, for fixing the mistakes that have punished an entire generation. Each author deliberately and thoughtfully evaluates the existing authorities for loan discharge, forgiveness, and cancellation and lays out the legal basis, method, and process by which the new administration can expeditiously utilize these authorities to provide widespread relief. Taken together, this compendium represents the path forward to create a system that protects the most vulnerable among us from the crushing weight of student debt—the relief that was promised but has so far been illusory. These articles show not only the importance of taking immediate action but also how to get there. Critically, the pieces included in this compendium do not merely advocate for reforms to protect the next generation of students and families—they demand justice for the borrowers who never benefited from the supposed safeguards meant to protect against an inherently risky, fundamentally broken system.

For too long, student debt has fractured the lives and livelihoods of borrowers who were promised a different future. Fortunately, there has never been more motivation, more determination, or more power behind the movement to end the student debt crisis. And now, with this compendium, we have a roadmap that a new administration can use to build America back better.

INTRODUCTION: THE URGENCY AND EQUITY OF STUDENT DEBT CANCELLATION

Ashley Harrington
Federal Advocacy Director & Senior Policy Counsel
Center for Responsible Lending

Mark Huelsman
Associate Director, Policy & Research
Demos

The year 2020 has been one of deep political and economic turmoil: a year in which families' finances were thrown into disarray; a year in which millions stood up to protect, respect, and center Black and Brown lives; a year in which a global pandemic magnified the basic inequity and unfairness at the heart of so much of our economy and society. Americans deserve a government and a policy agenda that meets the moment and gives hardworking families the ability to make ends meet and not fall further behind. We also deserve an agenda that reverses policies that have, either intentionally or through benign neglect, contributed to the generational and racial wealth inequality that is suppressing economic growth.

If we can reform higher education so that its promise as a path to the American dream is restored for all students, we may well be on our way to building a more inclusive, just economy. That our major policy choices have been disastrous is now undeniable; we are allowing college prices to skyrocket, for-profit institutions to prey on students, and higher education to be financed primarily through loans instead of generous public funding and grant aid.[1]

These policy choices fail to account for the broader context, the impact of compounding discrimination and inequality in every area of life from housing,[2] primary and secondary education,[3] healthcare,[4] consumer finance,[5]

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[1] *See, e.g.*, Jonathan Glater, *Student Debt and Higher Education Risk*, 103 Cal. L. Rev. 1561 (2016); Abigail Hess, *How Student Debt Became a $1.6 Trillion Crisis*, CNBC (June 12, 2020 11:33 AM), https://www.cnbc.com/2020/06/12/how-student-debt-became-a-1point6-trillion-crisis.html; Patricia Cohen, *For-Profit Schools, an Obama Target, See New Day Under Trump*, N.Y.Times (Feb. 20, 2017), https://www.nytimes.com/2017/02/20/business/for-profit-education-trump-devos.html.

[2] Laura Sullivan, Tatjana Meschede, Lars Dietrich, Thomas Shapiro, Amy Traub, Catherine Ruetschlin & Tamara Draut, Demos & Inst. On Assets and Soc. Policy, The Racial Wealth Gap: Why Policy Matters (2015), http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf.

[3] *See, e.g.*, Hannah Furfaro, *To Understand Structural Racism, Look to Our Schools*, Seattle Times (June 28, 2020), https://www.seattletimes.com/education-lab/to-understand-structural-racism-look-to-our-schools/.

[4] *See, e.g.*, Monique Tello, *Racism and Discrimination in Health Care: Providers and Patients*, Harv. Health Blog (Jan. 16, 2017), https://www.health.harvard.edu/blog/racism-discrimination-health-care-providers-patients-2017011611015; Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 Am. Bar Assoc., Human Rights Mag., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/.

[5] *See, e.g.*, Michael Calhoun, *Investigative Report Shows High Rate of Racial Discrimination in Auto Lending Market*, Ctr. For Responsible Lending (Jan. 11, 2018), https://www.responsiblelending.org/media/investigative-report-shows-high-rate-racial-discrimination-auto-lending-market; Ruth Susswein, *Economic Inequalities: The Impact of Systemic Racism in Your Finances*, Consumer Action News (Fall 2020), https://www.consumer-action.org/downloads/english/CANews-Race_and_Personal_Finances_Fall_2020.pdf; Michelle Singletary, *Credit Scores are Supposed to be Race-Neutral. That's Impossible*, Wash. Post (Oct. 16, 2020), https://www.washingtonpost.com/business/2020/10/16/how-race-affects-your-credit-score/?arc404=true.

and environmental degradation.[6] These policy choices fail to account for decades of sluggish wage growth,[7] systemic racism in our financial and labor markets,[8] and a shrinking safety net that has created a toxic mix for millions.[9] Though lauded in our society as a goal that those who want to succeed should strive for, many face financial ruin because they obtained—or tried to obtain—a college education. These policy choices, even prior to the COVID-19 pandemic, have caused massive financial pain for millions, particularly Black households who must borrow thousands of dollars more for postsecondary education and face greater difficulty repaying their loans.[10] This profound crisis is hardly the product of "choices" made by individuals seeking to better themselves and create financial stability and prosperity for their families; rather it is the result of policymakers choosing to ignore evidence, racial disparities, and long-term economic implications and instead creating an inequitable, unworkable system.

Because of student debt, rather than lifting people out of poverty and providing access to the middle class, higher education is exacerbating the racial wealth gap and perpetuating the cycle of poverty that results from systemic lack of access to resources, capital, and affordable credit.

Because of student debt, rather than lifting people out of poverty and providing access to the middle class, higher education is exacerbating the racial wealth gap and perpetuating the cycle of poverty that results from systemic lack of access to resources,

[6] *See, e.g.*, Thomas Astell-Burt, Maria J. Maynard, Erik Lenguerrand, Melissa J. Whitrow, Oarabile R. Molaodi & Seeromanie Harding, *Effect of Air Pollution on Racism on Ethnic Differences in Respiratory Health Among Adolescents Living in an Urban Environment*, Health Place (Sept. 23, 2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3783902/; Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism is Real*, The Atlantic (Feb. 28, 2018), https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/.

[7] John Schmitt, Elise Gould, & Josh Bivens, Econ. Policy Inst., America's Motion Wage Crisis (Sept. 2018), https://www.epi.org/publication/americas-slow-motion-wage-crisis-four-decades-of-slow-and-unequal-growth-2/.

[8] *See, e.g.*, Jhacova Williams & Valerie Wilson, Econ. Policy Inst., Black Workers Endure Persistent Racial Disparities in Employment Outcomes (Aug. 2019), https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/; New Am. Found., The Racialized Costs of Banking, https://www.newamerica.org/family-centered-social-policy/reports/racialized-costs-banking/the-racialized-costs-of-banking/; Catherine Ruetschlin, *Markets Don't Stop Racism But They Can Perpetuate It*, Demos (Aug. 21, 2014), https://www.demos.org/blog/markets-dont-stop-racism-they-can-perpetuate-it.

[9] *See, e.g.*, Jordan Weissman, *Turning Our Backs: How the American Safety Net Shrank for the Poorest of the Poor*, Slate (May 16, 2014), https://slate.com/business/2014/05/the-american-safety-net-its-shrinking-for-the-poorest-of-the-poor.html.

[10] Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS Notes (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm; Heather Long & Andrew Van Dam, *The Black-White Economic Divide is as Wide as it Was in 1968*, Wash. Post (June 4, 2020), https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/.

capital, and affordable credit.[11] This short-sighted approach is leaving jobs unfilled, money wasted, and human potential squandered, threatening our national security and economic well-being.[12] Even before the onset of COVID-19, the student debt crisis was on track to decimate our economy and communities in much the same way the mortgage crisis did.[13] Now, the process is accelerated by the economic fallout of the public health crisis.

Broken Promises and Bad Assumptions

The exacerbation of the racial wealth gap is a betrayal of the promise embedded in the Higher Education Act. As an essential component of its pledge to seek racial justice and alleviate poverty, Congress passed the Higher Education Act of 1965 (HEA).[14] This critical legislation was a significant feature of President Lyndon Johnson's "Great Society" agenda that came on the heels of passage of major civil rights legislation.[15] President Johnson put considerable effort into securing significant public investment for an ambitious plan, intended to open doors of opportunity and create unprecedented access to higher education, especially for Black students. Though the first HEA included access to student loans, they were not the foundation of his plan but rather a concession to lawmakers concerned about middle-class access.[16] The centerpiece of his legislation was to enable low-income students to finance their education through grants.[17]

[11] Jen Mishory, Mark Huelsman & Suzanne Kahn, The Century Found., How Student Debt and the Racial Wealth Gap Reinforces Each Other (Sept. 9, 2019), https://tcf.org/content/report/bridging-progressive-policy-debates-student-debt-racial-wealth-gap-reinforce/?agreed=1.

[12] *See, e.g.*, Sherrilyn Ifill, *It's Time to Face the Facts: Racism is a National Security Issue*, Wash. Post (Dec. 18, 2018), https://www.washingtonpost.com/opinions/its-time-to-face-the-facts-racism-is-a-national-security-issue/2018/12/18/f9746466-02e8-11e9-b5df-5d3874f1ac36_story.html; Council on Foreign Relations, *U.S. Education Reform and National Security, Independent Task Force Report vol. 68* (2012) cfrd8-files.cfr.org/sites/default/files/report_pdf/TFR68_Education_National_Security.pdf.

[13] Malcolm Harris, *Bad Education*, n+1 Mag. (Apr. 25, 2011), https://nplusonemag.com/online-only/online-only/bad-education/ ("When the housing bubble collapsed, the results (relatively good for most investors, bad for the government, worse for homeowners) were predictable but not foreordained. With the student-loan bubble, the resolution is much the same, and it's decided in advance."); Meghan Foley, *Bankers: College Debt Bubble Mimics Housing Bubble*, USA Today (May 11, 2013), https://www.usatoday.com/story/money/business/2013/05/11/college-debt-bubble-looks-like-housing-bubble/2151555/.

[14] Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

[15] TG Research and Analytical Servs., Higher Education Act: Forty Years of Opportunity 17 (2005), https://files.eric.ed.gov/fulltext/ED542500.pdf; see also *Higher Education Act Media Kit*, LBJ Presidential Library, http://www.lbjlibrary.org/mediakits/highereducation/p8.html (LBJ remarks at the signing of the HEA).

[16] TG Research and Analytical Servs., *supra* note 15 at 41.

[17] *Id.*

The HEA was not the first significant public investment in higher education. Decades earlier, the 1862 Morrill Act created land-grant universities (most of which only served white students) across the country; this was followed by the 1890 Morrill Act, which created and allowed for legally segregated land-grant institutions for Black Americans in southern states, though the investment in schools serving white versus Black communities was far from equitable, and remains so to this day.[18] And in 1944, Congress passed the GI Bill, which sent hundreds of thousands of veterans (mostly white) to college.[19] All of these policies further cemented the Black-white wealth gap. And, in 1965, higher education was still out of reach for most Americans, especially Black Americans.

Higher education was also not yet essential for upward mobility as it has become today.[20] Before higher education, pathways to wealth in this country have always included asset ownership (including enslaved people as well as homes, land, and stock) and entrepreneurship.[21] However, in recent years and especially in 2020, for many students, especially for Black and Latino students, higher education no longer leads to more financial security or wealth, even when yielding higher incomes.[22] Instead, education has gone from a ladder of upward mobility to a financial pit leading nowhere. While the door President Johnson mentioned may still be open, the cover charge is so prohibitively high that the door can neither be called nor considered meaningful access.

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[18] Morrill Act, Pub. L. No. 37-130, 12 Stat. 501 (1862); Morrill Land-Grant Act, 26 Stat. 417 (1890); Shaun R. Harper, Lori D. Patton & Ontario S. Wooden, *Access and Equity for African American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, 80 J. Higher Educ. 290 (2009), https://web-app.usc.edu/web/rossier/publications/231/Harper,%20Patton%20and%20Wooden%20(2009).pdf; Katherine I. E. Wheatle, *Neither Just Nor Equitable: Race in the Congressional Debate of the Second*, 46 Am. Educ. History J. 1 (2019), https://eric.ed.gov/?id=EJ1226050.

[19] Servicemen's Readjustment Act of 1944, P.L. 78-346, 58 Stat. 284 (1944); J.T. Minor, *Segregation Residual in Higher Education: A Tale of Two States*, 45 Am. Educ. Research J. 862 (2008); Edward Humes, *How the GI Bill Shunted Blacks into Vocational Training*, 53 The Journal of Blacks in Higher Education 92, www.jstor.org/stable/25073543; Shannon Luders-Manuel, *The Inequality Hidden Within the Race-Neutral G.I. Bill*, JSTOR Daily (Sept. 18, 2017), https://daily.jstor.org/the-inequality-hidden-within-the-race-neutral-g-i-bill/.

[20] Over 95% of jobs created since the Great Recession have gone to those with at least a bachelor's degree. *See* Anthony Carnevale, Tamara Jayasundera, & Artem Gulish, Georgetown Ctr. on Educ. and the Workforce, America's Divided Recovery: College Haves and Have-Nots (2016) https://cew.georgetown.edu/cew-reports/americas-divided-recovery/.

[21] Written Testimony of Signe Mary McKernan & Caroline Ratcliff before the S. Comm. on Small Bus. Entrepreneurship (Sept. 18, 2013), http://www.urban.org/sites/default/files/publication/24491/904611-closing-the-wealth-gap-empowering-minority-owned-businesses-to-reach-their-full-potential-for-growth-and-job-creation.pdf; Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Shortchanged Out of the Materials to Build Wealth*, Econ. Policy Inst. (Feb. 13, 2017), https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/.

[22] *See, e.g.*, Inst. on Assets and Soc. Policy, Stalling Dreams: How Student Debt is Disrupting Life Chances and Widening the Racial Wealth Gap (Sept. 2019) https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf; Darrick Hamilton & Naomi Zewde, Wash. Ctr. For Equitable Growth, *Promote Economic and Racial Justice: Eliminate Student Loan Debt and Establish a Right to Higher Education Across the United States* (Feb. 18, 2020), https://equitablegrowth.org/promote-economic-and-racial-justice-eliminate-student-loan-debt-and-establish-a-right-to-higher-education-across-the-united-states/.

Yet we often tell a story, and make policy, as if meaningful access exists. Over the years, we developed a narrative of student debt as "good debt" and framed the pursuit of higher education as an individual endeavor rather than a public good that should be invested in and supported.[23] Despite the broad societal benefits of higher education, the federal government and states have failed to meet the demand for education with the public investment necessary to keep costs low and debt to a minimum.[24] The Pell Grant has atrophied to the point that it covers barely one-quarter of the price at a public four-year college, leaving federal, and sometimes private, loans to make up the difference.[25] Notably, public investment in higher education shifted as higher education became more accessible to Black students after the passage of the Civil Rights Act of 1964 and the HEA. The assumption embedded in these policy choices was that attending and completing college was likely to pay off for nearly everyone who pursued it, a race-neutral assumption that failed to reckon with the fact that even college-educated families of color face a fundamentally different experience in the labor market, housing market, and every other facet of American life.[26] It also coincided with the rising costs of housing, childcare, and other necessities that have squeezed middle-income families as well.[27] In other words, this highly sought-after academic credential often fails to translate into financial stability. Nor does it produce wealth or the tangible benefits associated with middle and higher-income status. This is the proverbial "rock and hard place" that our current government-sanctioned and taxpayer-funded debt system has created for so many Americans, especially Black and Latino Students.

[23] *See* Seth Frotman, *Broken Promises: How Debt-Financed Higher Education Rewrote America's Social Contract and Fueled a Quiet Crisis*, 2018 Utah L. Rev. 812, https://dc.law.utah.edu/ulr/vol2018/iss4/1/.

[24] Pew Trusts, Two Decades of Change in Federal and State Higher Education Funding (Oct. 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding; Michael Mitchell, Michael Leachman & Kathleen Masterson, A Lost Decade in Higher Education Funding: States Have Driven Up Tuition and Reduced Quality (Aug. 2017) https://www.cbpp.org/sites/default/files/atoms/files/2017_higher_ed_8-22-17_final.pdf.

[25] Coll. Bd., Trends in College Pricing and Student Aid 2020, at 44, fig.SA-16A (2020), https://research.collegeboard.org/pdf/trends-college-pricing-student-aid-2020.pdf.

[26] Mishory, et al., *supra* note 11; Darrick Hamilton, Wiliam Darity, Jr., Anne E. Price, Vishnu Sridharan & Rebecca Tippett, Umbrellas Don't Make It Rain: Why Studying and Working Hard Isn't Enough for Black Americans (Apr. 2015), http://www.insightcced.org/wp-content/uploads/2015/08/Umbrellas_Dont_Make_It_Rain_Final.pdf.

[27] Ctr. for Am. Progress, *The Middle Class Squeeze* (Jennifer Erickson ed., 2014), https://www.americanprogress.org/issues/economy/reports/2014/09/24/96903/the-middle-class-squeeze/.

A Failure to Confront Systemic Inequity

The student debt crisis is one of the most recent and visible outcomes of our nation's failures to deal with both the persistent legacy of racial discrimination and also our continuing failure to create and implement policies that will narrow, not widen, wealth and income gaps. Today, Black households with a bachelor's degree have less wealth than white households where the head of household only has a high school degree or less.[28] In this context, it is clear that the assumptions that have undergirded our system of higher education financing are outdated and dangerous.[29]

Whether these failures are intentional efforts to keep the status quo in place and retain the racial and socioeconomic hierarchy that have defined our country since 1619,[30] or, as some would argue, simply benign neglect and ignorance that somehow resulted in $1.7 trillion[31] in outstanding debt, the overall effect is the same. What is without dispute is that many advocates and borrowers have been sounding the alarm for years and there have been few, if any, intentional steps to fully mitigate the devastating effects of these design flaws. Now, as the crisis spills over to the white middle class and the overall economy, the alarm has reached clarion levels and perhaps, finally, the calvary is on the way. Indeed, 70 percent of all undergraduates are borrowing and struggling, and the global pandemic and recession has only exacerbated the burden of student debt.[32]

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[28] Mark Huelsman, *Yes, Student Debt Cancellation Would be a Big Deal*, Demos Blog (Nov. 19, 2020), https://www.demos.org/blog/yes-student-debt-cancellation-would-be-big-deal.

[29] Abbye Atkinson, *Borrowing Equality*, 120 Colum. L. Rev. 1403 (2020).

[30] N.Y. Times, *1619 Project*, https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

[31] Board of Govs. of the Fed. Reserve Sys., *Consumer Credit – G.19*, (Nov. 6, 2020), https://www.federalreserve.gov/releases/g19/current/default.htm.

[32] Samantha Fields, *70% of College Students Graduate with Debt. How Did We Ge Here?*, Marketplace (Sept. 30, 2019), https://www.marketplace.org/2019/09/30/70-of-college-students-graduate-with-debt-how-did-we-get-here/; Ctr. for Responsible Lending, Student Debt During COVID-19 in Pennsylvania (Nov. 9, 2020), https://www.responsiblelending.org/research-publication/student-debt-during-covid-19-pennsylvania.

While we seldom find the political will to create change only for Black, Brown, and poor people, now as we transition to the Biden-Harris Administration, we hope lawmakers will use the full range of tools and resources at their disposal to address a crisis that communities of color have shouldered for years.

The fact that federal pandemic relief included student borrowers at all is already evidence that this crisis is similar to other major economic crises such as widespread poverty or subprime housing: each of these crises only truly gained a national focus and response when the damage leaked beyond communities of color to those our country has always deemed worthy of saving.

The fact that federal pandemic relief included student borrowers at all is already evidence that this crisis is similar to other major economic crises such as widespread poverty or subprime housing: each of these crises only truly gained a national focus and response when the damage leaked beyond communities of color to those our country has always deemed worthy of saving. Recently, we saw the failure of the Trump Administration to create intentional policy that reaches Black and Brown Americans play out in the now infamous Paycheck Protection Program (PPP) of the Small Business Administration (SBA). This $660 billion small business relief program created in response to the current COVID crisis was plagued with issues from the very start. Though well-intentioned—get money to small businesses as quickly as possible so they can survive—it failed to balance speed with effective execution. And, again, it failed to appreciate the need for racial equity in its application. Advocates were immediately concerned about a relief structure that relied on banks as intermediaries—the very institutions that have historically joined with government to exclude people of color from opportunity.[33] Relying on banks was enough to ensure that the program would privilege wealthy clients who are mostly white, but other decisions, such as those to limit immediate access to only employer businesses and creating hoops and hurdles for institutions that have a strong track record of serving businesses owned by people of color such as community development financial institutions (CDFIs) and minority depository institutions (MDIs), also had the effect of excluding millions of Black and Brown business owners.

[33] *See, e.g.*, Ctr. for Responsible Lending, The Paycheck Protection Program Continues to be Disadvantageous to Smaller Businesses, Especially Businesses Owned by People of Color and the Self-Employed (May 27, 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-cares-act2-smallbusiness-2020.pdf.

These barriers were easily foreseen and could have been easily mitigated. Had anyone taken the time to ask how this would impact the most vulnerable businesses, advocates could have provided the context and the data to confirm that the plan was inherently flawed.[34] Now the decline in Black and Brown businesses eclipses that of white businesses, and rampant fraud has been found throughout the program, even as millions of businesses never had a chance to access the relief.[35] This SBA program is more than simply an example of how the lack of a racial equity lens can lead to exclusion—it also exemplifies how these policies work together to solidify harms and compound inequity. The PPP, like other federal loan programs, is only open to those in good standing on their other federal loans, including student loans.[36] With Black borrowers being more likely to default than other groups, they were at greater risk of being shut out of this program at a time when relief was so desperately needed.[37] Similarly, Black borrowers can also face these hurdles when accessing other Small Business Administration programs or mortgage credit through federal homeownership programs,[38] even as Black borrowers are more likely to be shut out of the conventional mortgage market and require federal loans to access homeownership at all.[39]

There have always been dual systems of access and opportunity in this country. Black Americans have historically been denied access to the same financial and education systems, or similar opportunities, as

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[34] *See, e.g.*, Press Release, NCRC, Despite Gaping Holes in Government Data, Tests Show PPP Borrowers Faced Discrimination (July 15, 2020), https://ncrc.org/despite-gaping-holes-in-government-data-tests-show-ppp-borrowers-faced-discrimination/; Emma Coleman Jordan & Jamillah Bowman, *Surprise, Surprise. Big Banks' Racism Blocked Blacks' Access to PPP Loans*, Miami Herald (July 22, 2020), https://www.miamiherald.com/opinion/op-ed/article244416132.html.

[35] Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: Evidence of Early-Stage Losses from the April 2020 Current Population Survey*, Nat'l Bureau of Econ. Rsrch., Working Paper Series (June 2020), https://www.nber.org/system/files/working_papers/w27309/w27309.pdf; Aaron Gregg, *Watchdog Faults SBA on Minority-Owned and Rural Small-Business Relief Lending*, Wash. Post (May 8, 2020), https://www.washingtonpost.com/business/2020/05/08/sba-ppp-ig-report/.

[36] U.S. Treasury, *Paycheck Protection Program: Lender Application Form*, https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Fillable.pdf ("The Applicant has certified to the Lender that neither the Applicant nor any of its owners, nor any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years.").

[37] *See* Ctr. for Responsible Lending, Data Point: SBA Student Loan Restriction Disproportionately Impacts Black and Latino Business Owners (forthcoming 2020), https://www.responsiblelending.org/issues/student-loans.

[38] *See, e.g.*, U.S. Dep't of Com., Minority Bus. Dev. Agency, Disparities in Capital Access Between Minority and Non-Minority-Owned Businesses (Jan. 2010), https://archive.mbda.gov/page/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses.html; Amber Lee, Bruce Mitchell, & Anneliese Lederer, Divestment, Discouragement, and Inequity in Small Business Lending (2018), https://ncrc.org/disinvestment/.

[39] Nikitra Bailey, *New HMDA Data Shows Mortgage Market Continues to Exclude Black and Latino Borrowers*, Ctr. for Responsible Lending (June 26, 2020), https://www.responsiblelending.org/media/new-hmda-data-shows-mortgage-market-continues-exclude-black-and-latino-borrowers.

others.[40] Black Americans were shut out of the mainstream, often paying more for credit at every turn as they were steered into harmful products such as payday loans and subprime mortgages.[41] The effect of this exclusion is the perpetuation of poverty and financial instability, and the creation of a fragile Black middle class[42] that continues to build debt instead of wealth.[43]

We as a country are more than 50 years past the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the 1965 HEA. We are years into the false notion of post-racial colorblind policies. And we have yet to learn from our mistakes or right our wrongs.[44]

Our failures cost the economy trillions of dollars and will continue to do so. Recent studies extensively detail the costs of our failures to address racial discrimination in housing, banking, education—virtually every major arena.[45] Whether our government and society are ready to fully account for it or not, there is a price to pay. Beyond the costs we can quantify, we must also ask ourselves what we lose as a nation when a generation of Americans is left behind because of student debt.[46]

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[40] Testimony of Ashley C. Harrington, Senior Policy Counsel, Ctr. For Responsible Lending, before the U.S. House Comm. On Fin. Servs. (Sept. 10, 2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-harrington-protecting-studentborrowers-sep2019.pdf.

[41] Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. Irvine L. Rev. 887 (2019).

[42] Jason Houle & Fenaba Addo, *Racial Disparities in Student Loan Debt and the Reproduction of the Fragile Black Middle Class*, U. Wis.-Madison, Ctr. for Demography and Ecology (2018), https://cde.wisc.edu/wp-content/uploads/sites/839/2018/12/cde-working-paper-2018-02.pdf.

[43] *Id.* at 19-23.

[44] The federal National Advisory Commission on Civil Disorders ("Kerner Commission") discussed two "separate and unequal" societies (one Black, one white). Fifty years later, we are still struggling with this reality despite the availability of reforms. Fred Harris & Alan Curtis, *The Unmet Promise of Equality*, N.Y. Times (Feb. 28, 2018) https://www.nytimes.com/interactive/2018/02/28/opinion/the-unmet-promise-of-equality.html.

[45] *See, e.g.*, Dana M. Peterson & Catherine L. Mann, Citi GPS: Global Perspectives & Solutions, Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S., (September 2020), https://www.citivelocity.com/citigps/closing-the-racial-inequality-gaps; Nick Noel, Duwain Pinder, Shelly Stewart III & Jason Wright, McKinsey & Co., The Economic Impact of Closing the Racial Wealth Gap (August 2019), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap.

[46] Thomas Colson, *One Chart Shows How Millennials Got Screwed*, Bus. Insider (Nov. 16, 2017), https://www.businessinsider.com/how-chart-shows-how-millenials-got-screwed-2017-11 (showing ". . . millennials are the first generation who have failed to improve upon the living standards of the preceding 'Generation X'); Michael Hobbes, *FML: Why Millennials Are Facing the Scariest Financial Future of Any Generation Since the Great Depression.*, Huff Post: Highline, https://highline.huffingtonpost.com/articles/en/poor-millennials/ (last accessed October 12, 2019).

A Failure to Reckon with the Great Recession

Broad-based debt cancellation and structural reform offers us a chance to get back to basics, addressing a fundamental unfairness facing Black and Brown borrowers and jumpstarting our economic recovery. More than 10 years ago the Great Recession wreaked havoc on Black and Latino communities and the economy and the damage was never fully reckoned with. Between 2007 and 2012, over 12.5 million homes went into foreclosure because of toxic mortgages.[47] People of color were targeted and steered into these mortgages even when they qualified for safe, responsible mortgage loans.[48] And the impact spilled over far beyond those directly affected by foreclosure. Overall, $2.2 trillion in property value was lost by families living in close proximity to foreclosed properties.[49] *Over half of that spillover loss*—$1.1 trillion—was experienced by Black and Latino communities.[50] And while recovery from the Great Recession relieved many Americans, once again, communities of color were left out. The inadequate response produced unnecessary tightening of credit standards pushing the pursuit of economic security through homeownership further out of reach for Black and Latino families.[51] It is estimated that more than six million additional mortgages could have been made from 2009-2015 but for these tightened standards.[52] These disparities have yet to be corrected, and while mortgage reform is essential, so is consideration of student debt, especially given that homeownership, higher education, and small business opportunities are the traditional pillars of American middle-class stability. The interconnectedness of these systems cannot be ignored. Financial insecurity is often passed down the same way that the privileged pass down wealth and opportunity. For instance, the families who lost the most in the foreclosure crisis were the same

[47] Ctr. for Responsible Lending, 2013 Update: The Spillover Effects of Foreclosures (2013), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf.

[48] *See A Review of the State of and Barriers to Minority Homeownership: Hearing Before the Subcomm. On Hous., Cmty. Dev., and Ins. of the H. Comm. on Fin. Servs.*, 116th Cong. 52 (2019) (statement of Nikitra Bailey, Executive Vice President, Center for Responsible Lending), https://www.govinfo.gov/content/pkg/CHRG-116hhrg37522/pdf/CHRG-116hhrg37522.pdf ("Evidence shows that a large number of borrowers of color were targeted and steered into toxic mortgages even when they qualified for safer and more responsible loans with cheaper costs.") [hereinafter Bailey Statement].

[49] Ctr. for Responsible Lending, 2013 Update, *supra* note 47.

[50] *Id.*

[51] Nat'l Fair Hous. All., Fair Housing in Jeopardy: Trump Administration Undermines Critical Tools for Achieving Racial Equity (2020), https://nationalfairhousing.org/wp-content/uploads/2020/09/NFHA-2020-Fair-Housing-Trends-Report.pdf.

[52] Laurie Goodman, Jun Zhu & Bing Bai, *Overly Tight Credit Killed 1.1. Million Mortgages in 2015*, Urban Inst. (Nov. 21, 2016), https://www.urban.org/urban-wire/overly-tight-credit-killed-11-million-mortgages-2015.

families who were denied Parent Plus loans in 2012 when a change was made to the underwriting criteria.[53] The effect was immediate and devastating for Black students, Black families, and Black institutions.[54] Meanwhile, white college graduates are far more likely to receive large inheritances or gifts from their families, allowing them to avoid debt entirely or pay it off more quickly.[55]

In This Crisis, We Can Rectify Past Mistakes

We are now facing another "once-in-a-lifetime" economic collapse, sparked by the COVID-19 pandemic and exacerbated by a federal response that has been, in many ways, inadequate and uncoordinated.[56] Just as in 2008, the bailouts and recovery plans in response to the current crisis were quick and extensive. Yet they were uneven and inequitable. And by definition, recovery efforts are meant to get back to the status quo. But we know that communities of color never recovered from the last recession and entered this current downturn more vulnerable than when they entered the previous one, even before the public health issues are layered on top. We are on track to make the very same mistakes yet again.

While the federal government placed nearly all loans in administrative forbearance, pausing student loan payments and collections and waiving interest for borrowers at least until the end of this year, borrowers will still face a daunting debt burden once they are required to resume repayment.[57] If and when the payment freeze is lifted, we are likely to still be in a slow recovery in which Black workers face unemployment rates nearly twice

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[53] Jill Barshay, *How Fixing a Parent Loan program Hurt Black Students*, Hechinger Rep. (Apr. 20, 2015), https://hechingerreport.org/how-fixing-a-parent-loan-program-hurt-black-students; *see* Reginald Stuart, *HBCUs Trying to Undo Damage Resulting from Federal Parent PLUS Loans Revisions*, Diverse Issues in Higher Education (May 2, 2013); Cyril Josh Barker, *HBCUs Suffer After Changes to PLUS Loan Program*, Amsterdam New (March 21, 2013); Lezli Baskerville, *Student Loan Changes Are Crippling HBCUs*, The Atlanta Voice (June 7, 2013), http://theatlantavoice.com/news/2013/jun/07/student-loan-changes-are-crippling-hbcus/ ("The new PLUS Loan eligibility criteria are applicable to all applicants, but disproportionate percentages of HBCUs and students attending HBCUs were adversely impacted by the regulatory shift because HBCUs and the majority of families they serve have fewer financial resources."); *see generally* LaTanya Brown & Daren A. Conrad, *The Foreclosure Crisis, Parent PLUS Loan Approvals, and Minority College Enrollment: Is There A Link*?, 3(1) Am. Int'l J. of Contemp. Res. (2013).

[54] *Id.*

[55] Adam Harris, *White College Graduates Are Doing Great With Their Parents' Money*, The Atlantic (July 20, 2018), https://www.theatlantic.com/education/archive/2018/07/black-white-wealth-gap-inheritance/565640.

[56] *See generally* Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, Pew Rsrch. Ctr. (Sept. 24, 2020), https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.

[57] *See generally* Open Letter from 103 Community, Civil Rights, Consumer, and Student Advocacy Organizations to Congressional Leaders (July 15, 2020), https://www.demos.org/sites/default/files/2020-07/Student-debt-cancellation-July-15-2020.pdf.

that of white workers.[58] By late October of 2020, over half of Black households reported a loss of income since the pandemic began, and nearly a quarter of Black renters reported being behind on rent payments.[59] Remedies like expanded unemployment insurance or the benefit of one-time stimulus checks have long since expired, leaving workers—many of whom have student loans—to spend down any savings well before they have to resume repaying student loans.

Further, state budgets have and will continue to be decimated by the current crisis,[60] resulting in deep cuts to public higher education and higher prices for students.[61] Without any broad-based debt cancellation or added federal support for state and local governments, many families will have a harder time paying off their loans while trying to navigate a more expensive and more under-resourced system of colleges and universities for their children and families. The institutions hit hardest are likely to be community colleges and public Historically Black Colleges and Universities, which often receive a smaller share of state and federal funding.[62]

. . . [W]e persist with piecemeal policies that tinker at the edge of a system already destined to fail and that is only further imperiled by the current crisis we are facing. But we can still do something different.

And yet, we persist with piecemeal policies that tinker at the edge of a system already destined to fail and that is only further imperiled by the current crisis we are facing. But we can still do something different, something bold. The time for small solutions to big problems has ended. The time for ignoring the reforms we know are needed has ended; struggling individuals, families, and communities cannot wait any longer. And now, neither can our economy.

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[58] Olugbenga Ajilore, *The Persistent Black-White Unemployment Gap Is Built Into the Labor Market*, Ctr. For Am. Progress (Sept. 28, 2020, 9:02 AM), https://www.americanprogress.org/issues/economy/news/2020/09/28/490702/persistent-black-white-unemployment-gap-built-labor-market.

[59] Huelsman, *supra* note 28.

[60] Ctr. for Budget and Policy Priorities, States Grappling With Hit to Tax Collections 1–2 (Nov. 6, 2020), https://www.cbpp.org/sites/default/files/atoms/files/4-2-20sfp.pdf.

[61] Whitney Barkley-Denney & Cheye-Ann Corona, Ctr. for Responsible Lending, System Reboot: Challenges & Opportunities at the State Level for Higher Education During COVID-19 & Beyond 2 (Nov. 2020), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-student-loan-edu-covid-nov2020.pdf.

[62] Kery Murakami, *Racial Equity in Funding for Higher Ed*, Inside Higher Ed. (Oct. 29, 2020), https://www.insidehighered.com/news/2020/10/29/racial-disparities-higher-education-funding-could-widen-during-economic-downturn.

This year, people-led protests laid bare the pain of communities long denied equal access to the most basic aspects of America's promise of justice and equal opportunity. These communities continue to suffer the consequences of federal policy decisions that needlessly and unjustly make economic opportunities harder to access. In the context of our failures to serve people of color in any arena and our disposition to build systems of oppression on top of Black bodies, financial security and well-being are an essential part of this conversation. It is no coincidence that formerly redlined communities are the site of extensive over-policing as well as high levels of student debt.[63]

If we have learned anything from our current health and economic crisis, it is that the federal government has the ability to deploy large amounts of federal dollars without regard to deficits, despite numerous bureaucratic and political obstacles. The speed with which the government began generating and dispatching stimulus checks flies in the face of every claim that programs and policies like immediately refundable tax credits for down payment assistance or other support are impossible. Some people received stimulus checks just four weeks after the CARES Act[64] was signed into law. A near-immediate expansion of Unemployment Insurance prevented millions from falling into desperate poverty[65] and added a much-needed boost to the economy.[66] The impossible was made possible when necessity and urgency aligned with power and will.

The same energy must be applied to address the student debt crisis. We are more than overdue for overhauling our higher education funding system. More than just the long delay in reauthorizing the HEA, federal policy has allowed the student debt crisis balloon to $1.7 trillion, left borrowers in default and serious delinquency to struggle unnecessarily, and predatory institutions to once again proliferate. For decades, federal policy on student debt has been characterized by technocratic fixes meant to make loans slightly easier to manage, rather than dealing with its root causes and unequal effects. There has been a bipartisan push to expand income-driven

[63] *See* Marshall Steinbaum & Kavya Vaghul, *How the Student Debt Crisis Affects African Americans and Latinos*, Mapping Student Debt, https://mappingstudentdebt.org/#/map-2-race (presenting maps showing high concentrations of student debt delinquency in formerly redlined areas); *see also* Marshall Steinbaum & Kavya Vaghul, *How the Student Debt Crisis Affects African Americans and Latinos*, Wash. Ctr. For Equitable Growth (Feb. 17, 2016), https://equitablegrowth.org/how-the-student-debt-crisis-affects-african-americans-and-latinos (discussing results of the study in greater detail).

[64] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (2020).

[65] Jeehoon Han, Bruce D. Meyer & James X. Sullivan, Brookings Inst., Income and Poverty in the COVID-19 Pandemic (June 25, 2020) https://www.brookings.edu/wp-content/uploads/2020/06/Han-et-al-conference-draft.pdf.

[66] Cong. Budget Off., Economic Effects of Additional Unemployment Benefits of $600 Per Week (June 4, 2020), https://www.cbo.gov/publication/56387.

repayment plans, which, while admirable, has done little to eliminate or meaningfully reduce the delinquency and default rates on student loans. Existing loan forgiveness programs such as Public Service Loan Forgiveness are too often marked by confusing and complex eligibility criteria that result in too few people receiving relief. Even the implementation of regulations to provide broad relief to students who were misled or defrauded by predatory institutions—an effort that should qualify as the bare minimum that borrowers deserve—have been stymied or slow-walked by the Trump administration, resulting in years of uncertainty and unnecessary economic pain.

There is no question that the status quo is not working. The student debt problem (now a crisis within a crisis) has all the hallmarks that led to the mortgage crisis of 2008, including facially neutral policies that failed to protect people of color who suffered a disparate impact from the lending practices. The housing crash—a crisis hidden in plain sight—shattered Black and Brown communities in its infancy and grew to fracture the entire national economy in its maturation. Rather than repeat mistakes of the Great Recession, we should learn lessons from that experience, work to address this crisis head on, and fix the system going forward. The time has come for a new social contract for higher education—a less debt-centered approach and a return to funding higher education as a public good.

A Path Forward

The recommendations in this compendium provide considered, measured approaches that will provide substantial relief to many borrowers based on their status or occupation. Importantly, they focus on executive action as we watch continued partisan gridlock in Congress that may further delay higher education reform. These are all viable reforms that will improve our system dramatically, and they reflect what is possible when we have an administration that cares about students, consumer protection, accountability, and the basic functions of our loan program.

As we work within existing rules and regulations to make student debt more humane, we cannot lose sight of the need for broad-based cancellation and systemic reform at the front-end that invests in students and families and actually makes good on the promise of higher education as a public good and collective investment. Congress has already established limited cancellation based on borrower status, and these programs are necessary—and any administration should take seriously its responsibility to implement and improve them. We have seen the outcome of an administration that does not use, or actively undermines, the tools at its disposal to help borrowers.

At the same time, these tools do not address the full depth of struggling and vulnerable borrowers, and do not fully address the racial disparities of this crisis, especially for the Black middle class.[67] Broad-based cancellation is the best, most efficient way to ensure cancellation is as equitable as possible. And as a next step, executive action should then spur Congress to finally ensure affordability, access, and accountability at the front end so that we do not find ourselves in a similar position in 2030.

Many will fear that broad cancellation will provide a windfall to some borrowers or believe that college graduates by and large do not deserve relief. This moral hazard argument on student debt is more than outdated; it is out of touch and inconsistent with data and reality, and it almost always fails to consider the role that race plays in the economy and obtaining financial security. Even if a few wealthy borrowers experience relief, the benefits of providing life-changing relief to more than 40 million borrowers and families in a time of financial upheaval more than outweigh those "costs." It is worth it to lift the weight of debt off the shoulders of those who were unable to complete college, those whose families did not have the resources to pay because of systemic racism and discrimination, those who are on the edge of the middle class, aspiring homeowners and entrepreneurs, and those who are caring for children and older family members alike.

We can and we must do better. The way to do this is to cancel student debt, re-build the system as it was intended, and evaluate and re-evaluate at each step.

Moreover, just as solving the student debt crisis is just one piece of the fight for racial and economic justice, there are myriad other ways to address the deep inequities embedded in our economy and complement policies that cancel student debt. Nearly every advocate for student debt cancellation believes in the need to provide relief for those with and without student debt who struggle with unemployment, housing insecurity, and meeting basic needs for their families. We also support the need to address and close the racial wealth gap. And through only modest imagination and strong political will, we can ensure that the wealthiest households shoulder the burden of funding long-term investments in public goods.

We can and we must do better. The way to do this is to cancel student debt, re-build the system as it was intended, and evaluate and re-evaluate at each step. While fixing higher education and dealing with our student

[67] *See* Ashley Harrington, *Student Debt and the Racial Wealth Gap: Reform Should Narrow the Chasm*, Higher Learning Advoc. (Mar. 12, 2020), https://higherlearningadvocates.org/2020/03/12/student-debt-and-the-racial-wealth-gap-reform-should-narrow-the-chasm ("When we base a system solely and entirely on income, we penalize those whose income must go further because they don't have the wealth to back it up.").

debt crisis will not solve all of our problems or absolve us from the additional work that is necessary and urgent, it can be the starting point to signal that we are finally ready to build the America of our dreams.

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Introduction

The Public Service Loan Forgiveness (PSLF) program began as a straightforward idea: if Americans use their education in service of others for ten years, their student loans should be forgiven.[1] More than a decade ago, the law creating PSLF was enacted by large, bipartisan majorities in Congress and signed into law by President George W. Bush in an effort to provide expansive and comprehensive debt relief to workers serving our country and our communities.[2] This legislation was a direct response to concerns by lawmakers that the cost of education and the resulting rise in student indebtedness was making it hard for Americans to take jobs that had important social benefits but may not pay as much as work in the private sector.[3] Further, lawmakers expressly recognized that the PSLF program must be far-reaching, breaking with the federal government's prior approach to providing narrower debt relief to workers in specific professions.[4] As Senator Ted Kennedy described at the time this law was passed:

> [W]e have made this as wide as we could in terms of trying to respond to that sense that is out there in our schools and colleges, in all parts of our country, urban areas and rural areas, to say: Look, if you want to give something back, we are going to make it possible.[5]

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[1] The Public Service Loan Forgiveness program promises widespread debt relief to millions of student loan borrowers working in varied public service professions. The proposals contained in this paper consider this promise broadly. Readers should also note that there may be specific professions or employers that encounter unique obstacles to accessing PSLF, over and above those discussed in this paper. For example, as Michael Saunders describes in his contribution to this compendium, servicemembers and veterans have been denied access to PSLF due to unique challenges related to specific aspects of military service. See Michael Saunders, *Relief for Servicemembers and Veterans*, *infra* at 150.

[2] College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007).

[3] *E.g.*, 153 Cong. Rec. S9595 (daily ed. July 19, 2007) (statement of Rep. Rockefeller) ("Too often, a college graduate who wants to pursue a career in social work or another aspect of public service may not be able to afford to choose that career because of the low salaries and their high student loan debts."), https://www.congress.gov/congressional-record/2007/07/19/senate-section/article/S9574-2.

[4] Consider, for instance, the cancellation of Perkins loans, which has strict schedules of years worked, percentages of cancellation, and particular professions. *Perkins Loan Teacher Cancellation*, Fed. Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation/perkins/ (last accessed Oct. 31, 2020). This cancellation program existed well before PSLF. *See generally* De la Mota v. U.S. Dep't of Educ., 412 F.3d 71 (2d Cir. 2005) (discussing the history of the Perkins and Perkins cancellation programs).

[5] *See* 153 Cong. Rec. S9536 (daily ed. July 19, 2007), https://www.govinfo.gov/content/pkg/CREC-2007-07-19/html/CREC-2007-07-19-pt1-PgS9534.htm.

In 2013, the federal Consumer Financial Protection Bureau (CFPB), considering the potential scope of PSLF as designed, estimated that as many as one in four U.S. workers were employed by a PSLF-eligible employer.[6]

In addition to envisioning a program open to tens of millions of U.S. workers, Congress designed the law to be expansive in its effects—providing a long-term solution to the economic consequences of unaffordable student debt. Rather than merely providing short-term payment relief by ensuring monthly payments remain affordable, PSLF was created to provide public service workers with a path to secure complete debt cancellation. By relying on the promise of this total relief, a generation of teachers, nurses, first responders, and servicemembers could pursue careers in public service without fear that student debt would create a long-term barrier to economic security.[7]

. . . [A] combination of arbitrary and narrow regulations, administrative mismanagement by the U.S. Department of Education, and widespread abuses across the student loan industry conspired to deny a generation of public service workers the promise of this protection.

To access loan forgiveness, Congress established four key requirements for a borrower to qualify: (1) Borrowers must have the right type of loan;[8] (2) borrowers' loans must be enrolled in the right type of payment plan;[9] (3) borrowers must make the right number of payments;[10] and (4) borrowers must work at the right type of employment.[11]

[6] Consumer Fin. Prot. Bureau, Public Service & Student Debt: Analysis of Existing Benefits & Options for Public Service Organizations 3 (Aug. 2013), https://files.consumerfinance.gov/f/201308_cfpb_public-service-and-student-debt.pdf.

[7] Consumer Fin. Prot. Bureau, Staying on Track While Giving Back: The Cost of Student Loan Servicing Breakdowns for People Serving their Communities 21 (Jun. 2017), https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf ("Many choose careers in public service – seeking to give back to their country or community through teaching, nursing, military, or other service. Because many public service fields traditionally offer lower wages, individuals with average student loan debt and entry-level salaries in these fields are likely to face financial hardship when making their standard, 10-year payment amount [. . .] PSLF was created to protect public service workers against the prospect of this financial hardship and provide a pathway to satisfy their student loan obligation over a "standard" period of time (10 years)") [hereinafter "Consumer Fin. Prot. Bureau, Staying on Track"].

[8] 20 U.S.C. § 1087e(m).

[9] *Id.*

[10] *Id.*

[11] *Id.*

Unfortunately, with respect to each of these elements, a combination of arbitrary and narrow regulations,[12] administrative mismanagement by the U.S. Department of Education,[13] and widespread abuses across the student loan industry conspired to deny a generation of public service workers the promise of this protection.

As the following paper describes in detail, underlying each of these elements is an opportunity for a new Secretary of Education to reshape the implementation of the PSLF program and restore the promise of this critical protection for public service workers, granting immediate and total debt relief through executive action, realigning with the original intent of Congress. Through this action, a new administration will ensure the PSLF program finally delivers on its commitment to millions of public service workers: cancelling student debt for anyone who has served their community or their country for a decade.

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Problems

Administrative data published by the Department of Education reveals both the failure of PSLF to provide widespread debt relief and the potential the program still has to deliver on this promise. As of June 2020, approximately 98 percent of borrowers who have applied for PSLF have not been approved.[14] Borrowers owing more than $115 billion in outstanding student loans have already certified their intent to pursue PSLF, with

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[12] 34 C.F.R. § 685.219.

[13] Readers should note that student loan companies, in defending against consumer protection litigation related to PSLF, have asserted that they are bound by substantial non-public contractual requirements imposed by the Department of Education. The distinction between Education Department contractual directives and the practices implemented independently by private-sector companies who are awarded these contracts is often unclear to borrowers and the public. However some of these distinctions are described in the Department of Education's borrower-facing FAQs. *See Public Service Loan Forgiveness FAQ*, Fed. Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/questions (last accessed Oct. 31, 2020).

[14] *See Public Service Loan Forgiveness Data: June 2020 PSLF Report*, Fed. Student Aid, https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data (last accessed Oct. 31, 2020).

potentially millions more working in qualifying service but who have not taken this optional action.[15] Of those who previously took this intermediate step, only 3,233 borrowers with $236 million worth of loans have successfully discharged their loans under the program.[16] In other words, borrowers owing less than 0.2 percent of the total student debt known to be in the PSLF pipeline have successfully obtained loan forgiveness under the program.[17] Moreover, thousands, tens of thousands, or even millions more borrowers likely could utilize the program, but have been derailed by government mismanagement, poor loan servicing, and a lack of timely, accurate information about how to access PSLF.[18]

How did the program stray so far from its original ideals? The implementation of the PSLF program by the Department of Education took a needlessly narrow and often arbitrary approach that made it functionally impossible to achieve the broad public policy goal articulated by Congress. Each of the statutory elements described above was subsequently implemented via regulations or policies that imposed additional limitations, complicating the program's design and limiting its effects.[19] At every step, sub-regulatory decisions by the Department of Education and poor and often illegal business practices by student loan companies shaped the implementation of PSLF, further restricting access for public service workers.[20]

The last thirteen years of mismanagement and failed oversight have been documented by a string of scathing reports that have exposed these problems in exceptional detail.[21] Indeed, consumer complaints, consumer

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[15] As described below, since 2012, public service workers with student debt have been able to signal intent to pursue PSLF by certifying employment with a public service organization by submitting the Employment Certification Form (ECF) made available by the Department of Education. *See id.*

[16] *Id.*

[17] *Id.*

[18] For further discussion of the widespread obstacles to PSLF, *see, e.g.*, Consumer Fin. Prot. Bureau, Staying on Track, *supra* note 7.

[19] 34 C.F.R. § 685.219.

[20] *Supra* note 7; *see also* New York v. Pa. Higher Educ. Assistance Agency, No. 1:19-cv-09155 (S.D.N.Y. Oct. 3, 2019), https://ag.ny.gov/sites/default/files/pheaa_complaint_with_file_stamp.pdf; Alan White, *The Contract State, Program Failure, and Congressional Intent: The Case of the Public Service Loan Forgiveness Program*, 11 U.C. Irvine 255 (2020).

[21] *See, e.g.*, Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs., Keeping the Promise of Public Service Loan Forgiveness (Dec. 2018), https://protectborrowers.org/wp-content/uploads/2020/01/SBPC-AFT-PSLF-Investigation.pdf; Student Borrower Prot. Ctr & Am. Fed'n of Tchrs., Broken Promises: Employer Certification Failures (Aug. 2020), https://protectborrowers.org/wp-content/uploads/2020/08/ECF-Failures.pdf; Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs., Broken Promises: The Untold Failures of ACS Servicing (Oct. 2020), https://protectborrowers.org/wp-content/uploads/2020/10/Broken-Promises_ACS.pdf.

protection lawsuits, and research by borrower advocates and government watchdogs have revealed widespread, systemic barriers to loan forgiveness. Specifically:

- **Public service workers are trapped with ineligible loans because of regulatory inaction, government mismanagement, and industry abuses.** The Higher Education Act requires a borrower to have the right type of loan, namely a federal Direct Loan rather than the older and still-prevalent Federal Family Education Loan Program (FFELP) loan.[22] However, this restriction is not as limiting as it may appear on its face—Congress also gave all borrowers with federal student loans of any type, including FFELP loans, the right to convert these loans to Direct Loans and qualify for PSLF.[23] Yet the Department of Education never imposed a duty on the companies that own or owned FFELP loans to facilitate this process, [24] instead turning a blind eye as these companies deceived public service workers about their rights.[25] In the vacuum created by the absence of government oversight or regulation, student loan companies' practices appear to be driven by an economic conflict of interest that incentivizes deception and abuse. When a public service worker invokes his or her right to consolidate an older federal student loan to pursue PSLF, creditors and loan servicers who handle these older loans will lose all future revenue from that individual.[26] In recent years, advocates and enforcement officials have uncovered shocking new evidence of widespread efforts by creditors and loan servicers to block these borrowers' access to this entitlement.[27] As a consequence, borrowers have been denied access to PSLF more than 70,000 times

Yet the Department of Education never imposed a duty on the companies that own or owned FFELP loans to facilitate this process, instead turning a blind eye as these companies deceived public service workers about their rights.

[22] 20 U.S.C. § 1087e(m).

[23] 20 U.S.C. § 1078-3.

[24] 34 C.F.R. § 685.219.

[25] *Supra* note 21.

[26] *See also supra* note 7; *see also* Student Borrower Prot. Ctr. and Am. Fed'n of Tchrs, Broken Promises: How the Department of Education's Failures and Industry's Abuses Deny FFEL Borrowers Public Service Loan Forgiveness (forthcoming 2020) (on file with the author).

[27] Student Borrower Prot. Ctr. and Am. Fed'n of Tchrs, Broken Promises: How the Department of Education's Failures and Industry's Abuses Deny FFEL Borrowers Public Service Loan Forgiveness (forthcoming 2020) (on file with the author); *see also* Vullo v. Conduent Educ. Serv., LLC, Consent Order (N.Y. Dep't of Fin. Serv. Jan. 4, 2019), https://www.dfs.ny.gov/system/files/documents/2019/01/ea190104_conduent.pdf ("ACS

due to an "ineligible loan."[28] This data does not reflect the potentially hundreds of thousands of public service workers with FFELP loans who have never indicated to the Department of Education that they intend to apply for PSLF, but who intend to do so in the coming years.

- **Public service workers are enrolled in ineligible repayment plans because of needlessly narrow regulations, inadequate government oversight, and deception by student loan companies.** The Higher Education Act also requires a borrower to make payments at a specified amount, namely either the amount due when enrolled in an income-driven plan or an amount equivalent to what a borrower would pay under a fixed 10-year plan.[29] Other extended or graduated plans do not count for PSLF, even if they resulted in lower payments similar to an income-driven plan.[30] The statute itself imposes these requirements, which were then further narrowed via rulemaking.[31] For example, the statute counts all payments "not less than the monthly amount" due under a standard, 10-year repayment plan, irrespective of the payment plan selected by the borrower.[32] However, regulations promulgated by the Department of Education exclude any borrower enrolled in the so-called "alternative" payment plan—an extra-statutory requirement that excludes nearly 1.4 million people.[33] This is particularly alarming because the "alternative" payment plan is the default option for certain borrowers enrolled in income-driven repayment who fail to timely recertify income under this plan—a process that has faced continuous scrutiny by regulators and law enforcement officials. Further, recent evidence uncovered by government watchdogs, law enforcement officials, and advocates reveals that student loan companies routinely provide borrowers with incorrect information about qualifying payment plans, knocking

managers directed representatives not to provide information on PSLF eligibility criteria to borrowers who contacted ACS seeking information about the program.").

[28] Student Borrower Prot. Ctr. and Am. Fed'n of Tchrs, Broken Promises: How the Department of Education's Failures and Industry's Abuses Deny FFEL Borrowers Public Service Loan Forgiveness (forthcoming 2020) (on file with the author).

[29] 20 U.S.C. § 1087e(m).

[30] *Id.*

[31] 34 C.F.R. § 685.219.

[32] 20 U.S.C. § 1087e(m).

[33] 34 C.F.R. § 685.219; *see also Direct Loan Portfolio by Repayment Plan*, Fed. Student Aid (2020), https://studentaid.gov/data-center/student/portfolio (last accessed Nov. 18, 2020).

thousands of additional borrowers off track and necessitating the creation of a temporary expansion of the PSLF program, as described further below.[34]

- **Public service workers routinely forfeit credit for qualifying payments because of regulations that impose unnecessary procedural and substantive requirements, and because these rules have been mismanaged by the government and industry.** The Higher Education Act requires that a borrower make the right number of qualifying payments while meeting the previous two conditions described above.[35] Under the Education Department's implementing regulations, however, borrowers must make 120 separate monthly payments that are on time and in full, consistent with specific timeliness requirements not included in the statute itself.[36] Forbearances and other temporary payment pauses do not count,[37] and neither do most lump sum payments,[38] payments made while a loan is in so-called "paid ahead" status, [39] or payments considered "partial payments" based on rigid, non-public guidance.[40] A growing body of evidence suggests that the imposition of these additional administrative hurdles, as

[34] *See, e.g.*, Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs., Broken Promises: The Untold Failures of ACS Servicing (Oct. 2020), https://protectborrowers.org/wp-content/uploads/2020/10/Broken-Promises_ACS.pdf ("ACS's servicing errors were so egregious that both the Department of Education and Congress took targeted action to address certain discrete harms caused by ACS. In 2010, for example, after ACS failed to enroll hundreds of borrowers pursuing PSLF into an eligible repayment plan, the Department of Education authorized a one-time waiver to allow certain borrowers who had been enrolled in the wrong repayment plan to request credit toward PSLF.").

[35] 20 U.S.C. § 1087e(m).

[36] A payment counts toward the 120-month counter if the payment is made (1) after October 1, 2007; (2) during a month when the borrower was working full time for an eligible employer; and (3) on time - no later than 15 days after the scheduled due date. *See* 34 C.F.R. § 685.219(c)(1)(iii).

[37] *See, e.g.*, *supra* note 7 at 33 n.78.

[38] *Supra* note 13 ("If I pay more than my scheduled monthly student loan payment amount, can I get PSLF sooner than 10 years? No. You must make payments to cover 120 separate monthly obligations. Paying extra won't make you eligible to receive PSLF sooner.").

[39] In paid ahead status, a borrower had over-paid on a previous month and carried a balance forward month to month. For instance, say a borrower owed $100 per month but paid $101 by accident one month. That extra $1 carried forward and put the loans in "paid ahead" status meaning future full payments were not considered on time and in full. *Supra* note 7, at 42. Changes to the so-called paid-ahead loophole have been considered. *Questions Submitted by Senator Patty Murray: Every Student Succeeds Act and Required Reporting on Per-Pupil Spending*, U.S. S. Comm. On Health, Educ., Lab. & Pensions 37, https://www.help.senate.gov/download/wordmurrayqfrs5mar20hearingonfy21edbudget (last accessed Oct. 31, 2020) ("In a letter to Senator Murray dated March 3, 2020, the Department indicated a change to how payments are counted toward Public Service Loan Forgiveness (PSLF), writing that the Department is 'revising the policy by which we determine whether a monthly payment qualifies for PSLF purposes. Under the new policy, a borrower will receive credit for one months' qualifying payment towards PSLF, regardless of when or by whom the payment was made, so long as the payment due was made in full, no later than 15 days after the payment due date, and meets all other requirements for a PSLF qualifying payment. Under this revised policy, advance or "lump sum" payments may be qualifying monthly payments (up to a maximum of 12 qualifying payments) for PSLF. We anticipate implementing this change with our PSLF servicer later in 2020.'").

[40] *Supra* note 7.

implemented by the Education Department and the student loan industry, have denied borrowers' credit for years of qualifying service, undercutting the intent of PSLF.[41]

- **Public service workers are denied access to PSLF because of a haphazard process for approving, tracking, and certifying public service employment, along with an unnecessarily narrow definition of public service employer.** The Higher Education Act requires borrowers to serve in a full-time "public service job" for 120 months to be eligible for PSLF, enumerating more than a dozen specific public service functions, as well a broad classes of employers (i.e., all workers in government, 501(c)(3) nonprofits).[42] On top of this statutory structure, the Department of Education imposed a series of additional regulatory and sub-regulatory requirements that narrowed borrowers' access to PSLF.[43] For example, large segments of America's healthcare workforce, including home health aides, nursing assistants, and other frontline care providers to many of the most vulnerable patients are excluded from PSLF by virtue of the tax status of their employer—a restriction not included in the Higher Education Act itself.[44] In addition, the Education Department imposed a series of *ad hoc* measures to determine whether certain employees were eligible, even when those employees clearly perform a "public service job" identified in both the statute and its implementing regulations.[45]

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[41] *See, e.g.*, *supra* note 7, at 42 ("[B]orrowers, particularly those with automatically debited payments, complain that they do not realize their advanced payments are not qualifying payments until years later, when they learn that several months or years of previous payments will not count towards PSLF.").

[42] 20 U.S.C. § 1087e(m).

[43] See, e.g., 34 C.F.R. § 685.219.

[44] *Compare* 20 U.S.C. § 1087e(m) ("a full-time job in . . . public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics)") *with* 34 C.F.R. § 685.219 ("A private organization that . . . [p]rovides the following public services: . . . public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics) . . . *[i]s not a business organized for profit*.") (emphasis added). In a further example of ED's ad hoc practices, Program Specialist Ian Foss mentioned off-handedly at the public Federal Student Aid conference that a special appeals process existed inside the Department. @StacyCowley, Twitter (Dec. 5, 2019, 1:09 PM), https://twitter.com/StacyCowley/status/1202696431607222273. This program had not been documented or made public before.

[45] Tariq Habash, *The Internal Gov't Comm'n & Rec. Exposing the Broken Emp. Certification Process*, Student Borrower Prot. Ctr. (Aug. 12, 2020), https://protectborrowers.org/the-internal-government-communications-and-records-exposing-the-broken-employer-certification-process/; *see also supra* note 12.

Taken together, these four sets of barriers have worked in combination to establish a system that denies debt relief to millions of public service workers with student debt.[46]

Taken together, these four sets of barriers have worked in combination to establish a system that denies debt relief to millions of public service workers with student debt.

Lawmakers have recognized many of these issues, proposing and, in one case enacting, legislative changes to PSLF intended to deliver widespread debt relief as originally envisioned.[47] In 2018, Congress attempted to fix one of the specific breakdowns described above with the passage of Temporary Expanded PSLF (TEPSLF).[48] TEPSLF's changes to the PSLF program were limited to creating an expanded avenue for forgiveness for borrowers who otherwise met the program's obligations but had been paying while enrolled in the wrong type of repayment plan. However, TEPSLF has been plagued by its own administrative failings.[49] For example, in implementing TEPSLF, the Department of Education required that borrowers first apply and be rejected from PSLF before becoming eligible for this temporary expansion—a requirement absent from the law itself.[50] As a result, the acceptance rate for TEPSLF mirrors the acceptance rate of the program at large—fewer than six percent of applicants have secured loan forgiveness through TEPSLF. In total, only 1,943 borrowers have accessed TEPSLF since the expansion was authorized by Congress.[51]

The sparse level of relief afforded to these workers is an indictment of the administration of PSLF to date, yet it also offers a roadmap for reform that can restore the PSLF program to achieve its original purpose.

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[46] In 2013, the Consumer Financial Protection Bureau estimated that 1-in-4 U.S. workers were employed by an organization that met the definition of a "public service organization" as defined by the U.S. Department of Education in the implementing regulations for PSLF. In 2017, the authors of the 2013 estimate updated this analysis and confirmed that this projection had persisted over the intervening years. Assuming that the occupations of student loan borrowers were generally representative of the workforce at large, we can project that more than 11 million student loan borrowers work in public service and are potentially eligible for PSLF. *See supra* note 7.

[47] *See, e.g.*, What You Can Do for Your Country Act, H.R. 2441, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/2441.

[48] Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 1059 (2018).

[49] U.S. Gov't Accountability Off., Public Service Loan Forgiveness: Improving the Temporary Expanded Process Could Help Reduce Borrower Confusion, GAO-19-595 (Sep. 2019), https://www.gao.gov/assets/710/701157.pdf.

[50] *Supra* note 44.

[51] *See supra* note 14.

Solutions

A Secretary of Education committed to delivering on debt relief for teachers, nurses, child care providers, military borrowers, and so many others has the legal authority to take immediate action. As described below, current law allows the Secretary to provide immediate, one-time debt relief for hundreds of thousands or potentially millions of borrowers who work in public service and who have been unable to invoke their right to PSLF. Among available administrative tools are two particular options to consider: the 2003 HEROES Act and re-writing the current PSLF regulations. These options are not mutually exclusive, and the Secretary may choose to invoke the HEROES Act to provide immediate, retrospective relief to workers eligible for loan forgiveness and rewrite the rules to fix the program moving forward. The following section lays out the specific legal and procedural tools a Secretary should consider to deliver on the promises made by Congress when enacting PSLF, followed by a roadmap for the Secretary to address deep flaws in each of the specific program elements described above by leveraging these tools to provide immediate relief for student loan borrowers working in public service.

A Secretary of Education committed to delivering on debt relief for teachers, nurses, child care providers, military borrowers, and so many others has the legal authority to take immediate action.

A. Waivers and Modifications under the HEROES Act of 2003

The HEROES Act of 2003[52] was enacted by Congress to provide the Secretary of Education with the authority to grant financial and administrative relief for Americans affected by national emergencies.[53] In particular, it added

[52] The HEROES Act authority for the Secretary of Education initially expired on October 20, 2005. It was then extended by an act of Congress to September 30, 2007. On September 30, 2007, the President signed into law Public Law 110-93, which eliminated the expiration date on the HEROES Act, making the Secretary's authority to issue waivers and modifications permanent. Readers should note that when enacted in 2001, the HEROES Act did not provide the Secretary with broad authority to act in the event of all types of national emergencies and would have excluded circumstances like the present public health emergency caused by the COVID-19 pandemic. *See* Higher Education Relief Opportunities for Students Act, Pub. L. No. 107-122, 115 Stat. 2386 (2001). Upon reauthorization, Congress broadened the circumstances under which this authority could be invoked, ensuring that an event such as a pandemic would allow the Secretary to use the powers established under this law. *See* Pub. L. No. 110-93, 121 Stat. 999 (2007).

[53] 108 Cong. Rec. H2524 (daily ed. Apr. 1, 2013) (statement of Rep. Kline), https://www.congress.gov/congressional-record/2003/04/01/house-section/article/H2522-5 ("This bill is specific in its intent to ensure that as a result of a [. . .] national emergency our men and women are protected. By granting flexibility to the Secretary of Education, the HEROES Act will protect recipients of student financial assistance from further financial difficulty generated when they are called to serve, minimize administrative requirements without affecting the integrity of the programs,

emergency powers to the Higher Education Act which allow the Secretary to affect "waivers and modifications" of "any statutory or regulatory provision" applicable to Title IV funds "as the Secretary deems necessary in connection with a . . . national emergency."[54] The HEROES Act can be used to immediately lower administrative hurdles and automate a one-time administrative action to cancel student debt owed by borrowers previously delayed, denied, or derailed when seeking PSLF. On March 13, 2020, President Trump issued an emergency declaration in response to the COVID-19 pandemic, permitting the Secretary of Education to invoke these emergency powers.[55]

As described above, many of the most burdensome hurdles for public service workers have been the product of regulation, not the underlying statute, and appear on their face to directly conflict with Congressional intent. According to the Higher Education Act, the Secretary "shall cancel the balance of interest and principal" when the program's requirements are met.[56] As described above, the law authorizing PSLF says nothing about employment certification forms, applications, or the requirement that borrowers opt into the required repayment plans.[57]

Notably, a waiver process under the HEROES Act does not have to be individualized. The Secretary can implement broad-based changes that minimize the need for increased administrative burdens on borrowers, or on the Department of Education's staff or contractors.[58] There will be startup costs associated with the reforms described below, including efforts to automate key aspects of the process for invoking or verifying eligibility for PSLF; however, these are worthwhile investments and directly aligned with the goals of the HEROES Act, which is ultimately focused on giving the flexibility to borrowers affected by national crises.

adjust the calculation used to determine financial need to accurately reflect the financial condition of the individual and his or her family, and provide the Secretary with the authority to address issues not yet foreseen.").

[54] 20 U.S.C. § 1098bb.

[55] The White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak.

[56] 20 U.S.C. 1087e(m).

[57] College Cost Reduction and Access Act, Pub. L. No. 110-84 (2007).

[58] 20 U.S.C. § 1098bb.

There has perhaps never been a national crisis that more directly impacts as wide a base of borrowers as the COVID-19 pandemic—important context that has already been used as the pretext for the widespread exercise of this authority. The HEROES Act was the basis for an executive action by President Trump that suspended student loan payments and interest charges, and made significant modifications to the terms and conditions of federal student loans for 40 million people, all without an act of Congress.[59]

B. Revising Regulations under the College Cost Reduction and Access Act

In addition to immediate action using the emergency powers described above, the Secretary of Education should rewrite the rules and guidance implementing PSLF to maximize the number of borrowers eligible for loan forgiveness.[60] This approach has several important merits worth considering, and one significant drawback if used in isolation. Rewriting regulations would offer clarity and certainty to all participants in the student loan system as it relates to the Department of Education's intent and its interpretation of the law. Modified regulations would also ensure that courts defer to such an interpretation so long as these regulations are made via a notice and comment rulemaking, consistent with both the Administrative Procedures Act and the Department of Education's negotiated rulemaking process. However, this process is extremely time intensive and will significantly delay relief for borrowers who have been harmed by mismanagement and abuse to date. As a result, any regulatory overhaul should be paired with the use of the emergency powers granted under the HEROES Act to ensure eligible borrowers receive relief immediately, while future public service workers with student debt have the benefit of a system designed to meet their needs and uphold the promises made by Congress.

C. Roadmap for Reform

Having considered the two paths for executive action described above, we argue that a rulemaking is a necessary supplement to more aggressive action by the Secretary, as necessary, but should not be the government's sole avenue for reform. Instead, relying on the HEROES Act of 2003, the Secretary can immediately

[59] *Press Briefing by Press Secretary Kayleigh McEnany | 8/10/2020*, The White House (Aug. 10, 2020), https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-kayleigh-mcenany-8-10-2020/. Moreover, according to research from the Brennan Center, this provision has not been challenged as an unconstitutional use of executive powers. Brennan Ctr. for Just., A Guide to Emergency Powers & Their Use (2019), https://www.brennancenter.org/sites/default/files/2019-10/2019_10_EmergencyPowersFULL.pdf.

[60] 34 C.F.R. § 685.219.

take the following four regulatory or sub-regulatory actions to expand access to PSLF for existing public service workers and ensure tens of thousands of borrowers obtain immediate relief in 2021.

1) **Expand the definition of "eligible loan" to provide relief for all borrowers with federal student loans.** The Secretary of Education can take administrative action to expand the definition of an "eligible loan" under PSLF, ensuring that any borrower with a federal student loan who spent a decade working in public service can obtain loan forgiveness, consistent with the intent of the law. In 2007, Congress anticipated that all borrowers would be able to pursue PSLF; the Higher Education Act grants borrowers an entitlement to convert any other type of federal student loan into qualifying Direct Loans, including FFELP loans made by banks and other private lenders.[61] However, as presently implemented, exercising this right demands borrowers take an affirmative action at the beginning of their careers, consolidating their old loans before any payments may count toward PSLF. The timing of this intermediate step should be eliminated using the Secretary's waiver authority under the HEROES Act. Via such a waiver, payments on the older FFELP or Perkins loans would count towards PSLF.

   Unlike the current approach, borrowers would no longer forfeit months or years of qualifying public service if they failed to consolidate their loans at the beginning of their careers. Instead, the Secretary can accept PSLF applications from any borrower with a federal student loan, work with their loan holder to determine whether all other program criteria are met, consistent with the other reforms described below, and grant the borrower a preliminary approval for PSLF. [62] Only after the Secretary makes an administrative determination that a borrower is eligible, the borrower must consolidate his or her loans into Direct Loans which are then immediately cancelled by the Secretary—a procedure similar to the process through which the Secretary once approved cancellation for students who were defrauded by predatory schools and owe federal loans other than Direct Loans.[63]

[61] 20 U.S.C. § 1078-3.

[62] In the alternative, the Secretary may be able to use the authority under the HEROES Act to cancel FFELP and Perkins loans outright, but such an exercise of authority may invite opposition from holders of these loans that may be concerned about the financial consequences of such an action. By consolidating loans into the Direct Loan program before cancelling this debt, the Secretary can create a structure that aligns more closely with the statute and potentially assuages related legal and political concerns.

[63] In 2016, the Department of Education finalized rules that provided borrowers with federal loans held by private creditors a path to have these loans discharged in cases where a borrower was defrauded by their school. In this case, the Secretary had the authority to process and preliminarily approve such a discharge before compelling the holders of these loans to facilitate a loan consolidation, at which point such a loan was cancelled. *Borrower Def. Final Regul.: Summary of Major Provisions*, U.S. Dep't of Educ. (Oct. 28, 2016)

2) **Expand the definition of a qualifying payment plan for all borrowers and automatically, retroactively count qualifying months based on administrative data.** The Secretary of Education can ensure all borrowers can get credit toward PSLF for working in public service, irrespective of the payment plan selected by the borrower or whether or not a borrower had paused payments by using a deferment or forbearance. The Secretary can achieve this goal through two separate administrative actions.

   First, the Secretary can use the HEROES Act, in conjunction with an information sharing arrangement with the Secretary of the Treasury and the Internal Revenue Service,[64] to retroactively assess which federal student loan borrowers had income characteristics that would make them eligible for a $0 "payment" under an income-driven repayment plan, for any period of time since 2007. Where the Secretary is able to determine that a borrower meets this criteria, the Secretary should immediately award credit for all eligible months, irrespective of the payment plan selected by the borrower or whether a borrower had used deferment or forbearance. For any public service worker who meets these criteria for 120 months in total over the past thirteen years, the Secretary should immediately forgive the borrower's loans in full. In addition, for borrowers who have fewer than 120 months of eligibility under this approach, the Secretary notify these borrowers of their progress and grant credit for any qualifying months.

   Second, as described above, a growing body of evidence demonstrates that student loan companies routinely provided incorrect information about the payment plans eligible for PSLF. In order to remedy the effects of this widespread misinformation, the HEROES Act, in conjunction with the limited authority granted under TEPSLF, could again be the basis for a waiver to allow the Department of Education and its servicers to retroactively and automatically evaluate and give credit to borrowers who had selected any repayment plan, in order to immediately grant credit to borrowers working public service. For any public service worker who made 120 months of payments in total over the past 13 years (since the creation of the PSLF program), regardless of the payment plan selected, the Secretary should also immediately forgive the borrower's loans in full. Similarly, for borrowers who have fewer than 120 months

https://www2.ed.gov/documents/press-releases/borrower-defense-final-regulations.pdf, ("The final regulations recognize Federal Family Education Loan (FFEL) and Perkins loan borrowers' ability to receive borrower defense relief through Direct Consolidation Loans.").

[64] In 2019, Congress passed legislation providing new statutory authority for the Secretary of the Treasury and the Secretary of Education to enter into a data sharing arrangement to facilitate and streamline access to IDR. *See* Pub. L. No. 116-91, 133 Stat. 1189 (2019).

of eligibility under this approach, the Secretary notify these borrowers of their progress and grant credit for any qualifying months.

3) **Expand the definition of a qualifying payment to ensure all payments made by public service workers are eligible for PSLF and automatically, retroactively recount qualifying payments based on administrative data.** The Secretary of Education can immediately act to ensure no borrower is denied progress toward PSLF as a result of unnecessary regulatory or policy hurdles imposed by prior administrations. As noted above, lawmakers' goal was to ensure that 120 payment periods—i.e., 10 years—passed while the borrower was working at a public service employer. As with the "qualified payment plan" waiver described above, the HEROES Act could be used to bring the 120 payments requirement in line with lawmakers' intent. The Secretary should determine the total, cumulative amount that would have been owed by a borrower over the entire period during which the borrower had been in repayment and worked in public service, had the borrower been enrolled in the most generous income-driven repayment option available.[65] The Secretary should then determine whether the total paid by a borrower over this period was greater or equal to this amount.[66] For all borrowers who have worked in public service for 120 months since 2007, and who have made an appropriate total payment over this period, the Secretary must immediately forgive the borrower's loans in full. For all other borrowers, the Secretary should immediately grant prorated credit toward PSLF. Critically, this lookback should require the Department of Education to award credit irrespective of the timing of any payments made by the borrower, stripping away regulatory requirements related to timeliness, completeness, and loan status.

4) **Expand the definition of "public service" employment and automate the process of verifying employment.** As described above, the Higher Education Act defines a "public service job" as encompassing a series of specified professions, as well as specific categories of employer (i.e., "government" and 501(c)(3) nonprofits). In contrast, the implementing regulations for this program define a "public service organization"—a class of employer that excludes any "business organized for profit,"

[65] For most borrowers, this would be 10% of a borrower's discretionary income, as permitted under Pay As You Earn or Revised Pay As You Earn, two so-called "income-contingent repayment" options created via regulation by the Obama administration. If a new administration wished to create a more generous option using this same regulatory authority, that options should serve as the baseline for the purpose of this evaluation. *See* 20 U.S.C. § 1087e(m). (". . . [M]ade 120 monthly payments on the eligible Federal Direct Loan after October 1, 2007, pursuant to . . . an income contingent repayment plan under subsection (d)(1)(D).").

[66] While this calculation may seem complicated, because the current income-driven repayment scheme relies on tax filings for the vast majority of borrowers and a simple payment calculation formula tied to tax data, it should be straightforward for the government to make this assessment.

even where a worker performs a public service job identified in the statute. In the context of the COVID-19 pandemic, the inequity of this policy choice is laid bare: our nation's highly educated public health workforce, including front-line caregivers working in hospitals, nursing homes, and in patients' homes, has taken on the extraordinary burden of protecting vulnerable people at great personal risk, all while being denied the benefits promised under the law when their employer is not organized as a nonprofit. Research on the demographics of America's healthcare workforce shows vast racial and gender disparities across professions.[67] Of particular relevance to this policy choice, the health care services commonly performed by for-profit organizations, including home health care, eldercare, and nursing care, are heavily reliant on workforces that are disproportionately Black and Brown and disproportionately female.[68] The Secretary can immediately use her authority under the HEROES Act to retroactively redefine "public service" employment, defining this term as encompassing both the broad, employer-based definition in the current implementing regulations, and the job-function specific definition enacted by Congress. Further the Secretary can use all available government data sources, including the Defense Manpower Data Center, federal Office of Personnel Management employment records, state and local government employment records, and borrower tax data, to automate and identify public service workers who owe student debt.[69] There is precedent for such an execution of executive authority—the Secretary of Education currently requires all student loan servicers to query the Defense Manpower Data Center each month to determine borrower eligibility for an interest rate reduction under the Servicemembers Civil Relief Act.[70]

Conclusion

Taken together, the roadmap described above will allow a new Secretary of Education to deliver on the promise of PSLF. Each of the four sets of reforms proposed in this paper is designed to be implemented in a manner that

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[67] U.S. Dep't of Health and Human Srvs., Sex, Race, and Ethnic Diversity of U.S. Health Occupations (2017), https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/diversityushealthoccupations.pdf.

[68] *Id.*

[69] With the exception of the Defense Manpower Data Center, these other sources of data will likely require new information sharing agreements across these government agencies. The Secretary should consider implementing this data matching in phases to allow for debt relief on the fastest timeline possible.

[70] See Consumer Fin. Prot. Bureau, Annual Report of the CFPB Student Loan Ombudsman (Oct. 16, 2017), https://www.consumerfinance.gov/data-research/research-reports/annual-report-cfpb-student-loan-ombudsman-2017/.

offers expansive, immediate, and retroactive credit toward PSLF for broad classes of public service workers. These reforms can function as a series of separate, discrete policy proposals that will address the historical mismanagement and abuse plaguing PSLF. Working in tandem, these four proposals achieve a greater purpose: aligning the PSLF program with the original intent of Congress, guaranteeing complete debt cancellation to public service workers with federal student loans who serve our country or serve in our communities.

RELIEF FOR BORROWERS WITH A DEFENSE TO REPAYMENT

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Introduction

Student loan cancellation based on misconduct of the school is known as "borrower defense" (BD). Unlike other cancellation programs, which are statutory in nature and specific to federal student aid programs, borrower defense is best understood as a critical protection for borrowers whose loans should not have been made in the first place, or should not be treated as valid obligations, because they are void as against public policy and/or unconscionable. In other words, borrower defense is not meant to alter repayment obligations in line with ex post triggering conditions—this stands in contrast to other protections for federal student loan borrowers, such as where the borrower certifies an inability to meet standard repayment plans without severe financial stress over a period of years, is disabled, or commits to working in public service fields for a period of time. Rather, borrower defense is a fail-safe against loans that should never have been made in the first place, and were made only because a critical actor in the system—the institution, the accreditor, and/or the Department of Education (ED)—did something wrong or neglected to do something right.

. . . [B]orrower defense is a fail-safe against loans that should never have been made in the first place, and were made only because a critical actor in the system . . . did something wrong or neglected to do something right.

In this regard, borrower defense has common ground with the false certification discharge, both because it is triggered by institutional misconduct, and because the loan is infected with invalidity from the very beginning because of conditions occurring while the borrower is still in school. With the false certification discharge, ED understood that institutional misconduct could occur on a one-off basis at the hand of a rogue employee, or, more likely than not, that it occurred as part of a pattern. Thus, ED acknowledges its own affirmative obligation to stop collecting on loans when signs of such a pattern of false certification emerge, and also committed itself to discharge the loans of borrowers without application when they appeared to be part of a cohort of affected borrowers. So too should borrower defense be understood as a tool for addressing non-isolated instances of mistaken and/or improper lending.[1]

[1] Unlike false certification discharge, which is a creature of the HEA, borrower defense has roots in common law as well as state and federal statutory law.

This fail-safe is particularly important for those who borrowed in order to attend for-profit schools. Suffice it to say, without recounting the nearly hundred-year history of federal student aid programs, there has never been a statute, regulation, or administration that has been successful at preventing predatory actors from accessing federal funds via student debtor intermediaries.[2] In turn, the regulation of financial transactions between lenders and students of for-profit schools by the Federal Trade Commission was the occasion by which borrower defense rights were introduced into federal student loans.[3] And today, the vast majority of borrower defense applications concern the misdeeds and omissions of for-profit colleges.[4]

In brief, borrower defense has long been a component of federal student loans, although its necessity as a safety valve has come into clear focus only in the last half decade or so.[5] Although ED received and resolved dozens of borrower defense claims in the 1990s and 2000s, it only began to develop an administrative process for borrower

[2] "The history of federal college aid is one that involves both expanding opportunity for millions of people but also epidemics of abuse that hurt hundreds of thousands. Every regulation implemented to rein in the abuses has a deep history of what prompted it, why it was drafted the way it was, and, in some cases, how it went wrong." Robert Shireman, The Century Foundation, The For-Profit College Story: Scandal, Regulate, Forget, Repeat (Jan. 2017), https://tcf.org/content/report/profit-college-story-scandal-regulate-forget-repeat/?agreed=1&agreed=1.

[3] In 1971, the Federal Trade Commission (FTC) proposed a rule (Trade Regulation Concerning Preservation of Consumers' Claims and Defenses) that would require credit contracts to finance consumer purchases, in certain contexts, to include a notice to any lender or subsequent holder of the contract that they would be liable to the same extent as the seller for any claims or defenses the consumer had against the original seller. *See* Federal Trade Commission, Final Rule, Trade Regulation Rule Concerning Preservation of Consumer's Claims and Defenses, 40 Fed. Reg. 53,506 (Nov. 18, 1975) (16 C.F.R. Pt. 433). The purpose of the rule was to prevent the buyer's duty to repay from being separated from the seller's duty to perform as promised. Because the FTC has jurisdiction over matters affecting commerce, its rule generally does not apply to public institutions or non-profit organizations. On June 28, 1976, the Office of Education of the Department of Health, Education and Welfare (DE) issued Bulletin #L16, S9 to all lenders and educational institutions about the Federal Trade Commission's Rule, noting that "all for-profit educational institutions fall within the Rule's definition of 'seller' and are covered," therefore student loan contracts within the DE program had to include the notice when the loan was made to a student at a for-profit college. The FTC completed a periodic regulatory review of the Holder Rule in 2019 and determined to retain the rule, because "the Rule benefits consumers" and "there is a continuing need" for it. Federal Trade Commission, Confirmation of Rule, Trade Regulation Rule Concerning Preservation of Consumer's Claims and Defenses, 84 Fed. Reg. 18,711 (May 2, 2019).

[4] *See* Order Denying Class Settlement, to Resume Discovery, and to Show Cause, Sweet et al. v. DeVos, No. 19-cv-03674-WHA (N.D. Cal. Oct. 19, 2020), ECF No. 146, https://www.courtlistener.com/recap/gov.uscourts.cand.344091/gov.uscourts.cand.344091.146.0.pdf ("One hundred sixty thousand student-loan borrowers, defrauded by for-profit schools and saddled with debilitating debt, have asked the Secretary of Education for the relief which Congress has provided") [hereinafter "Sweet Oct. 19 Order"].

[5] Under the FFEL program, ED required all master promissory notes to include language preserving a borrower's claims and defenses against the seller (the school) as to any subsequent holder of the loan (in the FFEL program, a guaranty agency or, ultimately, ED). In creating the Direct Loan Program, Congress directed the Secretary to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." 20 U.S.C. § 1087e(h). ED promulgated final regulations for the Direct Loan Program in December 1994, which became effective on July 1, 1995. Under these regulations, a borrower is eligible for a discharge (cancellation) of part or all of one or more Direct Loans if the borrower's school engaged in acts or omissions that would give rise to a cause of action against the school under applicable state law. 34 C.F.R. §§ 685.206(c) and 685.222. ED recognizes a borrower's defense to repayment of a Direct Loan only if the cause of action directly relates to the Direct Loan or to the school's provision of educational services for which the Direct Loan was provided. 34 C.F.R. §§ 685.206(c)(1), 685.222(a)(5); U.S. Dep't of Educ., Notice of Interpretation, 60 Fed. Reg. 37,769 (Jul. 21, 1995). Upon a successful borrower defense assertion, the Secretary "may initiate a proceeding to collect from the school the amount of relief resulting from a borrower defense." 34 C.F.R. § 685.222(a)(6).

defense in 2015.[6] For the first time, it established an official form to "aid in preserving borrowers' rights" and to gather "the information needed to review and adjudicate requests for relief under borrower defense regulations."[7] Likewise, ED recognized that because "borrowers have a right to submit defense to repayment claims, the Department must set up a process to review and adjudicate them."[8]

Yet this crucial borrower protection and right remains an underutilized tool. This is due not only to anti-borrower policies of Secretary DeVos, but also to the ground rules established under President Obama. Although the Obama Administration identified over 300,000 individuals from a single school chain who were eligible for borrower defense, today—nearly six years later—only one in ten of those individuals has gotten loan cancellation. And to date, only borrowers at three schools, out of the dozens if not hundreds of schools whose borrowers have pointed to compelling evidence of systemic abuses, have received any loan cancellation.

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This paper provides a background on the history of borrower defense as a consumer protection tool with special salience for individuals who attend for-profit colleges. It then details the implementation of borrower defense since 2014, and highlights aspects of the 2016 Borrower Defense Rule that will be most relevant to the incoming Biden-Harris administration. Moving forward, this paper proposes three complementary rationales for the cancellation of debt under borrower defense: 1) where it would enhance the integrity of Title IV programs by punishing institutional misconduct and internalizing rather than externalizing regulatory failure; 2) where cancellation would erase debt that does not serve any purpose of Title IV programs; and 3) where equitable considerations would preclude an ordinary creditor from collecting on a loan. As these three complementary

[6] A borrower might naturally assert that he or she should not be obligated on a federal student loan because they did not get what they were promised in post-default collection proceedings like administrative wage garnishment and Treasury offset hearings. In fact, the predeprivation due-process hearings for these coercive collection activities, and the notices and forms that accompany them, do not advise of borrower defense rights. *See* Deanne Loonin, *Illusory Due Process: The Broken Student Loan Hearing System*, 11 U.C. Irvine L. Rev. 173 (2020), https://scholarship.law.uci.edu/ucilr/vol11/iss1/8/. And it was only in 2014, in a letter to Senator Elizabeth Warren, that then-Secretary Arne Duncan explained that "a borrower who is not in default can also assert a claim that the loan is not legally enforceable on the basis of a claim against the school,"—an affirmative borrower defense claim. *See* Letter from Sec'y of Educ. Arne Duncan to Sen. Elizabeth Warren (Aug. 4, 2014), https://protectborrowers.org/warren-duncan-letter.

[7] U.S. Dep't of Educ., Notice of Agency Information Collection Activities, 80 Fed. Reg. 32,944, 32,944-45 (June 10, 2015).

[8] *Id.*

rationales suggest, ED can and must recognize borrower defense as a tool for ensuring borrowers are not on the hook for regulatory failure or institutional misconduct. Common law, statutory law, and ED's statutory and regulatory framework allow for borrower defense cancellation wherever student loans are void for public policy considerations or because they are unconscionable. Finally, this paper specifies whether existing regulations allow or foreclose such cancellation, and whether alternate bases, including false certification discharge and general authority to settle, compromise, and/or modify debts, are available to achieve cancellation.

Problems

Borrower defense has been a failure. With a limited number of exceptions, documented school misconduct has not resulted in loan cancellation. ED has only used borrower defense to clean up—in a limited way—after a school closes. It has never used borrower defense against a still-operating school, one that it currently regulates. The processing of individual applications has been inefficient,[9] and ED has written regulatory ground rules that diminish the utility of borrower defense as a mechanism of program integrity and fall short of the borrower rights that it protects.

A. Processing of Individual Applications

To date, 333,596 student loan borrowers have submitted borrower defense applications.

To date, 333,596 student loan borrowers have submitted borrower defense applications.[10] This number represents a mere fraction of the individuals whose loans are tainted by misconduct and should, under any fair administration of borrower defense, qualify for discharge.[11] Only three institutions (CCI, ITT, and ACI—Massachusetts) account for all borrower

[9] In the same rulemaking, ED included a provision to automatically grant discharges to those who qualified because their school closed before they could complete. Using lack of re-enrollment as a proxy for eligibility, ED found that 47 percent of those who were eligible for complete cancellation never applied. ED estimated that creating an automatic discharge would result in $1.732 billion in federal student loans being cancelled. U.S. Dep't of Educ., Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926, 76,059 (Nov. 1, 2016) (2016 BD Rule).

[10] U.S. Dep't of Educ., Borrower Defense Quarterly Report for the quarter ending September 30, 2020 (2020 Q3 Report), https://studentaid.gov/data-center/student/loan-forgiveness/borrower-defense-data.

[11] As just one point of illustration, the numbers do not include those borrowers who belong to cohorts on whose behalf state attorneys general have requested cancellation.

defense cancellation, and each of these institutions were bankrupt and out of the federal student loan program before ED cancelled their students' debt. Of the applicants that have received cancellation,[12] half are still obligated on a substantial amount of debt[13] despite having succeeded in establishing school misconduct.

When ED made a series of findings in 2015 and 2016—working from evidence garnered by Vice President-elect Kamala Harris in her then-role as California Attorney General[14]—that schools operated by Corinthian Colleges (CCI) had materially misrepresented job placement rates to prospective students and accreditors on a system-wide basis, it estimated that 300,000 students were affected and presumptively eligible for loan cancellation under borrower defense. Although the students could be identified, ED decided that individuals needed to submit a simplified application to serve as a proxy for proof that each borrower relied upon false job placement rates.[15] Thus, at the end of the Obama administration, only one tenth of eligible borrowers had received cancellation. Since that time, there has been:

- a program review by the Inspector General;[16]
- a new relief policy that uses specious logic and math to cut loan cancellation to these borrowers from 100 to 15 percent;[17]
- a court battle to enjoin that policy;[18]

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[12] ED has granted 61,511 borrower defense applications. *See* 2020 Q3 Report.

[13] ED reports that 43.5 percent of grants have resulted in only partial cancellation. The median dollar amount of outstanding debt of all who were granted any cancellation is reported as $10,230, and the median dollar amount of debt remaining for those who receive only partial cancellation is reported as $7690.

[14] Vice President-Elect Harris obtained a $1.1 billion default judgment against Corinthian for its predatory and unlawful practices. Among Harris's findings was Corinthian's practice of providing prospective students with job placement rates that were 80% higher than the actual rate. People of the State of California v. Heald College, LLC et al., No. CGC-13-534793 (Sup. Ct., Cty. of San Francisco); *see also* U.S. Dep't of Educ., Fact Sheet: Protecting Students from Abusive Career Colleges (June 8, 2015), https://www.ed.gov/news/press-releases/fact-sheet-protecting-students-abusive-career-colleges.

[15] U.S. Dep't of Educ., Fact Sheet, *supra* note 14.

[16] U.S. Dep't of Educ. Off. of Inspector Gen., *Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process*, ED-OIG I04R0003 (Dec. 8, 2017), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf.

[17] Press Release, U.S. Dep't of Educ., Improved Borrower Defense Discharge Process Will Aid Defrauded Borrowers, Protect Taxpayers (Dec. 20, 2017), https://www.ed.gov/news/press-releases/improved-borrower-defense-discharge-process-will-aid-defrauded-borrowers-protect-taxpayers.

[18] Calvillo Manriquez et al. v. DeVos, 345 F.Supp.3d 1077 (N.D. Cal. May 25, 2018).

- an appeal of that injunction;[19]
- a programmatic halt on processing individual applications;[20]
- a court battle to challenge that halt;[21]
- a new relief policy with differently specious math and logic;[22]
- a second court battle to enjoin that policy;[23]
- continued collection on borrowers in the meantime;[24]
- a contempt finding regarding that unlawful collection;[25]
- a refusal to consider group applications;[26]
- a court order to consider and grant a group application from an attorney general;[27]

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[19] Calvillo Manriquez et al. v. DeVos, No. 18-16735 (9th Cir.).

[20] Order Granting Motion for Class Certification, Sweet v. DeVos, No. No. 19-cv-03674-WHA, 2019 WL 5595171 (Oct. 30, 2019) ("*But here is a fact no one disputes: the Department has decided zero applications since June 2018.*") (emphasis original).

[21] *Id.*

[22] Press Release, U.S. Dep't of Educ., Secretary DeVos Approves New Methodology for Providing Student Loan Relief to Borrower Defense Applicants (Dec. 10, 2019), https://www.ed.gov/news/press-releases/secretary-devos-approves-new-methodology-providing-student-loan-relief-borrower-defense-applicants.

[23] Pratt, et al. v. DeVos, No. 20-cv-1501-TNM (D.D.C.); *see id.*, Declaration of Jordan Matsudaira, Doc. No. 20-1 (Nov. 2, 2020) (explaining that ED's stated rationales for new partial relief rule "are nonsensical and betray a deep misunderstanding of statistics, its conventions, and its procedures").

[24] Calvillo Manriquez, Order Denying Motion to Lift Stay and Requiring Compliance Report, Doc. No. 110 (Aug. 19, 2019); *id.*, U.S. Dep't of Educ., Off. of Fed. Student Aid, Compliance Report, Doc. No. 111-2 (Sept. 18, 2019) (disclosing that ED violated injunction against collection tens of thousands of times).

[25] *Id.*, Order Regarding Sanctions, Doc. No. 130 (Oct. 24, 2019) (finding ED in civil contempt).

[26] Williams v. DeVos, Order on Motions for Judgment, No. 16-11949-LTS, Doc. No. 99, 2018 WL 5281741 (D. Mass. Oct. 24, 2018) (noting ED's refusal to consider application of Attorney General of Massachusetts for borrower defense on behalf of Corinthian students as "the very definition of arbitrary and capricious action").

[27] Vara et al. v. DeVos, Memorandum and Order on Plaintiffs' Motion for Class Certification and Plaintiffs' Motion for Judgment, No. 19-12175-LTS, 2020 WL 3489679 (D. Mass. June 25, 2020) (ruling on same group application at issue in *Williams v. DeVos*).

- an appeal of that court order.[28]

In sum, fewer than 50,000 individuals have received any loan cancellation under borrower defense. Secretary DeVos has implemented review procedures that have resulted in upwards of 90 percent of applications being denied, and has done so in the face of acknowledged evidence of misconduct.[29]

. . . [F]ewer than 50,000 individuals have received any loan cancellation under borrower defense. Secretary DeVos has implemented review procedures that have resulted in upwards of 90 percent of applications being denied, and has done so in the face of acknowledged evidence of misconduct.

B. Regulatory Framework

The 2016 BD Rule created a new regulation, 34 C.F.R. § 685.222, to govern the process and standards for borrower defense going forward. Although Secretary DeVos finalized a replacement rule (2019 BD Rule),[30] which took effect on July 1, 2020, that rule by its terms applies only to loans disbursed on or after that date.[31] Thus, the

[28] Vara et al. v. DeVos, No. 20-1832 (1st Cir.).

[29] The Department was ordered to file a comprehensive list of schools against which it has found misconduct. Its filing listed schools by ownership group: Apollo Group (University of Phoenix); Bridgepoint Inc./Zovio (Ashford University); Career Education Group (Katherine Gibbs School, Lehigh Valley College, McIntosh College, Brooks College, Washington Business School, Allentown Business School, Harrington College of Design, School of Computer Technology, Missouri College, Al Collins Graphic Design School, Brown College, Brown Institute, Orlando Culinary Academy, Southern California School of Culinary Arts, Pennsylvania Culinary Institute, California Culinary Academy, California School of Culinary Arts, Cooking and Hospitality Institute of Chicago, Scottsdale Culinary Institute, Texas Culinary Academy, Kitchen Academy, Le Cordon Bleu College of Culinary Arts, Le Cordon Bleu Institute of Culinary Arts, Le Cordon Bleu College of Culinary Arts in Chicago, Western Culinary Institute, Pittsburgh Career Institute Western School of Health and Business Careers, American InterContinental University, Briarcliffe College, SBI Campus—an affiliate of Sanford-Brown, Brooks Institute of Photography, Collins College, Colorado Technical University (CTU), Sanford-Brown College (SBC), Sanford- Brown Institute (SBI), Ultrasound Diagnostic Schools, Katharine Gibbs School, Gibbs College, International Academy of Design and Technology); Concorde Career Colleges (Concorde Career Colleges); Corinthian Colleges Inc. (Everest, Heald, WyoTech); Delta CEC (McCann, Miller-Motte Technical College, Miami Jacobs); DeVry (DeVry University, DeVry College of Technology, DeVry Institute of Technology, Chamberlain University, Keller Graduate School of Management, Ross University School of Veterinary Medicine, Ross University School of Medicine, Carrington College, American University of the Caribbean School of Medicine); ECA College (Brightwood College, Brightwood Career Institute, Virginia College); Education Management Corporation (Argosy University, South University, Brown Mackie, The Art Institutes, Western State University College of Law); ITT Technical Institute (ITT Technical Institute); JTC Education Inc. (Gwinnett College, MedTech College, Radians College); Kaplan Inc. (CHI Institute, Kaplan Career Institute, Kaplan College, Kaplan University); Laureate (Walden); Lincoln Technical Institute, Inc. (Lincoln Technical Institute); Star Career Academy (Star Career Academy); The Infilaw System (Charlotte School of Law); Westwood College (Westwood College). Sweet v. Devos, No. 19-cv-03674-WHA (N.D. Cal.), ECF No. 145 (Oct. 14, 2020), https://protectborrowers.org/wp-content/uploads/2020/11/School-Misconduct-List.pdf.

[30] U.S. Dep't of Educ., Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788 (Sept. 23, 2019) (2019 BD Rule). This rulemaking has been challenged by a legal aid organization, see New York Legal Assistance Group v. DeVos, No. 20-cv-1414 (LGS) (S.D.N.Y.), and a group of 22 states and the District of Columbia, *see* Commonwealth of Massachusetts v. DeVos, No. 20-cv-04717 (N.D. Cal.).

[31] 34 C.F.R. § 685.206(e).

incoming administration's actions, for all loans issued prior to July 1, 2020, will be guided by the rules in section 685.222.

As prescribed by these regulations:

Substantive Standard

- Loans issued prior to July 1, 2017[32] are governed by a state-law standard, (a)(1),[33] specifically that any act or omission of the school attended by the student relating to the making of the loan or the provision of educational services for which the loan was provided "would give rise to a cause of action against the school under applicable State law," 34 C.F.R. § 685.206(c).
- Loans issued after July 1, 2017 and prior to July 1, 2020 are eligible for discharge under borrower defense to the extent the borrower:
  - is the beneficiary of a "nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction" (b);
  - establishes that the institution "failed to perform its obligations under the terms of a contract with the student," (c); or
  - reasonably relied, to his or her detriment, on a substantial misrepresentation by the school or any of its representatives when deciding to enroll or remain enrolled (d).
- A preponderance of the evidence must support a borrower defense for loans disbursed on or after July 1, 2017 and prior to July 1, 2020, (a)(2).

[32] The regulation was intended to go into effect July 1, 2017, and this date is reflected in the regulatory text. However, ED made three unlawful attempts to delay the rule, all of which were invalidated by a district court. *See Bauer v.* DeVos, 325 F.Supp.3d 74 (D.D.C. 2018). Following this, the 2016 BD Rule became effective on October 16, 2018. It is thus ambiguous or arguable whether loans issued between July 1, 2017 and October 16, 2018 are governed by the state law standard or the federal standard articulated in the 2016 BD Rule.

[33] All cites to subsections of 34 C.F.R. § 685.222 unless otherwise noted.

Individual Adjudication

- An individual must submit an application, on a form approved by the Secretary, (e)(1);
- An ED official, designated by the Secretary, "resolves the claim through a fact-finding process," (e)(3);
- This fact-finding process must include a notice to the school of the application, and the ED official must consider any response or submission by the school, (e)(3)(i);
- If loan cancellation results, ED may, but is not obligated to, initiate a separate proceeding to recoup the amount of cancellation from the school, within specified timeframes, (e)(7).

Group-Based Adjudication

- In the Secretary's sole discretion,[34] ED may determine that a group of borrowers has a borrower defense, and the group of borrowers may be identified from individually filed applications "or from any other source," and ED may include borrowers in the group who have not applied,[35] (f)(1);
- ED must provide notice and the right to opt out of the group to all individuals included in the group, (f)(2);
- If the loans at issue in the group process concern "a

ED may determine that a group of borrowers has a borrower defense, and the group of borrowers may be identified from individually filed applications "or from any other source," and ED may include borrowers in the group who have not applied . . . .

[34] ED has never initiated a group-based adjudication under the 2016 BD Rules. Comments on the proposed rule asked ED to make the group process mandatory in certain circumstances, or to allow outside actors such as attorneys general to formally invoke a group process. ED rejected these suggestions, stating, "We believe that it is important that the Department retain the discretion to decide if the circumstances warrant the initiation of a group process to decide its right of recovery from a school," at 81 Fed. Reg. at 75,967. This explanation is confusing, because only when a school is operational does the group process also decide ED's "right of recovery" from a school.

[35] ED must provide forbearance or stopped collections to members of the group who have not yet applied. 34 C.F.R. § 685.222(f)(2)(iii). ED has undertaken this process with respect to borrowers who were included in a discharge application submitted by the Attorney General of the Commonwealth of Massachusetts, after being commanded by a federal court to recognize and adjudicate this group application. *See* Defendants' Response to Plaintiffs' Motion to Enforce Judgment, Vara et al. v. DeVos, No. CV-19-12175-LTS (D. Mass.), Doc. No. 75 (Nov. 4, 2020); U.S. Dep't of Educ., *Notice of Decision about the* Vara v. DeVos *Case*, https://studentaid.gov/announcements-events/vara (last accessed Nov. 20, 2020) ("ED is identifying all federal student loans associated with enrollment at Everest Institute's Brighton and Everest campuses between 2007 and 2015 by the persons identified in the Massachusetts Attorney General's exhibit. All such loans that are held by ED will remain in forbearance or stopped collection status for the pendency of the government's appeal.").

school that has closed and has provided no financial protection currently available to the Secretary from which to recover any losses arising from borrower defenses, and for which there is no appropriate entity from which the Secretary can otherwise practicably recover such losses," the process largely resembles the individual process, except that it applies broadly, (g);

- If there is a possibility of recovery from the school, the hearing official decides cancellation and liability in a single decision, and the school is allowed to present not only evidence but "argument" as well, and the school has the right to appeal the decision to the Secretary, (h).

Cancellation

- In all events, the hearing official also determines the amount of cancellation, which may be less than complete, (i);
- The hearing official must factor in certain considerations, which vary depending on the basis of the grant, including the school's cost of attendance, "the value of the education the borrower received, the value of the education that a reasonable borrower in the borrower's circumstances would have received, and/or the value of the education the borrower should have expected given the information provided by the institution," or "any other relevant factors," (i)(2)(i) (substantial misrepresentation);[36]
- In a group process against an operational school, the school bears the burden of proving what if any "value" it provided to students;
- ED may award "further relief," such as (but not limited to) restoring Title IV eligibility and updating adverse credit reports made to consumer reporting agencies, (i)(7).

[36] The regulation does not provide any considerations specific to borrower defenses granted pursuant to the state-law standard of § 685.206(c) (applicable to loans issued prior to the effective date of the 2016 BD Reg), meaning that the discretion of the hearing officer identified in (i)(1) is not constrained. At times, ED has interpreted 685.206(c) as incorporating the measure of relief provided by the relevant state law cause of action as dictating relief; other times, it has not. *See* Memorandum to James Manning from Steven Menashi, Re: Legal bases for approval and discharge of pending borrower defense claims for former Corinthian students qualifying for approval on the grounds of Job Placement Rate, Guaranteed Jobs, and Transfer of Credit findings (Dec. 14, 2017), https://int.nyt.com/data/documenthelper/6576-menashi-memo/e1518a22b8810dd9f9a3/optimized/full.pdf [hereinafter "Menashi Memo"].

Refunds

- The borrower may be entitled to a refund of amounts collected voluntarily or involuntarily, if "payments made by the borrower or otherwise recovered on the loan . . . exceed the amount owed on that portion of the loan not discharged," 34 C.F.R. § 685.212(k)(1)(ii);[37]
- A borrower defense based on a "nondefault, favorable contested judgment based on State or Federal law in a court or administrative tribunal of competent jurisdiction" may be asserted at any time, (b);
- A borrower defense based on breach of contract may be asserted (for purposes of a refund) not later than six years after the breach, (c);
- A borrower defense based on substantial misrepresentation may be asserted (for purpose of a refund) not later than six years after the borrower "discovers, or reasonably could have discovered, the information constituting the substantial misrepresentation," (d);
- A borrower defense based on state law may be asserted (for purposes of a refund) within "the limitation period under applicable law to the claim on which relief was granted," 34 C.F.R. § 685.212(k)(ii)(A).

Solutions

A. Making Borrowers Whole

It is critical that the next administration take the necessary steps to fully implement borrower defense to provide borrowers whose schools engaged in misconduct receive the relief to which they are entitled. For years, there has been a profound failure and missed opportunity in the whiplash borrowers face when seeking to access these protections. Simply put, ED has failed to make injured borrowers whole. For these borrowers, the federal student loan program has left them decidedly

The Secretary can, however, fulfill the intent of borrower defense without an act of Congress, and expand relief to hundreds of thousands of borrowers.

[37] This provision could be read to mean that if a borrower's debt is completely cancelled, the limitations on refunds do not apply regardless of when the borrower submitted the claim.

worse off than before. ED has also missed an opportunity to realign the incentives and place the risk of failure on those with the ability to stop it before it happens. The Secretary can, however, fulfill the intent of borrower defense without an act of Congress, and expand relief to hundreds of thousands of borrowers. Action to cancel loans should be taken: 1) where it would enhance the integrity of Title IV programs by punishing institutional misconduct and internalizing rather than externalizing regulatory failure; 2) where cancellation would erase debt that does not serve any purpose of Title IV programs; and 3) where equitable considerations would preclude an ordinary creditor from collecting on a loan.

1. Program Integrity Cancellation

ED is statutorily vested with the obligation to ensure that only qualified schools with the appropriate financial responsibility and administrative capability are able to participate in Title IV programs.

The logic underlying the Holder Rule is that, as between "an innocent consumer, whose dealings with an unreliable seller are, at most, episodic, and a finance institution . . . the financer is in a better position both to protect itself and to assume the risk of a seller's reliability."[38]

Here, ED is the bank. It is the repeat player. But more than that, ED is statutorily vested with the obligation to ensure that only qualified schools with the appropriate financial responsibility and administrative capability are able to participate in Title IV programs.[39] It must establish and implement a "quality assurance system" to ensure that each institution responsible for creating Direct Loan obligations "is complying with program requirements and meeting program objectives."[40] And ED alone is charged with regulating, enforcing, and terminating participation of institutions that do not follow the rules.[41] It is, in a colloquial and legal

The cycle of exploitation of the federal student aid program by predatory actors will never end until ED is forced to internalize the cost of its own inadequate regulation, oversight, and enforcement.

[38] 40 Fed. Reg. 53506, 53509 (Nov. 18, 1975).

[39] 20 U.S.C. § 1099c(a).

[40] 20 U.S.C. § 1087d(a)(4).

[41] 20 U.S.C. §§ 1094, 1099c.

sense, acting in concert with each and every institution in the Direct Loan program to originate federal student loans.

The cycle of exploitation of the federal student aid program by predatory actors will never end until ED is forced to internalize the cost of its own inadequate regulation, oversight, and enforcement.[42] Yes, ED should seek to recoup money from schools wherever possible.[43] But the only way to ensure that ED stops originating bad loans is to put the cost in the appropriate column—off the back of the borrower and onto the shoulders of the regulator.

. . . [T]he only way to ensure that ED stops originating bad loans is to put the cost in the appropriate column—off the back of the borrower and onto the shoulders of the regulator . . . .

Thus, borrower defense should be implemented swiftly and broadly wherever a school falls (or has fallen) short of the requirements of Title IV program integrity regulations. Existing regulations authorize this approach. Whether under a state-law standard, or under one of the bases established in the 2016 BD Rule, a borrower defense is "an act or omission of the school . . . that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided . . . ."[44] The 2016 BD Rule also notes that "violation by the school of an eligibility or compliance requirement" in the HEA or implementing regulations may form the basis of a borrower defense, so long as it would also fit the foregoing definition of "borrower defense"—an act or omission relating to the making of a Direct Loan.[45] The 2016 BD Rule "strike[s] a balance" between conferring a borrower defense on the basis of technical violations of rules that do

[42] Between April 2012 and January 2017, ED reached 44 "final program review determinations" based on noncompliance with consumer disclosures, prohibitions on misrepresentation, and provision of inadequate facilities. As one for-profit college attorney noted, "Program Review findings involving [findings of such misconduct] do not typically lead to sanctions (e.g., fine, limitation, suspension, or termination) . . . . In no instance was a monetary liability asserted. And in only one instance did the Department refer a finding concerning the Asserted Noncompliance to the Department's Administration Actions and Appeals Service Group." Export Report of Aaron D. Lacey, U.S. ex rel. Handal v. Center for Employment Training et al., No. 13-cv-1697-KM (E.D. Cal.) ECF No. 87-1 (Aug. 25, 2017). Although "postsecondary institutions are routinely cited for noncompliance with one or more of the statutes or regulations governing participation in the Title IV Programs," and although "the Department could cite any one of these findings as the basis for initiating a termination proceeding and refusing to permit further Title IV payments to flow to the institution," in "the vast majority of cases," no such action is taken. Id. These data were used to argue that a whistleblower lawsuit—in which the government did not intervene—could not proceed because, even if the for-profit school in question had violated its contract with ED and lied about it every time it drew down Title IV money, ED's pattern of non-enforcement meant that flouting the law was irrelevant, because it effectively had no bearing on whether federal dollars should flow.

[43] *Accord* 34 C.F.R. § 668.87 (specifying process for recouping borrower defense liabilities from institutions); *see also* 40 Fed. Reg. 53,506, 53,523 ("We believe that a rule that compels creditors to *either absorb seller misconduct costs or return them to sellers* . . . will discourage . . . predatory practices and schemes . . . . The market will be policed in this fashion and all parties will benefit accordingly.").

[44] 34 C.F.R. § 685.222(a)(5).

[45] 34 C.F.R. § 685.222(a)(3).

not bear on program integrity and the commitment of the institution to fair treatment of students.[46] But the following kinds of regulatory violations constitute underlying misconduct that supports a borrower defense:[47]

Failing Gainful Employment Metrics (Where and When They Applied)

ED doesn't require programs to prove up front that they do prepare students for gainful employment in a recognized occupation.[48] Rather (and before these regulations were rewritten),[49] it assesses the earnings of program graduates relative to their debt burden, and establishes thresholds based on that burden.[50] As a result, cohorts of students

According to ED's analysis . . . 72 percent of the for-profit college programs it analyzed produced graduates who, on average, earned less than high school dropouts.

[46] 81 Fed. Reg. at 75,944 (recognizing that some HEA violations concern "underlying misconduct" that would also satisfy the definition of borrower defense in § 685.222(a)(3)).

[47] The precise relation of the program integrity violations specified in the section to the substantive standards governing existing borrower defense claims could be spelled out in more detail than it is here. Suffice it to say that the "act or omission" in (a)(3) need not be made to the borrower but could be one that is made to a regulator. The "cause of action" under "applicable state law" in 34 C.F.R. § 685.206(c) may be a cause of action by someone other than the borrower, such as a state or federal regulator. Thirty-nine states and the District of Columbia have state laws that broadly prohibit unfair or unconscionable acts enforceable by consumers or a state agency. *See* Nat'l Consumer Law Ctr., *Consumer Protection in the States* (March 2018 update), https://www.nclc.org/images/pdf/udap/report_50_states.pdf. Substantive unconscionability is a term implied into consumer contracts in all jurisdictions, *see, e.g.,* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. Davis L. Rev. 965 (2019) ("the doctrine has quietly flourished in courts in recent years" and has been used "to invalidate payday loans, mortgages, medical bills, and checking account fees"), making an act that renders a contract void as unconscionable a basis for borrower defense under either § 685.206(c) or § 685.222(c). Further, Congress's directive in section 455(h) of the HEA was that the Secretary must establish *in regulation* which acts or omissions of an institution can give rise to a borrower defense. 20 U.S.C. § 1087e(h). It is within the Secretary's discretion to interpret any program integrity regulation—separate and apart from the borrower defense regulations—as a regulation identifying institutional actions that give rise to a borrower defense.

[48] In fact, the suggestion that for-profit colleges "first prove their value to the U.S. Department of Education before gaining eligibility for federal aid" was seen by Steve Gunderson, president of Career Education Colleges and Universities, as "the proof" that "some within the Democrat Party seek to remove our sector from participation in all Title IV programs." Lauren Camera, *For-Profit Colleges Look to 'Urban Members of Congress' to Protect Gains Under Trump*, U.S. News (Sept. 23, 2020), https://www.usnews.com/news/education-news/articles/2020-09-23/for-profit-colleges-look-to-urban-members-of-congress-to-protect-gains-under-trump.

[49] ED's implementation delay of the 2014 gainful employment regulations was challenged as unlawful, *Maryland et al. v. DeVos*, No. 17-cv-02139 (D.D.C.), but remained in effect until a final rule was issued essentially rescinding gainful employment regulations. U.S. Dep't of Educ., Final Rule, Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392 (July 1, 2019). This rescission rule is also subject to legal challenge. American Federation of Teachers v. DeVos, No. 20-cv-455 (N.D. Cal.).

[50] The regulations sanctioned schools when graduates' annual loan repayment amount exceeds 12 percent of their annual earnings, or 30 percent of discretionary income for three straight reporting periods. Built-in features of the metrics understate the cost and overstate the earnings of graduates. The GE rates do not account for students who withdrew from a program and who often take on massive amounts of student loan debt without earning a degree. Additionally, the total loan amounts used to calculate the GE rates do not include federal Parent PLUS loans that may have paid for a portion of the program. Furthermore, although private student loan amounts are included in the GE calculation, the federal interest rate is used in the calculation as opposed to the actual interest rates of the loans, which are invariable higher. Finally, the GE rates are calculated based on a 15-year amortization, but a standard repayment plan under the federal student loan program is ten years.

progress through programs that demonstrably do not meet minimum standards. According to ED's analysis in 2014, 72 percent of the for-profit college programs it analyzed produced graduates who, on average, earned less than high school dropouts. ED data showed that more than 350,000 students graduated from programs that did not meet the minimal thresholds in the 2014 gainful employment regulation. Together, these students owed nearly $7.5 billion in student loans.[51] The loans should not have been issued; there is no way for a borrower to have known that.

The nature of gainful employment as a lagging indicator, and the unfairness to borrowers whose terrible outcomes prove retrospective noncompliance, was apparent from the beginning. In fact, borrower defense was identified by advocates as a safety valve during the rulemaking, proposing that "the determination of a program's subsequent ineligibility should be an allowable defense to collection."[52] Unfortunately, ED considered and rejected this and other borrower relief proposals,[53] but allowed the issue further consideration—though it has not spoken again to the issue directly. Rather, the gainful employment regulation was undercut before sufficient time had elapsed for programs to lose eligibility under its metrics.

An analysis by The Institute for College Access and Success highlights the impact on students:

> Had the GE rule been enforced, schools that have closed precipitously over the last year, and left students stranded with debt and little path to completion would have instead been largely ineligible for federal aid. Based on how programs performed under the GE Rule, the Department should have known that Virginia College, Vatterott College, and Argosy College – three schools that closed impacting tens of thousands of students – offered too many risky programs. Fewer

[51] *How Much Did Students Borrow to Attend the Worst-Performing Career Education Program? The Need for a Strong Gainful Employment Rule*, The Inst. for Coll. Access & Success (Aug. 22, 2018), https://ticas.org/accountability/how-much-did-students-borrow-attend-worst-performing-career-education-programs-need-strong/.

[52] Memorandum from The Inst. for Coll. Access & Success to Interested Parties (Aug. 19, 2013), https://ticas.org/files/pub_files/TICAS_memo_re_upcoming_neg_reg_issues_Aug_19_2013.pdf. Note that section 1087e requires the Secretary to "specify in regulation which acts and omissions give rise to a borrower defense." It is possible to interpret gainful employment regulations as establishing an act—enrolling students in a program that, by the established measure, does not prepare the student for gainful employment in a recognized occupation—that gives rise to a borrower defense.

[53] ED rejected outright the notion that such students would be eligible under section 437(c) of the HEA for a false certification discharge ("This discharge authority does not extend to loans obtained by borrowers who met properly administered admission standards for enrollment in a program or at an institution that was not eligible"), and noted that section 455(h) of the HEA and 34 C.F.R. § 685.206(c) provided an alternate basis for relief. U.S. Dep't of Educ., Final Regulations, Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014). But, because the proposals "raise important but complex issues," ED left the question for another day. 79 Fed. Reg. at 64,971.

> than 10 percent of the programs offered at Virginia and Vatterott Colleges could show that graduates earned enough to repay loans.[54]

Borrower defense is an appropriate remedy for borrowers who attended these and other programs where data establish that they did not meet regulatory thresholds.

Incentive Compensation

Federal regulations prohibit participating schools from offering "incentive compensation" to employees. When it comes to recruiting and financial aid employees, tying compensation to head counts (students enrolled, loans packaged) encourages unlawful and abusive practices, and therefore threatens the integrity of Title IV programs. As with gainful employment, ED has a mixed track record of ensuring that program integrity is not compromised by incentive compensation. It wrote safe harbors into the rule,[55] then instituted an internal policy of non-enforcement.[56] Despite action by the Obama administration to close these loopholes and curb abusive conduct by for-profit colleges and their contractors, a report of ED's Inspector General found that FSA had failed to "revise its enforcement procedures and guidance to ensure that they facilitated and did not hinder enforcement actions" for violations of incentive compensation.[57]

Borrower defense is an appropriate remedy for students who attended schools that received federal dollars despite using incentive compensation. For example, in 2011, the federal government, along with several states, sued Education Management Corporation (EDMC), alleging that it violated state and federal law and then lied about it to get federal aid. According to the lawsuit, in order to maximize enrollments, EDMC paid its admissions employees based on the number of students they could enroll, encouraging a "'boiler room' style sales culture"

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[54] Beth Stein & Brett Robertson, The Inst. for Coll. Access & Success, *Why a Strong Gainful Employment Rule is More Important Now Than Ever* (July 1, 2019), https://ticas.org/accountability/why-a-strong-gainful-employment-rule-is-more-important-now-than-ever/.

[55] U.S. Dep't of Educ., Final Regulations, Federal Student Aid Programs, 67 Fed. Reg. 67,048 (Nov. 1, 2002). This regulation could also be read as a regulation specifying institutional acts that give rise to a borrower defense.

[56] Memorandum from William D. Hansen to Terri Shaw, Re: Enforcement Policy for Violations of Incentive Compensation Prohibition by Institutions Participating in Student Aid Programs (Oct. 30, 2002), https://www.hmbr.com/wp-content/uploads/2015/06/Hansen-Incentive-Compensation-Memo.pdf.

[57] U.S. Dep't of Educ., Off. of Inspector Gen., Final Audit Report, Federal Student Aid's Oversight of Schools' Compliance with the Incentive Compensation Ban, ED-OIG A05N0012 (March 24, 2015), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a05n0012.pdf. Only after the IG's Report did ED formally repeal the Hansen Memo. Memorandum from Ted Mitchell to James Runcie, Re: Enforcement of the Statutory Prohibition on Payment of Incentive Compensation by Postsecondary Institutions (June 2, 2015), https://www.documentcloud.org/documents/2095024-mitchell-incentive-compensation-memo.html.

that focused exclusively on the volume of new students each recruiter could sign up, rewarding top sellers with bonuses and gifts.[58] The lawsuit between DOJ and EDMC settled in 2015 for $95.5 million—less than one percent of the more than $11 billion in taxpayer-funded federal student grants and loans that the government alleged EDMC had received. The settlement did not relieve affected borrowers of their federal student loan debt, however. Moreover, the schools continued to exist and deceive students. ED approved their sale to the nominally-nonprofit Dream Center Education Holdings (in part to avoid the conduct provisions imposed in the settlement and to escape gainful employment regulations), which ultimately declared bankruptcy.

Similarly, borrower defense is available and should be used where a student attends an institution that violates the incentive compensation ban by relying on third-party "lead generators" where payment under the contract is based on the number of eventual enrollments.[59] Lead generators, as third-party contractors, must also comply with ED regulations applicable to eligible institutions, including proscriptions on misrepresentation, and the institution is jointly and severally liable to ED for any violations.[60]

Substantial Misrepresentations

An institution that commits substantial misrepresentations is not administratively capable and ED should not deem it "qualified" for Title IV participation. Loans made to students at schools that commit substantial misrepresentations should be eligible for borrower defense. ED fined Heald for violations of the prohibition on making substantial misrepresentations to students. The saga of Corinthian borrowers has already been discussed—but ED has made findings of substantial misrepresentation as to other schools.[61] For example, in January 2016, ED issued a Notice of Intent to Limit to DeVry University. ED found that, starting in at least 2008 and continuing until at least 2015, DeVry's advertising campaign (We Major in Careers)[62] positioned DeVry as helping its graduates achieve career success—claims that DeVry could not substantiate as truthful. Today, ED

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[58] Press Release, U.S. Dep't of Just., U.S. Files Complaint Against Education Management Corp. Alleging False Claims Act Violations (Aug. 8, 2011), https://www.justice.gov/opa/pr/us-files-complaint-against-education-management-corp-alleging-false-claims-act-violations.

[59] 34 C.F.R. § 668.25(c)(2)(viii).

[60] 34 C.F.R. § 668.25(c).

[61] U.S. ex rel. Handal v. Center for Employment Training et al., No. 13-cv-1697-KM (E.D. Cal.).

[62] "Since 1975, 90.1% of DeVry graduates system-wide in the active job market held positions in their fields of study within 6 months of graduation." Memorandum from the U.S. Dep't of Educ. to Robert Paul, President, DeVry Univ. 2 (Jan. 27, 2016), (https://studentaid.gov/sites/default/files/devry-limitation-notice.pdf, (citing DeVry promotional material that made this claim).

claims no final determination has been made by it, "an accreditor, or other entity that the school made misrepresentations or engaged in fraudulent conduct for which borrower defense relief may be granted." It has not granted a single application from a borrower who attended DeVry. Further, ED takes the position that settlements are not final determinations.[63] ED,[64] the New York Attorney General,[65] and the FTC[66] all reached settlements with DeVry concerning its misrepresentations. ED has not granted a single borrower defense application from a borrower who attended DeVry.

Borrower defense is also an appropriate remedy where an institution contracts with lead generators that engage in abusive and deceptive tactics. For example, Career Education Corporation was sued by the Federal Trade Commission for engaging in a deceptive telemarketing scheme using lead generators posing as, in some cases, U.S. military recruiters or job-finding services, since at least 2012.[67]

Failure to Meet Accreditation Standards

ED must ensure that every institution participating in Title IV is accredited by a body that ED recognizes as a reliable authority on institutional and/or programmatic quality. When institutions fail to meet this standard, ED should grant borrower defenses to students who attended a program that did not meet accreditor standards. This is especially true where a school concealed facts about its accreditation status from students and the public, as ED found that Charlotte School of Law (CSL) did. ED denied CSL's application for recertification in December 2016, citing "substantial" and "persistent" noncompliance with accreditor standards, including making substantial misrepresentations regarding the nature of its academic programs in violation of ED regulations (including representations that its bar passage and job placement rates were adequate to meet standards of "full

[63] *See* Sweet v. DeVos, No. 19-cv-03674-WHA (N.D. Cal.), ECF No. 145 (Oct. 14, 2020), https://protectborrowers.org/wp-content/uploads/2020/11/School-Misconduct-List.pdf.

[64] Press Release, U.S. Dep't of Educ., U.S. Department of Education Reaches Settlement with DeVry University Over Job Placement Claims (Oct. 13, 2016), https://www.ed.gov/news/press-releases/us-department-education-reaches-settlement-devry-university-over-job-placement-claims.

[65] Kevin McCoy, *DeVry reaches $2.75M settlement over misleading ads about grads' jobs, pay*, USA Today (Jan. 31, 2017), https://www.usatoday.com/story/money/2017/01/31/devry-reaches-275m-settlement/97284248/.

[66] Fed. Trade Comm., *Cases and Proceedings: DeVry Univ*, https://www.ftc.gov/enforcement/cases-proceedings/132-3278/devry-university (last accessed Nov. 21, 2020).

[67] Complaint, Fed. Trade Comm. v. Career Educ. Corp., et al., No. 19-cv-5739 (N.D. Ill Aug. 27, 2019), https://www.ftc.gov/system/files/documents/cases/career_education_corporation_complaint_8-27-19.pdf.

accreditation").[68] In the year prior to denial (2015-16 award year), CSL created $48.5 million dollars in federal student loan obligations. CSL was part of a consortium of for-profit law schools owned by InfiLaw Holdings, LLC, nearly all of the voting units of which are held by Sterling Capital Partners, L.P. Today, ED claims that its finding and "common evidence" of misrepresentations and fraud do not apply to any borrower who separated from the school prior to February 24, 2015. It has not granted a single application from a borrower who attended CSL.

Violations of the Law of the Authorizing State

ED is charged with ensuring that only institutions of higher education that are duly authorized by the state, and administratively capable of ensuring compliance with the laws of the state(s) in which it operates, can be the vehicle of loan obligations under Title IV. Borrowers who attended schools that are found to violate state laws should receive cancellation under borrower defense. For example, a trial court in Colorado recently found that the CollegeAmerica and Stevens-Henager chains of career training schools violated state consumer protection laws.[69] The court specifically found that owner Carl Barney and chief financial officer Eric Juhlin directed and were personally liable for the fraud. Students who attended this school during this established period of illegality and deception should have their loans cancelled pursuant to borrower defense. Further, the court findings render all institutions owned or operated by these two executives immediately ineligible for Title IV.[70] All students who attend during this period of statutory ineligibility—regardless of whether and when ED takes action to terminate participation by the institutions—should have their loans cancelled under borrower defense.[71]

Borrowers who attended schools that are found to violate state laws should receive cancellation under borrower defense.

[68] Memorandum from U.S. Dep't of Educ to Chidi Ogene, Pres., Charlotte Sch. of L. (Dec. 19, 2016), https://studentaid.ed.gov/sa/sites/default/files/csl-recert-denial.pdf.

[69] Findings of Fact, Conclusions of Law, and Judgment, Colorado v. Ctr. for Excellence in Higher Educ., 14-CV-34530 (Denver Cntry Dist. Ct. Aug, 21, 20120) [hereinafter "Colorado Order"]

[70] 20 U.S.C. § 1002(a)(4)(B); 34 C.F.R. § 600.7(a)(3)(ii).

[71] Schools operated by the Center for Excellence in Higher Education include, in addition to CollegeAmerica and Stevens-Henager, include Independence University, California College San Diego, and National American University.

Violations of the 90/10 Rule

ED requires for-profit colleges to obtain at least 10 percent of their revenue from sources other than grants and loans provided by ED.[72] Even allowing for the fact that institutions may count revenue from state aid programs as well as Department of Defense and Department of Veterans' Affairs education benefits towards the 10 percent (despite representing governmental funding), many schools fail this metric.[73] Since passage of the Higher Education Opportunity Act in 2008, compliance with the 90/10 rule has been a component of an institutions' Program Participation Agreement, and thus a violation in a single year results in provisional certification, not loss of eligibility.

2. Purposive Cancellation

Congress enacted the HEA "to keep the college door open to all students of ability, regardless of socioeconomic background."[74] The overall purpose of the HEA is to "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education."[75] The FFEL and Direct Loan programs are in service of this purpose.[76]

[72] 20 U.S.C. § 1094(a)(24).

[73] Of the schools for which ED had denied more than ten borrower defense applications as of September 2020. See Sweet v. DeVos, No. 19-cv-03674-WHA (N.D. Cal.), ECF No. 140-1 (Oct. 1, 2020), https://protectborrowers.org/wp-content/uploads/2020/11/Sweet-140-1.pdf. A number have violated the 90/10 revenue requirement at least once in the past ten years (Advanced College, American Institute, Anthem College, Blue Cliff College, Brookstone College of Business, California College of Vocational Careers, California Institute, College of Business and Technology, Cosmetology Career Institute, Kaplan College, Healthy Hair Academy, International Career Development Center, LA College International, Laurus Technical Institute, Mattia College, New Life Business Institute, Pennsylvania School of Business, Prism Career Institute, Southern Careers Institute, Suburban Technical School, Toni & Guy Hairdressing Academy), and even more were within two percentage points of failing in multiple years (Advanced Career Training, Advanced College, American Commercial College, American Institute, American School of Technology, Anthem College, Anthem Institute, Arizona College, Associated Technical College, Austin's School of Spa Technology, Blue Cliff College, Brookline College, Camelot College, Career Quest Learning Centers, Career Technical Institute, Cleveland Institute of Dental-Medical Assistants, College of Business & Technology, Coyne College, Dade Medical College, Dawn Career Institute, Delta School of Business and Technology, Empire Beauty School, Fremont College, Georgia Beauty Academy, Glendale Career College, Heritage Institute, Herzing, Hollywood Institute of Beauty Careers, IBMC College, IntelliTec College, International Career Development Center, Iverson Institute, Jones International University, Lincoln Technical Institute, Marinello School of Beauty, MCI Institute of Technology, Midwest Technical Institute, National College, National Polytechnic College, New Life Business Institute, North-West College, Orion College, Pennsylvania School of Business, Prism Career Institute, Ridley-Lowell Business & Technical Institute, Royal Beauty Careers, School of Communication Arts of North Carolina, Southern Careers Institute, Stautzenberger College, Texas Barber College, Unitech Training Academy, Whittier College) (analysis on file with the author).

[74] Rowe v. Educ. Credit Mgmt. Corp., 559 F.3d 1028, 1030 (9th Cir. 2009) (internal quotation marks omitted).

[75] 20 U.S.C. § 1070(a).

[76] Neither the FFEL nor the Direct Loan statutory provisions contain an independent statement of purpose. See 20. U.S.C. §§ 1071 (FFEL); 1087a (Direct Loan). When ED regulated the use of predispute arbitration provisions and class-action waivers by institutions of higher education, inserting requirements into the Direct Loan Agreement, it determined such regulation was "necessary to protect the interests of the United States and to promote the purposes of this part," 20 U.S.C. § 1087d(a)(6). The regulatory preamble defined the purpose of the Direct Loan

As previously stated, a 2014 ED analysis found that 72 percent of the for-profit college programs subject to the Gainful Employment Rule produced graduates who, on average, earned less than high school dropouts. A 2016 study found that for-profit college students earned less after leaving school than they did before they enrolled. Almost 90 percent of undergrad certificate programs—the bulk of enrollment at for-profit colleges—had earnings below $30,000, the rough approximation of how much employed high school graduates make.[77]

Students who attend for-profit schools account for 13 percent of the student population, but 47 percent of all federal student loan defaults. Students of color make up one-third of all college students, but nearly half of the enrollment at for-profit colleges. And 70 percent of African Americans who borrow to attend a for-profit college default on their loans within ten years.[78]

ED conducted an analysis on CCI borrower defense applicants who had not yet been granted cancellation under the Obama administration, and found that more than half of the studied applicant pool attended programs with median earnings below the 2014 poverty guidelines for a family of two—$15,730.[79] It further found that, of all CCI applicants with outstanding applications, more than 20,000 (out of 40,000) attended programs whose earnings were below that of a worker with only a high school education.[80] The total debt carried by those applicants was $464 million.[81]

Program as being "to provide loans to students and parents to finance the attendance of students in postsecondary education. Loans are not grants and are expected to be repaid." 81 Fed. Reg. at 39,381. Repayment of loans alone cannot be the purpose of the Direct Loan program, because the very premise of the program is that government subsidization is necessary to make college accessible and, indeed, budgeting of the program recognizes that not all loans will be repaid in full or at all, for various reasons. For an alternate framing of Congressional purpose in enacting and amending the HEA, see John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, 72 SMU L. Rev. 725 (2019) (identifying equal access to education, freedom of choice of career, producing an educated population for the benefit of the country, and benefiting students as four goals of the federal student-loan programs).

[77] *Takeaways from New Program-Level Data on the College Scorecard*, The Inst. for Coll. Access & Success (Dec. 5, 2019), https://ticas.org/accountability/data-evidence-and-information/takeaways-from-new-program-level-data-on-the-college-scorecard/.

[78] *For-Profit Colleges and Racial Justice*, Harv. Project on Predatory Student Lending, https://predatorystudentlending.org/predatory-industry/racial-justice/ (last accessed Nov. 22, 2020).

[79] This methodology identified 12,285 applicants whose CCI programs had earnings below poverty (out of 22,669 for whom it had program earnings data available). The total debt associated the poverty-producing programs was $239 million, and the average discharge, if ED moved forward on this basis, would be $19,500. *See* U.S. Dep't of Educ., Off. of Fed. Student Aid, *Borrower Defense: Alternative Relief Options*, https://protectborrowers.org/borrower-defense-alternative-relief-options (last accessed Nov. 22, 2020).

[80] ED used a benchmark of the median earnings of workers employed full-time in 2015 with only a high school diploma and who are age 25-34 ($30,000).

[81] The average debt discharge if ED moved forward on this basis would be $23,093.

When an institution or a program pushes an individual (through completion or otherwise) into poverty, or places that individual in a worse position than if they had never attended the program, the institution has failed the individual. The debt incurred did not make the benefits of higher education available to the borrower. The purposes of Title IV—to the extent it is understood as a social program in furtherance of the Great Society—are actually subverted rather than furthered. Since these debts fail to serve the purpose of the Title IV program, the Secretary should cancel them.

When an institution or a program pushes an individual . . . into poverty, or places that individual in a worse position than if they had never attended the program, the institution has failed the individual.

Borrower defense is an appropriate vehicle for cancelling student loan obligations where they do not serve the purposes of the HEA. As recognized in the 2016 BD Rule, borrower defense discharge has key social benefits, because borrowers whose loans are discharged can "become bigger participants in the economy" by "buying a home, saving for retirement, or paying for other expenses."[82] This finding has renewed salience today, when the COVID-19 pandemic has touched upon every citizen, and especially upon those who are most likely to be burdened by unsustainable student loan debt from predatory or reputable schools alike.

3. Equitable Cancellation

There is no question that borrowers have been mistreated throughout the borrower defense process. As one federal court put it, they have been subjected to a "disturbingly Kafkaesque" process.[83] The hundreds of thousands of borrowers who waited upwards of five years for an answer to their claims for cancellation bear a "shared trauma."[84] ED's failure "hangs borrowers out to dry,"[85] and subjects them to irreparable harm.[86] In the meantime, borrowers have not been protected against coercive collection and credit harm. Notably, ED was held in contempt of court for violating an injunction against collection from former Corinthian students,[87] behavior

[82] 81 Fed. Reg. at 76,051.

[83] Sweet Oct. 19 Order, *supra* note 4 at 5

[84] Sweet Oct. 19 Order, *supra* note 4 at 11.

[85] Sweet Oct. 19 Order, *supra* note 4 at 10.

[86] *Id.*

[87] Calvillo Manriquez v. DeVos, Order Regarding Sanctions, No. 17-cv-07210-SK, Doc. No. 130 (Oct. 24, 2019). ED demanded payment from 45,034 borrowers, collected voluntary payments from 14,804, subjected 2369 to involuntary collection, and made adverse credit reports against 5981

Another borrower was evicted after her tax refund was unlawfully seized, and became homeless. Though her debts should have been cancelled years ago, ED seized her earned income tax credit in direct violation of a court order . . . .

characterized by (yet another) federal court as "at best" "gross negligence of the magnitude of 'we don't' care about the order'" and, at worst, "intentional flouting" of borrowers' rights.[88] These borrowers—former students of CCI—had already demonstrated that collection would cause them irreparable harm. When ED violated the injunction, it caused unfathomable harm[89]— seizing a tax refund that a woman planned to use to flee her abusive spouse, causing eviction and homelessness,[90] and forcing people into the debt trap of payday loans.[91] In one case, a daughter was unable to pay for medical care for an ailing father, who died before she could afford a plane ticket to visit him.[92] Another borrower was evicted after her tax refund was unlawfully seized, and became homeless.[93] Though her debts should have been cancelled years ago, ED seized her earned income tax credit in direct violation of a court order to pay for a debt she supposedly owed for attendance at a known fraud of a school.[94] These are egregious examples, and point to the widespread, senseless, and compounding injury that ED has inflicted on people who had the misfortune to attend predatory schools.[95]

Failure to adequately oversee the Title IV program so as to prevent the origination of debt that does not serve the purposes of the program could also be a bar to collecting student loan debt.

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borrowers. In total, ED took more than $21 million from borrowers in violation of a court order. *Id.*, Plaintiffs' Motion for Partial Reconsideration of Sanctions, Doc. No. 164-10 (Dec. 23, 2019), https://predatorystudentlending.org/wp-content/uploads/2018/02/Proposed-Motion-for-Partial-Reconsideration.pdf.

[88] Calvillo, Doc. No. 124 at 6:15-21.

[89] As of December 20, 2019, ED had refunded over $21 million to borrowers that it had unlawfully seized from 17,000 individuals. Calvillo, Doc. No. 164-10 at 6-7.

[90] *Id.* at 10.

[91] *Id.*

[92] *Id.* at 15.

[93] *Id.*

[94] *Id.* at 10.

[95] In the words of Linda Greenhouse, "During the four years struggling to keep up with the flood of court cases challenging the refusal by various Trump administration officials to follow the law, a word has come to mind so often that I can't shake it. It's the word 'mean.'" *Four Years of the Trump Administration in Court. One Word Stuck in My Head*, N.Y. Times (Nov. 19, 2020), https://www.nytimes.com/2020/11/19/opinion/trump-

In an ordinary creditor relationship, such egregious misconduct could render a creditor powerless to collect from a debtor because of unclean hands or bad faith.[96] Failure to adequately oversee the Title IV program so as to prevent the origination of debt that does not serve the purposes of the program could also be a bar to collecting student loan debt.[97] And, the circumstances of institutional misconduct and regulatory misfeasance can, as discussed, render student loan contracts void as unconscionable or against public policy.

As discussed below, ED has substantial discretion under prevailing borrower defense regulations and its own inherent authority to cancel debts, and it should do so as a matter of course. Occasions for such equitable cancellation include:

- Cancellation of the debt of any person whose borrower defense application has been pending for more than 90 days;
- Cancellation of the debt of any person who was unlawfully collected against while their borrower defense application was pending;[98]
- Cancellation of the debt of any borrower who received a pretextual denial notice[99] or a specious partial

policy-mean.html. Greenhouse went on to identify Betsy DeVos as an Education Secretary who "doesn't believe in granting legally required relief to indebted students who were defrauded by the for-profit colleges to which they paid tuition with federally guaranteed student loans," citing the "scathing" opinion in *Sweet*, recounting the ways that DeVos's non-administration of borrower defense "hangs borrowers out to dry." *Id.*

[96] For example, ED's delay of the 2016 BD Rule for 18 months was a bad faith action. Every single step that the Department took to delay the 2016 Borrower Defense Rule was found illegal. The Department's delay actions "did not come close" to being lawful under the APA. *Bauer I* at 34. Their assertion that the Court lacked power to review their invocation of section 705 was "unpersuasive," *id.* at 45, and the Department's "mere boilerplate" rationale that "justice" required the stay was "unsupported by any analysis," "at odds with the Department's prior conclusion to the contrary," and "lack[ing] any meaningful analysis," *id.* at 51. This bad faith denied borrowers the benefit of a rule that was designed to both deter institutional misconduct and remedy the burdens of such misconduct.

[97] ED's failure to adequately regulate institutional participation in Title IV could vitiate a borrower's obligation to perform, or repay, under the student loan promissory note. *See generally* Restatement 2d of Contracts § 237, Effect on Other Party's Duties of a Failure to Render Performance.

[98] In addition to violating the injunction against collection in *Calvillo Manriquez*, ED has collected against individuals in violation of the CARES Act, *see. e.g.,* Barber v. DeVos, No. 20-cv-1137 (D.D.C.), Doc. No. 27-2, Declaration of Joe Lindsey (confirming that ED collected payments through administrative wage garnishment during the national emergency).

[99] "For eighteen months, the Secretary refused, largely on the grounds that [borrower defense adjudications] required backbreaking effort and, thus, substantial time. Now, the Secretary has begun issuing decisions at breakneck speed. But most are perfunctory . . . without explanation." Sweet Oct. 19 Order, *supra* note 4 at 4. The court described the denial notices as "utterly devoid of meaningful explanation," not reflective of the actual evidence of misconduct, and smelling of "pretext."

relief determination.[100]

B. Mechanics

Under the 2016 BD Rule, ED "may reopen a borrower defense application at any time to consider evidence that was not considered in making the previous decision," and such reopening results in forbearance or stopped collections.[101] There is no time limit on ED's ability to reopen a borrower defense application. It may be done at any point.[102] The new administration may reopen every single borrower defense application on day one, and grant all of them under one or more of the above rationales.

The incoming Biden/Harris administration may do so by establishing a rule or rules of decision under which any individual application may be decided.[103] ED recognized its own discretion over "subordinate questions of procedure, such as the scope of what acts or omissions alleged by borrowers meet the Department's requirements, how such claims by borrowers should be determined," and other matters.[104]

It may also do so by initiating a group process. The 2016 BD Rule allows ED to initiate a group process "[u]pon consideration of factors including, but not limited to, common facts and claims, fiscal impact, and the promotion of compliance by the school or other title IV, HEA program participant."[105] Group processes to determine cancellation—for individuals who have submitted applications or can be identified by ED—on the basis of the program integrity and purposive considerations outlined above are therefore warranted.

[100] *See* Matsudaira Declaration, *supra* note 23.

[101] 34 C.F.R. § 685.222(e)(5)(ii).

[102] "We disagree that a time limit should be placed on the Secretary's ability to reopen a borrower's application. We believe that if the Department becomes aware of new evidence that would entitle a borrower to relief under the regulations, then the borrower is entitled to relief regardless of the passage of time." 81 Fed. Reg. at 75,969.

[103] In the past, ED established by memoranda that categories of individual applications should be granted. *See generally* Menashi Memo, *supra* note 34.

[104] 2016 BD Rule, 81 Fed. Reg. at 75,965 (citing FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940)).

[105] 34 C.F.R. § 685.222(f)(1) (emphasis added).

Against an open school, ED stated that the group process must "be structured to provide the substantive and procedural due process protections both borrowers and schools are entitled to under applicable law," including rights "regarding notice; the opportunity for an oral evidentiary hearing where parties may confront and cross-examine adverse witnesses if warranted; or those for the submission and exchange of written material provided under enforcement procedures" in Subpart G of Part 668. However, even as it created this group process for open schools, ED also recognized that "the regulations do not prevent a hearing official from using his or her discretion to structure a factfinding procedure . . . as necessary based upon the circumstances of each group case," including "ordering a bifurcated process if appropriate."[106] In other words, existing regulations do not bind ED to determine in one fell swoop whether a borrower's loan should be cancelled and whether the institution is liable, even when the institution is open.

. . . [E]xisting regulations do not bind ED to determine in one fell swoop whether a borrower's loan should be cancelled and whether the institution is liable, even when the institution is open.

Finally, it is worth noting that the existing regulation does not encompass the full extent of ED's borrower defense authority. It granted group discharges prior to there being any regulation,[107] and wrote its regulation with a high degree of flexibility.

ED addressed the concern of "false positives" when it enacted the automatic closed school discharge. It disputed that this created any "windfall," and stated that any "potential cost" of cancelling the loans of "borrowers who do not qualify" would be "counterbalanced by the benefit of" making sure that those who do qualify receive cancellation, who otherwise would remain obligated. ED's "concern that borrowers are unaware of their possible eligibility" for loan cancellation trumped the concern about potential false positives. This rationale should be applied to achieve borrower defense in a scalable manner, in short order. Closed school discharge is an important means of releasing borrowers from repayment obligations when their school precipitously closes.

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[106] 81 Fed. Reg. at 75,966.

[107] Press Release, U.S. Dep't of Educ., American Career Institute Borrowers to Receive Automatic Group Relief for Federal Student Loans (Jan. 13, 2017), https://www.ed.gov/news/press-releases/american-career-institute-borrowers-receive-automatic-group-relief-federal-student-loans; *see also* Vara v. DeVos, No. 19-12175-LTS, 2020 WL 3489679 at * 26 (D. Mass June 25, 2020) ("while the agency's practice clearly indicates that it engaged in group discharge adjudications, nothing in the text of the HEA, the 1995 borrower defense regulation, nor in the agency's interpretations or memoranda indicate that the agency considered itself bound to adjudicate as a group an application requesting borrower defense relief on behalf of multiple similarly situated persons. Rather, the agency was free to either adjudicate such a group application in one fell swoop or adjudicate constituent individual applications one at a time. As noted above, though, the agency was not free to simply ignore such an application.").

Borrower defense has a purpose beyond remedying the injury of existing borrowers—it is meant to prevent future borrowers from suffering the same fate, by enhancing program integrity across the board. The salutary benefits to the overall integrity of Title IV justify painting with broad strokes.

And where existing regulations impede sensible, fair, and timely administration of borrower defense, ED can and should use its broad authority to cancel student loan debt. Congress enumerated general powers of the Secretary under Title IV, including the power to prescribe such regulations as are necessary to carry out the programs; to sue and be sued in federal court; and to include terms, conditions, and covenants relating to repayment, and to modify such terms.[108] Although located in the portion of the HEA specific to FFELP, the Secretary openly relies on these authorities in carrying out activities under other Title IV programs,[109] and Congress has acquiesced in this interpretation. Direct Loans are understood to have the same terms and conditions as FFELP loans.[110] Amongst the general powers conferred by Congress to the Secretary in the HEA is the power to "enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption."[111] This compromise authority was contained in the HEA from its initial enactment.[112]

Congress enumerated general powers of the Secretary under Title IV, including the power to prescribe such regulations as are necessary to carry out the programs; to sue and be sued in federal court; and to include terms, conditions, and covenants relating to repayment, and to modify such terms.

[108] 20 U.S.C. § 1082(a).

[109] For example, there is no other Congressional authorization for the Secretary to sue and be sued in the Higher Education Act, and the Secretary regularly initiates and defends lawsuits related to DLP activities. Likewise, the Secretary promulgates regulations under the DLP. Insofar as the general power conferred in §1082 relates to the ability to set terms and conditions of federal student loans, and to cancel or compromise those loans, Congressional intent to apply such powers to DLP loans is evident in the DLP "parity provision," 20 U.S.C. § 1087e(a)(1): "Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers [of FFELP loans]." Statutory discharges exemplify the functioning of the parity provision. Congress has authorized the Secretary to discharge (or, cancel) student loans under the FFELP in circumstances of death, disability, or false certification by an institution of the student's eligibility for the loan. 20 U.S.C. § 1087. The Secretary has promulgated regulations making these discharges available to borrowers under the DLP. *See* 34 C.F.R. §§ 685.212 (discharge of a DLP loan obligation when borrower dies); 685.213 (discharge of a DLP loan obligation when a borrower is disabled); 685.214 (discharge of a DLP loan obligation when a borrower's school closes); 685.215 (discharge of a DLP loan obligation when a borrower's eligibility is falsely certified by an institution).

[110] 20 U.S.C. § 1087a(b)(2).

[111] 20 U.S.C. § 1082(a)(6) (emphasis added). Subsection (a)(5) authorizes the Secretary to compromise "any claim on, or arising because of, any such insurance or any guaranty agreement" under FFELP.

[112] Pub. L. 89-329, § 432(a)(6) (Nov. 8, 1965).

Borrower advocates including The Institute for College Access and Success and others specifically cited the settle and compromise authority in relation to student relief proposals accompanying the 2014 gainful employment rule.[113] Additionally, the Higher Education Relief Opportunities for Students Act of 2003,[114] the Secretary of Education may "waive or modify any statutory or regulatory provision" under Title IV "as the Secretary deems necessary in connection with a . . . national emergency,"[115] so as to "ensure that" borrowers who "suffered direct economic hardship as a direct result of a . . . national emergency"[116] are "not placed in a worse position financially in relation to" their federal student loans because of the national emergency.[117]

Conclusion

The long history of abuses by for-profit colleges, and the use by ED of program integrity safeguards that are by their nature lagging indicators, has left hundreds of thousands of individuals with student debt. This debt should not have been made in the first place, its enforcement does not serve the purposes of Title IV, and it should be cancelled. Borrower defense is an important feature of federal student loans. It provides a failsafe for individuals and realigns incentives as between ED and the institutions it regulates in a manner that can dramatically enhance program integrity. Although borrower defense has failed so far to achieve its potential, there are immediate actions the new administration can and must take to correct past wrongs and ensure program integrity moving forward.

Although borrower defense has failed so far to achieve its potential, there are immediate actions the new administration can and must take to correct past wrongs and ensure program integrity moving forward.

[113] Memorandum from the Inst. for College Access & Success to Interested Parties, *supra* note 52 (citing 20 U.S.C. § 1082(a) (FFEL); 31 U.S.C. § 3711 (General authority to compromise government debts); 34 C.F.R. § 30.70. 23).

[114] Pub. L. 108-76 (codified at 20 U.S.C. §§ 1098aa *et seq.*).

[115] 20 U.S.C. § 1098bb(1).

[116] 20 U.S.C. § 1098ee(2)(D). It is possible that Secretary DeVos has already made the determination that each and every student loan borrower has suffered direct economic hardship. *See* U.S. Dep't of Educ., *Fiscal Year 2020 Agency Financial Report* (Nov. 16, 2020), https://www2.ed.gov/about/reports/annual/2020report/agency-financial-report.pdf (describing Presidential Memorandum and discretionary authority used to continue temporary suspension of payments and waiver of all interest of federally held student loans through December 31, 2020, resulting in an upward modification of subsidy cost of $13.5 billion).

[117] 20 U.S.C. § 1098bb(2)(A).

RELIEF FOR BORROWERS IN INCOME-DRIVEN REPAYMENT

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Introduction

In 1995, more than 25 years ago, student loan borrowers in the Direct Loan program became eligible to enroll in the first income-driven repayment (IDR) plan, called Income Contingent Repayment (ICR), which was created by Congress in the 1992 reauthorization of the Higher Education Act (HEA).[1] The original ICR plan provides cancellation to borrowers who have an outstanding balance after 25 years of repayment. Therefore, the first cohort of borrowers who entered ICR in 1995 and remained in ICR should be eligible for cancellation starting in 2020.[2] With this legislation, Congress opened the door to a radical reimagining of most borrowers' relationship with student debt—one that promised borrowers that debt need not be a lifelong burden, regardless of borrowers' financial futures.

All of the IDR plans work in a similar way; they calculate the borrower's monthly payment using the borrower's income, and if the borrower is unable to repay the loan within a certain number of years, the remaining balance is cancelled. This is in contrast to the balance-based payment plans where borrowers generally pay the same amount for each installment period. Most borrowers are automatically placed in the standard plan which must be repaid in a maximum of ten years.[3] ICR was a precursor to the more recently developed Income-Based Repayment (IBR), Pay As You Earn (PAYE), and Revised Pay As You Earn (REPAYE) plans. It was designed not only to benefit low-income borrowers, but also, according to Senator Kennedy in 1993, to "provide borrowers with a variety of repayment plans, including an income-contingent repayment plan, so that borrowers['] . . . obligations do not foreclose community service-oriented career choices."[4]

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[1] Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448.

[2] As described below, due to the interplay between ICR and a different IDR plan created during the Obama Administration, certain borrowers first became eligible prior to this date. For further discussion, *see infra* text accompanying notes 6-7.

[3] For a full explanation of the different repayment plans, *see* Nat'l Consumer L. Ctr., Student Loan Law, ch. 3 (6th ed. 2019), www.nclc.org/library.

[4] Staff of S. Comm. on the Budget, 103d Cong., Reconciliation Submissions of the Instructed Committee Pursuant to the Concurrent Resolution on the Budget (H.R. Con. Res. 64) 453 (Comm. Print 1993) (reprinting report by Senate Committee on Labor and Human Resources to accompany Title XII of the Budget Reconciliation Act).

Loan cancellation is an important structural feature of the Higher Education Act's (HEA) income-driven repayment (IDR) scheme—the most important anti-poverty measure in the student loan system.

On July 1, 2009, the IBR plan went into effect for Direct Loan and FFEL program borrowers.[5] Over the past decade, the Department of Education (ED) has utilized the ICR statute to create PAYE and REPAYE, which provide a more generous repayment amount and a shorter cancellation period for more borrowers.[6]

Due to regulatory changes implemented by the Obama Administration in 2014, borrowers who enrolled in ICR prior to 2000 and then switched to the REPAYE plan, which provides for cancellation after 20 years of repayment to borrowers who are paying only undergraduate loans, should have their loans cancelled as early as 2015. However, data obtained through FOIA show that as of November 2019, fewer than 20 borrowers who entered ICR early on and switched to REPAYE have had their loans cancelled.

However, data obtained through FOIA show that as of November 2019, fewer than 20 borrowers who entered ICR early on and switched to REPAYE have had their loans cancelled.

The shockingly low rate of cancellation of these borrowers' loans foreshadows the widespread problems affecting millions of low-income borrowers and is emblematic of the failure of the Department's IDR programs to deliver the relief Congress intended for struggling borrowers when it passed the enabling statutes for these programs. Loan cancellation is an important structural feature of the HEA income-driven repayment (IDR) scheme—the most important anti-poverty measure in the student loan system. Federal student loans have no underwriting, meaning that the student loan system never considers borrowers' so-called "ability to repay" when extending credit. Congress designed IDR to protect student loan borrowers from financial hardship—an important counterweight to the risks posed when creating an entitlement to access credit. This protection operates in two ways. First, IDR offers immediate payment relief to any borrower who qualifies—payments that can be as low as zero dollars per month for borrowers who are unemployed or have very low income. Second,

[5] College Cost Reduction & Access Act of 2003, Pub. L. 110-84, § 203, 121 Stat. 784 (2007).

[6] *See* 34 CFR § 685.209; *see contra* 20 U.S.C § 1087e; 20 U.S.C. § 1098e(b).

and as is the subject of this paper, both the IBR and ICR statutes offer loan cancellation for borrowers who experience extended financial hardship.

Loan cancellation is what separates a federal student loan from other types of consumer financial products commonly thought of as predatory lending, or "debt traps." Many student loan borrowers regularly make payments at amounts less than the accruing interest on their loans and find themselves falling deeper into debt each month, as unpaid interest accumulates.[7] For some borrowers with very low income and moderate to large debts, unpaid interest can quickly dwarf the outstanding principal balance of their loans. In the absence of a robust loan cancellation feature, income-driven repayment would result in a life-long financial obligation—low-income borrowers could pay only what they could afford each month but would remain in debt in perpetuity. Loan cancellation was intended to be a lifeline for these borrowers, delivering on the promise that student debt could remain "affordable"—measured both in terms of monthly payment and, importantly, in terms of the length of the obligation itself—even as students increasingly took on larger debts to pay for college. As House Education Committee Chairman George Miller described on the day the first income-driven repayment plan became widely available in 2009:

> The Income Based Repayment and loan forgiveness programs will alleviate some of the stress working families feel when repaying their loans . . . allowing them to keep their primary focus on their interests, not their outstanding loan balances.[8]

Under these IDR plans, many more borrowers would be eligible for cancellation but for common challenges borrowers face in repayment, including missed, delayed, or nonqualifying payments due to recertification delays, forbearances, certain deferments, and missed payments.[9] Policymakers have made some attempts to improve the IDR program going forward though changes in regulations and servicer contracts.[10] Several legislative

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[7] *See, e.g.*, Marshall Steinbaum, The Jain Family Inst., The Student Debt Crisis is a Crisis of Non-Repayment (Nov. 2020), https://www.jainfamilyinstitute.org/assets/msd4-2020-student-debt-crisis-is-a-crisis-of-non-repayment.pdf.

[8] Cal. Rep. George Miller, *New Benefits Make Student Loan Repayment More Manageable & Affordable for Millions (Rep. George Miller)*, The Hill (Jul. 1, 2009, 11:34 AM), https://thehill.com/blogs/congress-blog/education/49207-new-benefits-make-student-loan-repayment-more-manageable-and-affordable-for-millions-rep-george-miller.

[9] *See, e.g.*, *Student Loan Servicing*, Consumer Fin. Prot. Bureau (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

[10] *See, e.g.* Press Release, U.S. Dep't of Educ., Education Department Launches 'Pay As You Earn' Student Loan Repayment Plan (Dec. 21, 2012), https://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan; Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Availability of Additional Flexible Repayment Plan to Help Borrowers Manage their

proposals have also looked at ways to improve IDR.[11] While many of these changes have merit, these changes and proposals fail to adequately address the harms borrowers have incurred: too many borrowers have been in repayment for too long, and a solution is needed to get those borrowers loan cancellation.

The current regulations—proposed and adopted incrementally by administrations of both parties—when taken together pose a significant barrier to providing relief. For example, under current regulations, cancellation is available only after 20 or 25 years of qualifying payments on the loan being cancelled, and defaulted loans are excluded from IDR. As will be described in greater detail below, this needless regulatory barrier has been made worse through widespread mismanagement by the Department of Education and abuse by the student loan industry, knocking borrowers off track and denying them access to debt cancellation through no fault of their own.

However, the authority Congress conferred on the U.S. Department of Education is much broader and provides the Department the ability under the Higher Education Act to provide relief to all these borrowers harmed by the broken student loan system. The IBR and the ICR statutes, in particular, have the flexibility to solve many of the problems that have occurred in the implementation of IDR. In fact, these statutes can be read to allow the Secretary to cancel the loans of nearly any borrower who has ever been enrolled in an IDR plan.

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As this paper will discuss, the Department can immediately provide relief to millions of borrowers who have been denied relief through IDR. Going forward, the Department can also initiate a rulemaking to ensure that the regulations take full advantage of the range of options available under the IBR and ICR statutes to prevent these problems from being barriers to cancellation in the future.

Student Loan Debt (Dec. 17, 2015), https://www.ed.gov/news/press-releases/us-department-education-announces-availability-additional-flexible-repayment-plan-help-borrowers-manage-their-student-loan-debt.

[11] See, e.g. *College Affordability Act*, Educ. & Labor Comm., https://edlabor.house.gov/the-college-affordability-act-facts; Suzanne Bonamici, *Bonamici, Mitchell, Moulton, Fitzpatrick Introduce Bipartisan Bill to Help Student Loan Borrowers Avoid Default* (July 22, 2019), https://bonamici.house.gov/media/press-releases/bonamici-mitchell-moulton-fitzpatrick-introduce-bipartisan-bill-help-student.

Problems

The design and implementation of IDR programs by the Department of Education and by the private-sector student loan companies that service these loans have created many hurdles and problems for borrowers. First, many borrowers have been steered into forbearances and away from IDR plans.[12] This is an illegal practice that could open the door to the claim that, by entering forbearance, the borrower has forfeited progress toward loan cancellation. The practice of forbearance steering has been the basis for numerous lawsuits by private borrowers, the Consumer Financial Protection Bureau (CFPB), and several state attorneys general.[13] As a New York Department of Financial Services Consent Order highlighted, borrowers were "directed into forbearance when they would have benefited from entering into IBR. This led to increased loan balances for already-struggling borrowers and cost them months of payments which could have counted towards IBR's 25-year forgiveness period."[14] Not only did those borrowers lose time towards cancellation, but as the CFPB noted in its own complaint against a different company, Navient, for similar illegal conduct:

> Enrollment in multiple consecutive forbearances imposed a staggering financial cost on this group of borrowers. At the conclusion of those forbearances, Navient had added nearly four billion dollars of unpaid interest to the principal balance of their loans. For many of these borrowers, had they been enrolled in an income-driven repayment plan, they would have avoided much or all of

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[12] *See, e.g.*, Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908 (11th Cir. 2020), Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639 (7th Cir. 2019), Hyland v. Navient Corp., No. 18CV9031(DLC), 2019 WL 2918238, at *1 (S.D.N.Y. July 8, 2019), Consumer Fin. Prot. Bureau v. Navient Corp., No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017), Complaint, Pa. v. Navient Corp., No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019), https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf; Complaint, Cal. v. Navient Corp., No. CGC-18- 19 567732 (Cal. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf; Complaint, Ill. v. Navient Corp., No. 2017-CH-00761 (Ill. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf; Complaint, Miss. v. Navient Corp., No. G2108-98203 (Miss. July 24, 2018), https://www.scribd.com/document/384612507/Navient-Complaint-Filed; Complaint, Wash. v. Navient Corp., No. 17-2- 01115-1 SEA (Wash. Jan. 18, 2017), https://www.classaction.org/media/state-of-washington-v-navient-corporation-et-al.pdf.

[13] *Supra* note 9.

[14] Vullo v. Conduent Educ. Serv., LLC, Consent Order (N.Y. Dep't of Fin. Serv. Jan. 4, 2019), https://www.dfs.ny.gov/system/files/documents/2019/01/ea190104_conduent.pdf.

> their additional charges because the government would have paid the unpaid interest on their subsidized loans in full during the first three years of consecutive enrollment.[15]

Borrowers who do attempt to access IDR also face substantial challenges. An April 2017 report by the CFPB detailed borrowers' reports of difficulty enrolling and staying in income-driven repayment plans, including processing delays, inaccurate denials, lost paperwork, and insufficient information or guidance. [16] The CFPB found certain of these practices to be illegal, taking action against a student loan servicer when borrowers routinely had IDR applications improperly denied when they were otherwise eligible to enroll in IDR.[17] Similarly, New York's Attorney General aptly described the harm these practices cause borrowers, stating in a lawsuit against the servicer known as the Pennsylvania Higher Education Assistance Authority (PHEAA):

> PHEAA's slow and error-ridden processing of IDR applications has consequences that extend beyond the financial stress it imposes on borrowers suddenly confronted with a jump in their monthly payment amounts. . . . PHEAA's mistakes in calculating payment amounts can also end up depriving borrowers of payments that would otherwise count toward IDR or PSLF forgiveness.[18]

The Department's own data bears out these harms. Department data from 2013 and 2014 show that more than half of borrowers in IDR plans did not recertify on time.[19] The National Consumer Law Center (NCLC) recently requested data from the Department of Education through the Freedom of Information Act to try to quantify how

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[15] Complaint, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_Navient-Pioneer-Credit-Recovery-complaint.pdf.

[16] *CFPB Monthly Snapshot Spotlights Student Loan Complaints*, Consumer Fin. Prot. Bureau (Apr. 25, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-monthly-snapshot-spotlights-student-loan-complaints/; *see also Consumer Fin. Prot. Bureau Finds Consumers Complain of Needless Hurdles in Applying for Lower Student Loan Payments*, Consumer Fin. Prot. Bureau (Aug. 18, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-finds-consumers-complain-needless-hurdles-applying-lower-student-loan-payments/.

[17] Press Release, Consumer Fin. Prot. Bureau, CFPB Supervision Recovers $11 Million for 225,000 Harmed Consumers (Oct 31, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-supervision-recovers-11-million-225000-harmed-consumers/ ("CFPB examiners have found that one or more servicers are regularly and illegally denying applications from qualified borrowers.").

[18] Complaint at 33-34, New York v. Pa. Higher Educ. Assistance Agency, No. 1:19-cv-09155 (S.D. N.Y. Oct. 3, 2019), https://ag.ny.gov/sites/default/files/pheaa_complaint_with_file_stamp.pdf.

[19] *See e.g.*, Sample Data on IDR Recertification Rates for ED-Held Loans, U.S. Dep't of Educ. (2015), https://www2.ed.gov/policy/highered/reg/hearulemaking/2015/paye2-recertification.pdf; and Sarah Sattelmeyer, Rich Williams, & Brian Denten, *Streamlined Data Sharing Could Help Millions Pay Back Student Loans*, Pew (Jul. 22, 2019), https://www.pewtrusts.org/pl/research-and-analysis/articles/2019/07/22/streamlined-data-sharing-could-help-millions-pay-back-student-loans.

many borrowers were missing out on IDR cancellation because of the known common problems with IDR. Unfortunately, the Department refused to answer most of NCLC's requests stating either that its systems did not allow for the type of analysis NCLC sought or that it would be unduly burdensome for the Department to produce the data.

Problems with the implementation of income-driven repayment worsen racial disparities in the student loan system. Because of decades of structural inequities and discrimination, student loans burden Black and Latinx borrowers more than other groups. For example, a recent study by the JPMorgan Institute found "significant disparities exist across racial groups in managing student debt, with Black student loan borrowers having higher student loan balances and repayment burdens and being less likely to be making progress on their loans compared to White and Hispanic borrowers."[20] A recent analysis of the Federal Reserve's Survey of Consumer Finances offers new evidence that borrowers of color struggle to benefit from IDR, even as they access this protection at higher rates than their white peers.[21] Because borrowers' payments in IDR plans are often insufficient to cover all of the interest, causing loans to negatively amortize over time, many Black and Latinx borrowers will be required to repay more over the life of their loan. Fixing this damage will repair a harm that is most acutely felt by Black and Latinx borrowers.

Solutions

The IBR and ICR statutes are much more flexible than the implementing regulations authored by past administrations would suggest. An examination of four key areas related to IDR cancellation will showcase the true flexibility of the IBR and ICR statutes:

A. Cancellation period;

B. Qualifying payments;

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[20] *Policy Brief Student Loan Debt: Addressing Disparities in Who Bears the Burden*, JP Morgan Chase & Co. Institute (Oct. 2020), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/jpmcinstitute-student-loan-debt-policy-brief.pdf.

[21] Ben Kaufman, *New Data Show Borrowers of Color and Low-Income Borrowers are Missing Out on Key Protections, Raising Significant Fair Lending Concerns*, Student Borrower Prot. Ctr. (Nov. 2, 2020), https://protectborrowers.org/new-data-show-borrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns/.

C. Types of qualifying loans; and

D. Treatment of defaulted borrowers.

After describing the full range of possibilities that exist under these statutes and the extent to which the Department of Education is currently using the most restrictive interpretation of these statutes, this paper will then propose alternative solutions permissible under the statute that will allow the Department to provide relief to the millions of borrowers who have been harmed by its failure to properly administer the IDR program.

A. Rethinking the Time to IDR Cancellation

Both the ICR statute and the IBR statute contain identical language that borrowers should be entitled to loan cancellation after "a period of time prescribed by the Secretary, not to exceed 25 years."[22] Thus both statutes can be interpreted to allow a cancellation period that is shorter than 25 years. There is no minimum cancellation period so long as the other conditions of the statutes are met.

In 2012, in establishing the PAYE repayment plan, the Department of Education demonstrated the flexibility of ICR statutory authority to create payment plans with a cancellation period shorter than 25 years.[23] The PAYE repayment plan provides cancellation after only 20 years, thus establishing the precedent that 25 years is the maximum repayment period under ICR but that it can be shortened through regulatory action.[24] Then during the REPAYE negotiated rulemaking, the Department established the precedent for using additional factors (graduate versus undergraduate debt in that case) for determining the repayment term.[25]

Importantly, the IBR statute only requires borrowers with qualifying loans to meet two conditions in order for the Secretary to repay or cancel any outstanding loan balance. Those two conditions are:

[22] 20 U.S.C §§ 1087e(d)(1)(D), 1098e(b)(7).

[23] *Negotiated Rulemaking For Higher Educ. 2011 – Team II, Student Loan Issues*, U.S. Dep't of Educ., https://www2.ed.gov/policy/highered/reg/hearulemaking/2011/loans.html.

[24] *If Your Fed. Student Loan Payments Are High Compared To Your Income, You May Want To Repay You Loans Under An Income-Driven Repayment Plan.*, Fed. Student Aid, https://studentaid.gov/manage-loans/repayment/plans/income-driven.

[25] *Negotiated Rulemaking For Higher Educ. 2014 - 2015*, U.S. Dep't of Educ., https://www2.ed.gov/policy/highered/reg/hearulemaking/2015/index.html.

1) That a borrower "at any time, elected to participate in income-based repayment"; and

2) That "for a period of time prescribed by the Secretary, not to exceed 25 years," the borrower must make qualifying payments.[26]

Notably, there is no requirement that those two conditions be met simultaneously nor does the statute explicitly state that the payments must be on the loans for which a borrower is seeking cancellation.

The conditions set forth in the ICR statute, though worded differently, functionally work the same way.[27] Borrowers must have enrolled in an ICR plan and have made some number of qualifying payments—although the requirements for qualifying payments are different from IBR, as will be discussed in the next section.[28]

The Department's current regulations which, as noted above, were implemented in phases over the course of multiple prior administrations, have implemented the most restrictive interpretation of this statutory language. In contrast, the statute itself allows the Secretary to create a repayment plan under the IBR and ICR statutes, where any borrower who has ever enrolled in either IBR or one of the three ICR repayment plans and has made a single qualifying payment could qualify for cancellation.[29]

B. The Categories of Qualifying Payments

Both the IBR and ICR statutes require that borrowers make some unspecified number of payments that fall into one of five categories. The categories enumerated in either statute are:[30]

1) Payments made while enrolled in an IBR plan, of an amount that is at least the amount required by the IDR formula or the 10-year standard plan when the borrower first chose IDR;

[26] 20 U.S.C. § 1098e(b)(7)(A), (B).

[27] 20 U.S.C. § 1087e(e).

[28] 20 U.S.C. § 1087e(e).

[29] As described below, the Secretary has routinely taken advantage of this flexibility, creating new criteria to set different benchmarks for the number of years of monthly payments needed to be eligible debt cancellation for different borrower segments. *See, e.g.*, 34 CFR § 685.209 (establishing a 25 year timeline for debt cancellation under ICR, a 20 year timeline for debt cancellation under PAYE, and both a 20 and 25 year timeline for debt cancellation under REPAYE).

[30] *See generally* 20 U.S.C. §§ 1087e, 1098e.

2) Payments while enrolled in an ICR plan;

3) Payments equal to or greater than the amount required by the 10-year standard plan when the borrower first chose IDR;

4) Payments equal to or greater than the amount required by the 10-year standard plan as calculated at some time other than when the borrower first chose IDR; and

5) Time in an economic hardship deferment.[31]

Note that the third and fourth categories specify the amount of the payment rather than the actual payment plan that the borrower is enrolled in. This could include lump sum payments or involuntary payments if the amount is more than the 10-year standard plan amount.[32]

As stated above, neither statute requires that a borrower make qualifying payments while enrolled in an IDR plan. In fact, the IBR statute doesn't even require that the qualifying payments be made on the loans that are being cancelled. The IBR statute states that "the Secretary shall repay or cancel any outstanding balance of principal and interest due on *all loans* made under part B [FFEL] or D [Direct Loan] (other than a loan under section 1078-2 of this title or a Federal Direct PLUS Loan) to a *borrower* who" participated in IBR and made qualifying payments.[33] This seems particularly useful in three different situations:

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[31] 20 U.S.C. § 1098e(b)(7).

[32] Lump sum payments have been a source of confusion for borrowers in repaying IDR. Making a lump sum payment will often result in a borrower's loan going into "paid ahead" status—meaning that the lump sum payment is applied to future payments and borrowers will not need to make payments during those months. This status notoriously caused problems in the Public Service Loan Forgiveness program because those months do not count as "qualifying payments" under that program. Under the IDR plans, these months can count towards cancellation; however, lump sum payments can not be applied to payments past the IDR anniversary or recertification date. This means that borrowers receiving loan repayment assistance, such as through the Department of Defense Student Loan Repayment Program, would receive the benefit of "paid ahead" status and could be longer or shorter depend on timing of the payment. *See e.g.,* Consumer Fin. Prot. Bureau, *Overseas & Underserved, Student Loan Servicing & The Cost To Our Men & Women In Uniform* (Jul. 2015), https://files.consumerfinance.gov/f/201507_cfpb_overseas-underserved-student-loan-servicing-and-the-cost-to-our-men-and-women-in-uniform.pdf.

[33] 20 U.S.C. § 1098e(b)(7) (emphasis added).

1) Borrowers who made qualifying payments in either the Direct[34] or FFEL program and then consolidated their loans into a new Direct Consolidation Loan and lost credit for those payments;

2) Borrowers whose servicing was split between multiple servicers and who had one set of loans in an IDR plan and another set that was not in such a plan (which may happen inadvertently or without the borrower's knowledge); and

3) Borrowers who were in an IDR plan and then went back to school and took on additional loans.

The ICR statute is less explicit on this point. It does not state that all loans should be cancelled. However, in describing the period of time that should be included, the statute directs the Secretary to "include all time periods during which a borrower of loans under part B [FFEL], part D [Direct], or part E [Perkins]."[35] Given that the ICR repayment plans are only available for Direct Loans (loans made under part D), by listing the other loan types the statute contemplates counting payments made on loans other than the ones that were in ICR.

The ICR statute does impose one additional requirement on the qualifying payments. It states that: "In calculating the extended period of time for which an income contingent repayment plan under this subsection may be in effect for a borrower, the Secretary shall include all time periods during which a borrower . . . (A) is not in default on any loan that is included in the income contingent repayment plan; and" makes qualifying payments. [36] Thus at the time that the qualifying payment is made, the borrower cannot have been in default. Issues for loans in default which include but extend beyond this restriction are covered in more detail later.

C. Which Loans Qualify for Cancellation

The IBR and ICR statutes can both be read to cancel loans other than the ones that were enrolled in the repayment plan. As described above, under the IBR statute, so long as the borrower has made some type of qualifying payment on some loan and at some point enrolled in the IBR plan on some loan, then "the Secretary

[34] According to ED data obtained through FOIA, in three quarters of FY2019, between 134,000 and 149,000 borrowers in an IDR plan consolidated their loans each quarter. Under the current IDR regulations, those borrowers will not have any IDR payments counted towards IDR cancellation. The number of FFEL borrowers who consolidated from the IBR plan is unknown.

[35] 20 U.S.C. § 1087e(e)(7).

[36] *Id.*

shall repay or cancel any outstanding balance of principal and interest due on *all loans* made under part B [FFEL] or D [Direct]" (other than a Parent PLUS Loan).[37] Thus, borrowers who have both FFEL and Direct Loans could have both types of loans cancelled under the IBR statute even if they enrolled only one of those types of loans in IBR.

The cancellation provision of the ICR statute is structured differently. Rather than discussing when loan cancellation occurs, the ICR statute authorizes cancellation by limiting the duration of the repayment plan. Conservatively, the ICR statute could be read to provide cancellation only for the loans that are in the ICR repayment plan. However, § 1087e(e)(7) which defines the maximum repayment period, explicitly includes "all time periods during which a borrower of loans under part B [FFEL], part D [Direct], or part E [Perkins]" made certain types of payments. Given that FFELP and Perkins loans are included in the repayment period, it is reasonable to infer that through the ICR statute, Congress also intended to limit the repayment period for those loans.

Both repayment statutes explicitly exclude Parent PLUS borrowers. However, both statutes are silent when it comes to consolidation loans that include Parent PLUS.[38] Notably, the IBR statute is explicit that consolidated loans that repaid a Parent PLUS loan are not eligible to be repaid under the IBR formula. However, that language is not mirrored in the cancellation provision, suggesting that these loans can be cancelled.[39]

Perkins loans do not appear to be forgivable under the IBR statute and would need a legislative solution.

D. Treatment of Defaulted Borrowers

One of the most promising and under-utilized provisions of both the IBR and ICR statutes is their flexibility for defaulted borrowers. Although the current regulations limit access to both the IBR and ICR repayment plans to borrowers in good standing, that limit actually contradicts the statutes.[40]

[37] *Id.*

[38] Arguably, the ICR statute could be read to say no one who has ever borrowed a Parent PLUS loan is eligible for the ICR plan even on non-Parent PLUS loans. However, from the ICR regulations it is clear that this is not how the Department of Education has interpreted the statute.

[39] 20 U.S.C. § 1098e.

[40] *See* 34 CFR § 685.209; 34 CFR § 685.221 (limiting access); *see contra* 20 U.S.C § 1087e; 20 U.S.C. § 1098e(b).

Neither statute contains any prohibition against defaulted borrowers benefiting from either program. The IBR statute explicitly anticipates it, stating: "a borrower . . . who has a partial financial hardship *(whether or not the borrower's loan has been submitted to a guaranty agency for default aversion or had been in default)* may elect, during any period the borrower has the partial financial hardship, to" pay the amount in the IBR formula.[41] The HEA also states, that "[t]he Secretary may require any borrower who has defaulted on a loan made under this part to . . . repay the loan pursuant to an income contingent repayment plan."[42]

However, only the IBR statute allows qualifying payments that are made while the borrower is in default to count towards cancellation. In calculating the repayment period, the ICR statute only includes "time periods during which a borrower . . . is not in default on any loan that is included in the income contingent repayment plan."[43] The IBR statute contains no such language. Thus under the IBR statute, borrowers in default can both benefit from IBR and have payments made while in default count towards cancellation so long as they are otherwise qualifying payments.

So while borrowers in default can enroll in one of the ICR plans, those ICR payments made while in default will not count towards cancellation.[44] However, as discussed in the *Rethinking the Time to IDR Cancellation* section, the requirement for cancellation is that the borrower is at some point enrolled in ICR and at some point made some number of qualifying payments, but those actions need not be simultaneous. So, for example, a borrower who was in an economic hardship deferment or made payments under the standard 10 year plan prior to defaulting on a loan, and then enrolled in ICR while in default, could theoretically meet the criteria for loan cancellation.

[41] 20 U.S.C. § 1098e(b)(1) (emphasis added).

[42] 20 U.S.C. § 1087e.

[43] 20 U.S.C. § 1087e(e)(7)(A).

[44] While outside the scope of this paper, the Department should also consider mechanisms beyond just rehabilitation and consolidation to ensure that all borrowers are able to exit default.

E. Combining the Four Cancellation Areas to Provide Relief

Given the intense financial pressures caused by the COVID-19 pandemic and the urgent need to help borrowers and the broader economy, these emergency powers offer an extraordinary opportunity to undo the mistakes made by prior administrations and deliver on the promises made by Congress.

Fortunately for borrowers, the relevant provisions of the Higher Education Act promise that student loans need not be a life-long burden. By removing unnecessary and restrictive regulatory requirements, an administration can ensure these protections live up to their intended purpose. Although rulemaking is one option to achieve this end, the Secretary also has an alternative path: on day one, the Secretary of Education can utilize the HEROES Act of 2003 to waive the current implementing regulations of the IDR plans and provide IDR cancellation to nearly all borrowers who satisfy any alternate criteria established by the Secretary. Given the intense financial pressures caused by the COVID-19 pandemic and the urgent need to help borrowers and the broader economy, these emergency powers offer an extraordinary opportunity to undo the mistakes made by prior administrations and deliver on the promises made by Congress.

The HEROES Act of 2003[45] was enacted by Congress to give the Secretary of Education the authority to grant financial and administrative relief for Americans affected by national emergencies.[46] In particular, it added emergency powers to the Higher Education Act which allow the Secretary to effect "waivers and modifications" of "any statutory or regulatory provision" applicable to Title IV Funds "as the Secretary deems necessary in connection with a . . . national emergency."[47] The HEROES Act can be used to immediately lower administrative

[45] The HEROES Act authority for the Secretary of Education initially expired on October 20, 2005. It was then extended by an act of Congress to September 30, 2007. On September 30, 2007, the President signed into law Public Law 110-93, which eliminated the expiration date on the HEROES Act, making the Secretary's authority to issue waivers and modifications permanent. Student Borrower Prot. Ctr., Protecting Military Borrowers, (Nov. 11, 2020), https://protectborrowers.org/wp-content/uploads/2020/11/Protecting-Military-Borrowers_SBPC.pdf.

[46] "This bill is specific in its intent to ensure that as a result of a . . . national emergency our men and women are protected. By granting flexibility to the Secretary of Education, the HEROES Act will protect recipients of student financial assistance from further financial difficulty generated when they are called to serve, minimize administrative requirements without affecting the integrity of the programs, adjust the calculation used to determine financial need to accurately reflect the financial condition of the individual and his or her family, and provide the Secretary with the authority to address issues not yet foreseen." 108 Cong. Rec. H2524 (daily ed. Apr. 1, 2013) (statement of Rep. Kline), https://www.congress.gov/congressional-record/2003/04/01/house-section/article/H2522-5.

[47] 20 U.S.C. § 1098bb.

hurdles and automate a one-time administrative action to cancel student debt owed by borrowers previously delayed, denied, or derailed when seeking IDR.

The COVID-19 pandemic is an unprecedented crisis that is wreaking financial havoc on millions of student loan borrowers. Debt cancellation is the best way to protect them now and ensure that they recover along with the economy. Senate Minority Leader Chuck Schumer, Senator Elizabeth Warren, and their colleagues recently introduced a resolution that called upon the next President to use existing executive authority to cancel up to $50,000 of federal student loan debt for each borrower. This relief is badly needed.

Over and above any broad-based debt cancellation implemented by a new administration, the Secretary should use the authorities described in this paper to overhaul the framework for IDR. In doing so, the Secretary should prioritize steps to grant immediate, automatic debt relief to borrowers who satisfy criteria that indicate prolonged financial hardship. The following discussion offers a framework to set these criteria in a manner that prioritizes the needs of low-income student loan borrowers and borrowers who have been harmed by abuses in the current, broken student loan system. To restore the promise of IDR, a new administration should:

- **Immediately grant automatic credit for borrowers with a history of financial hardship and cancel student debt for those who qualify.** As described above, the Secretary has wide latitude to determine what past characteristics a borrower must exhibit in order to be granted credit towards loan forgiveness under IDR. Using the waiver provision of the HEROES Act in conjunction with an information sharing arrangement with the Secretary of the Treasury and the Internal Revenue Service, the Department can automatically, retroactively enroll borrowers in IDR and assess which federal student loan borrowers had income characteristics that would qualify for credit toward cancellation. For borrowers who do not immediately meet the criteria for total cancellation, the Department should determine the total, cumulative amount owed by the borrower over the entire period during which the borrower has been in repayment, had the borrower been enrolled in the most generous income-driven repayment option available,[48] compare it to the total paid by the borrower over this period, and immediately grant credit to those borrowers with the equivalent number of qualifying payments to count towards eventual cancellation, putting them on a better path for recovery after the national emergency. The HEROES

[48] Under current regulations, this would be 10% of a borrower's discretionary income. If a new administration wished to create a more generous option, that option should serve as the baseline for the purpose of this evaluation.

waiver process can also be used to waive the prohibition on Parent PLUS loans and defaulted loans, allowing those loans to be analyzed using this process.

- **Grant complete relief for borrowers harmed by the broken student loan system.** Because, as discussed previously in this paper, Congress only required that a borrower make a single income-driven payment for the Secretary to cancel an eligible loan, a new administration has broad discretion to determine what criteria indicate financial hardship and through what process relief is granted. In addition to providing the automatic relief described above, the Secretary should waive the current IDR regulations and still utilize the statute to provide full loan cancellation of the loans of millions of borrowers who have been harmed through the failures of a broken and often abusive system. These actions can ensure that IDR lives up to the promises made by Congress in the moment where borrowers need this relief the most. A non-exhaustive list of borrowers who should be granted full cancellation immediately includes borrowers who were previously enrolled in an IDR plan at any point and who also meet either of the following criteria:

    - **Borrowers whose history demonstrates financial distress**. The Department should look for characteristics that demonstrate that borrowers have experienced long-term distress to target for immediate loan cancellation, for example whether the borrower is or has been in default, has been in a $50 or smaller IDR plan for three or more years, has been in an economic hardship or unemployment deferment or forbearance for two or more consecutive years, or has used an economic hardship or unemployment deferment or forbearance over a total period of three or more years[49]; or

    - **Borrowers who have been victim to abusive or otherwise illegal practices.** We know that abusive or otherwise illegal practices were widespread, but affected borrowers remain hard to identify in a comprehensive manner. Therefore, we should immediately cancel the loans of borrowers who demonstrate characteristics similar to those who have experienced these abusive or illegal practices including borrowers who had loans serviced by ACS/Xerox,[50] consolidated their loans after

[49] Readers should note that these criteria are not intended to be exhaustive. As policymakers consider efforts to broaden access to debt cancellation under IDR, they should consider and pursue criteria that indicate long term financial distress beyond those outlined in this paper.

[50] Until 2009, all Direct Loans were serviced by a single Direct Loan servicer, ACS (Xerox). In 2012, ACS's contract was terminated by the Department of Education and by 2013 its portfolio of 35 million student loans was transferred to other federal loan servicers. An investigation by American Federation of Teachers (AFT) and the Student Borrower Protection Center (SBPC) uncovered previously unpublished correspondence

enrolling in IDR, or have been in an economic hardship or unemployment deferment or forbearance for two or more consecutive years, or have used an economic hardship or unemployment deferment or forbearance over a total period of three or more years.[51]

All borrowers who satisfy the requirements identified above should be a priority for debt cancellation in a new administration, but a reimagining of the IDR cancellation regime need not be limited to these borrowers. The next administration should immediately seek input from key stakeholders including individual borrowers, borrower advocates, and state and federal regulators to identify additional categories of borrowers to receive IDR cancellation. As part of this process, the Department should ensure that this action provides relief to all borrowers who never accessed IDR because they were never advised of the option to use IDR and/or were steered away from the plans into other plans or costly forbearances and deferments.

Targeting relief to a subset of borrowers has inherent problems; it is administratively complicated, and, more importantly, any cutoffs will ultimately be arbitrary and will never be able to capture all of the borrowers who have been harmed or who need the relief. More universal debt cancellation options are critically needed. As demonstrated above, these statutes can be read to allow the Secretary to cancel the total loan balance of nearly any borrower who has ever been enrolled in an IDR plan.[52] Using the process described above, the Department could retroactively enroll borrowers (including Parent PLUS borrowers) into IDR and cancel those loans as well.

- **Implement prospective reforms to build a fairer, more accessible income-driven repayment scheme.** The Secretary should also look beyond the pandemic to both fix the systemic failures that have plagued the IDR program and ensure that the program retains the flexibility to provide relief to borrowers when problems do arise. To this end, in addition to the immediate action to cancel student debt through

among student loan servicers, the Department of Education, and the United States Senate revealing that millions of the loan files transferred from ACS contained widespread, costly flaws, hindering or delaying borrowers' access to programs such as IDR. *See* Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs. Broken Promises: The Untold Failures of ACS Servicing (Oct. 2020), https://protectborrowers.org/wp-content/uploads/2020/10/Broken-Promises_ACS.pdf.

[51] Because steering borrowers experiencing financial hardship into deferments or forbearances is a well-documented practice, these borrowers fit into both categories.

[52] The total number of borrowers who could be expected to receive cancellation through total IDR cancellation is unknown but large. The latest data released by the Department of Education show 8.97 million borrowers with Department held loans currently enrolled in an IDR plan.

IDR, the Department of Education should initiate a negotiated rulemaking to revise the IDR regulations to take full advantage of the range of options available under the IBR and ICR statutes.

At minimum, new regulations should be driven by the same principles outlined above—expanding access to IDR for all borrowers and simplifying eligibility for payment relief and debt cancellation at every step. To achieve these ends, such regulation should, at minimum, ensure IDR access for defaulted borrowers, ensure that any amounts taken through wage garnishment or the Treasury Offset Program are calculated using the IDR formula and that those payments count as qualifying payments, count qualifying payments made prior to loan consolidation, shorten the cancellation period for all borrowers, provide a shorter cancellation period for borrowers who receive public assistance, ensure that borrowers are not harmed by servicer delays and processing errors by counting any time borrowers are placed in administrative forbearances as qualifying payments, and provide a catch-all provision that will shorten any repayment period by any amount of time that a borrower was steered or improperly advised to use a non-IDR repayment plan.

Although outside of the scope of this paper, any negotiations on a new IDR plan should also revise the repayment amount to ensure that repayment truly is affordable. The new administration should also work with Congress to ensure that Parent PLUS borrowers have access to affordable repayment programs.

Conclusion

The fact that years after the implementation of REPAYE fewer than 20 borrowers who have qualified for cancellation demonstrates that IDR has failed to deliver on the promise of an affordable repayment plan without a lifetime of debt. Providing relief to borrowers who have been harmed by the failed implementation of the income-driven repayment program is essential.

As has been discussed throughout this paper, the Department has the authority to cancel the debt of all of the borrowers who have accessed income-driven repayment. Because the law already permits

The fact that years after the implementation of REPAYE fewer than 20 borrowers who have qualified for cancellation demonstrates that IDR has failed to deliver on the promise of an affordable repayment plan without a lifetime of debt.

the so-called “cancellation period” to be as little as a single monthly payment, the Secretary has wide authority to cast aside the restrictive and outdated requirements imposed by prior administrations and create an emergency IDR framework that credits borrowers for a wide range of characteristics that signal past and present financial hardship, consistent with the intent of the IDR statute. As a result, the Secretary has a blank slate to seize the opportunity presented by the pandemic and cancel student debt. Specifically, the Department has the authority to:

- Broaden the types of qualifying payments that are counted to include payments made prior to loan consolidation or made on loans not included in the IDR plan;
- Provide cancellation of all Direct and FFEL program loans held by a borrower who qualifies for cancellation of any loan (except Parent PLUS loans); and
- Give borrowers in default on their loans access to IDR and count payments made while in default towards cancellation.

Much of the harm that abusive servicing and implementation failures have caused can be alleviated through a more aggressive use of the authority provided by the IBR and ICR statutes. Moving forward, these statutes can be utilized to create a system that is more inclusive and provides borrowers with the loan relief they need.

RELIEF FOR BORROWERS WITH DISABILITIES

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Introduction

Millions of people with disabilities in the United States take out loans to pursue postsecondary education—many took out loans before the onset of their disability or before an element of their disability began to interfere with their capacity to work. But when an individual's disability prevents them from earning a meaningful income, looming student loan debt is an acute burden—in addition to managing a condition that often involves increased long-term medical costs, borrowers must also somehow manage student loan debt or, in some cases, risk seizure of their disability benefits.[1] In 1965, Congress took action to assist student loan borrowers with disabilities and created the total and permanent disability (TPD) discharge process that allows them to discharge their federal student loans.[2]

TPD discharge is available to people who become "permanently and totally disabled" which is further defined as "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, has lasted for a continuous period of not less than 60-months, or can be expected to last for a continuous period of not less than 60-months."[3] This standard is based on the Social Security Administration (SSA) disability determination process,[4] but it is not enough for a person to meet SSA's disability standard; under the durational requirements of the TPD statute, borrowers must continuously meet SSA's disability standard for 60 months rather than the 12 months under the Social Security Act. TPD discharge is also available to veterans who have "been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected condition."[5] Many veterans with disabilities may not have *service-connected* disabilities but are still eligible for TPD discharge because they receive Social Security

[1] 31 U.S.C § 3716.

[2] Higher Education Act of 1965, § 430, 20 U.S.C § 1087(a).

[3] 20 U.S.C. § 1087(a)(1).

[4] 42 U.S.C. § 423(d)(1)(A).

[5] 20 U.S.C. § 1087(a)(2).

disability benefits for non-service-connected disabilities and meet the durational requirement to be eligible for loan discharge, or because their physicians certify them as meeting the disability standard.[6]

When borrowers successfully navigate the discharge process, they are subject to lengthy three-year monitoring periods and excessive paperwork burdens not required by statute that result in nearly 60 percent of loans being reinstated. When borrowers cannot navigate the byzantine discharge process, they risk having their disability benefits seized, potentially driving them further into poverty.

Unfortunately, access to TPD discharge remains an illusory protection for too many. In implementing the statute, the Department of Education (ED) narrowed the scope of TPD discharge beyond the statutory eligibility established by Congress.[7] ED also created a series of unnecessary bureaucratic hurdles which deny this critical relief to the very borrowers the statute is intended to protect.[8] To date, the overly restrictive and narrow implementation of the discharge process has denied debt relief to hundreds of thousands of eligible borrowers with disabilities.[9] When borrowers successfully navigate the discharge process, they are subject to lengthy three-year monitoring periods and excessive paperwork burdens not required by statute

[6] In 2018, over 9 million veterans received Social Security benefits—either retirement or disability—accounting for 18 percent of all adult beneficiaries. Soc. Sec. Admin., *Research, Statistics & Policy Analysis: Population Profiles, Veteran Beneficiaries* (2019), https://www.ssa.gov/policy/docs/population-profiles/veteran-beneficiaries.html.

[7] 34 C.F.R. § 685.213.

[8] 20 U.S.C. § 1087(a) ("The Secretary may develop such safeguards as the Secretary determines necessary to prevent fraud and abuse in the discharge of liability under this subsection."); *but see infra* note 10.

[9] Under the statute, anyone who has been receiving SSA disability benefits (including Supplemental Security Income, Social Security Disability Insurance, and other Title II programs) for 60 months should be eligible for discharge. Under the considerably more narrow documentation requirement detailed by ED, this would cover over 350,000 borrowers. Office of the Inspector Gen., Social Security Administration Beneficiaries Eligible for Total and Permanent Disability Federal Student Loan Discharge (Nov. 2020), https://www.oversight.gov/sites/default/files/oig-reports/A-06-17-50281.pdf [hereinafter "2020 OIG Report"]; Press Release, U.S. Dep't of Educ., U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities (Apr. 12, 2016), https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities ("Approximately 387,000 borrowers were positively identified in the first set of matches which were conducted in December 2015 and March 2016. In total, these borrowers have a combined loan balance of over $7.7 billion, and roughly 179,000 are currently in default.").

that result in nearly 60 percent of loans being reinstated.[10] When borrowers cannot navigate the byzantine discharge process, they risk having their disability benefits seized, potentially driving them further into poverty.[11]

The problems borrowers face in accessing TPD discharge are so egregious that lawmakers from both parties have repeatedly engaged in efforts to fix the process. In response to Congressional pressure in 2016, ED, the Department of Veterans Affairs (VA), and SSA used data sharing to conduct outreach to eligible borrowers.[12] Unfortunately, very few of these eligible borrowers actually applied for relief, likely because their lack of knowledge of the TPD program and, for those who became or were aware, the complex and unnecessary administrative hurdles.

Recent efforts to automate discharge have been more successful. In 2018, a bipartisan group of U.S. Senators called upon ED to take immediate action to identify and discharge student debt for veteran borrowers with service-connected disabilities.[13] Following pressure from the attorneys general of more than 50 states and territories,[14] an executive order from the President,[15] and additional Congressional pressure,[16] ED automatically discharged debt for hundreds of thousands of VA beneficiaries eligible for TPD.[17] In late November 2019, ED issued an interim final regulation "to amend and update the regulations for total and permanent disability student loan discharge for veterans by removing administrative burdens that may have prevented at least 20,000 totally and permanently disabled veterans from obtaining discharges of their student loans."[18] The rule acknowledged

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[10] U.S. Gov't Accountability Off., Report to Congressional Requesters: Social Security Offsets, Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief (2016), https://www.gao.gov/assets/690/681722.pdf [hereinafter 2016 GAO Report].

[11] *See infra* note 24.

[12] Press Release, U.S. Dep't of Educ., *supra* note 9.

[13] Letter from U.S. Senator Chris Coons et al. to Sec'y of Educ. Betsy DeVos et al. (Feb. 15, 2018), https://www.coons.senate.gov/imo/media/doc/2018-02-15%20VA%20ED%20SSA%20letter.pdf.

[14] Letter from Nat'l Ass'n of Attorneys General to Sec'y of Educ. Betsy DeVos (May 24, 2019), https://attorneygeneral.utah.gov/wp-content/uploads/2019/05/NAAG-Letter-to-Sec.-DeVos.pdf.

[15] Presidential Memoranda, Discharging the Federal Student Loan Debt of Totally and Permanently Disabled Veterans (2019), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-discharging-federal-student-loan-debt-totally-permanently-disabled-veterans/.

[16] Letter from U.S. Senator Chris Coons et al. to Sec'y of Educ. Betsy DeVos et al. (Feb. 15, 2018), https://www.coons.senate.gov/imo/media/doc/2018-02-15%20VA%20ED%20SSA%20letter.pdf.

[17] 84 Fed. Reg. 228, 65,000 (Nov. 26, 2019), https://www.govinfo.gov/content/pkg/FR-2019-11-26/pdf/2019-25813.pdf.

[18] *Id.*

that the TPD application process "continues to be a barrier that creates significant and unnecessary hardship" for borrowers and indicated that ED would use their existing data sharing arrangement with the VA to automatically discharge all remaining debt for veterans receiving VA disability benefits.[19] Borrowers also had the choice to opt out of the discharge if they desired.[20] Student loan debt for thousands of veterans was discharged.[21]

But this automation has not been extended to the hundreds of thousands of borrowers who rely on SSA disability benefits and ED's actions have been wholly insufficient to address the tremendous burdens it has placed on *all* borrowers eligible for TPD discharge under the statute. Although these borrowers are entitled to a discharge under the statute, ED has undercut relief through unnecessarily rigid regulatory demands and bureaucratic barriers. Piecemeal efforts to improve the process for limited segments of borrowers are not enough. ED should take immediate steps to ensure that all people with disabilities who meet the stringent disability standard set forth by Congress have their loans discharged as automatically and easily as possible.

Problems

Borrowers with total and permanent disabilities face a wide range of obstacles that deny them access to critical protections guaranteed by law. These problems span every part of the TPD discharge process, from qualifying for discharge, to navigating the application process, to satisfying the post-discharge monitoring period.[22] Because of the monitoring period, *a creation of regulation not mentioned in the statute*, the entire discharge process will take years for most borrowers and will require regular submission of burdensome and complex paperwork and maintenance of a stable address to which notices can be sent.[23] People with disabilities live in poverty at twice

[19] *Id*. at 65,002.

[20] *Id*.

[21] Press Release, U.S. Dep't of Educ., *supra* note 9.

[22] *See* Consumer Fin. Prot. Bureau, Snapshot of Older Consumers and Student Loan Debt 13 (2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf ("The number of borrowers age 65 and older who had their Social Security benefits offset to repay a federal student loan increased from about 8,700 to 40,000 borrowers from 2005 to 2015. Social Security benefits are the only source of regular retirement income for 69 percent of beneficiaries age 65 and older.") (footnote omitted).

[23] Borrowers with a service-connected disability who submit VA documentation are exempt from the monitoring period.

the rate of non-disabled people,[24] and poverty creates substantial barriers to obtaining electronic or paper forms which would require access to a computer.[25] Poverty also creates heightened risk of housing instability that in turn leads to specific issues for the monitoring program.[26]

Legal or other assistance is generally not available to people with disabilities to assist with TPD loan discharges.[27] There are hundreds of thousands of individuals with work-limiting disabilities attempting to navigate this broken system. Legal aid resources are always strained to the breaking point and the protection and advocacy system for people with disabilities does not have specific funding to do this work—let alone to accommodate it on a wide scale. This lack of resources often leaves people to struggle through the process on their own without the necessary assistance.[28]

A. Qualifying for TPD Discharge

As previously discussed, Congress has always intended for disability discharge to be available to any borrower who is "unable to engage in any substantial gainful employment" for a period of 60 months.[29] Maintaining access to disability discharge is a vital economic protection for people with long-term, extremely work-limiting disabilities. Given the high rates of poverty for people with disabilities,[30] as well as the increased health care

[24] Nat'l Council on Disability, National Disability Policy: A Progress Report (2017), https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf ("[P]eople with disabilities live in poverty at more than twice the rate of people without disabilities (29 percent compared to 12 percent).").

[25] Monica Anderson & Madhumitha Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption*, Pew Research Ctr. (May 7, 2019), https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.

[26] Gina Schaak et al., *Priced Out: The Housing Crisis for People with Disabilities*, Technical Assistance Collaborative, Inc. (Dec. 2017), http://www.tacinc.org/media/90970/priced-out-in-2016.pdf.

[27] Legal Services Corp.: America's Partner for Equal Justice, *The Unmet Need for Legal Aid*, https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid.

[28] *See, e.g.*, Kathryn Joyce, *No Money, No Lawyer, No Justice*, The New Republic (June 22, 2020), https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice.

[29] 20 U.S.C. § 1087(a)(1).

[30] Diane Morris, *Combatting Poverty in the Disability Community*, Relias (Jan. 15, 2020), https://www.relias.com/blog/combatting-poverty-in-the-disability-community.

expenses experienced by all people with disabilities and otherwise elevated costs of living,[31] it is particularly important that the TPD discharge process work well and ease the severe financial strain on people with disabilities posed by student loan debt.[32] Unfortunately, ED imposed unduly restrictive and unnecessarily cumbersome requirements to qualify for TPD discharge. The regulations narrowly construing acceptable documentation of disability from SSA confuse borrowers with disabilities and result in loan discharge denials for many individuals with disabilities who clearly meet the statutory requirements.

The regulations narrowly construing acceptable documentation of disability from SSA confuse borrowers with disabilities and result in loan discharge denials for many individuals with disabilities who clearly meet the statutory requirements.

Much of this confusion stems from ED's decision in the 2012 regulations to equate SSA's method of determining the timing of reviews with the statutory durational requirement.[33] Once an individual has been found to be disabled and eligible for disability benefits, SSA assigns a disability review period based on the beneficiary's likelihood of improvement—including a five-to-seven year review period that is assigned to beneficiaries who are unlikely to improve called the Medical Improvement Not Expected (MINE) diary review category.[34] These review categories are not an accurate measure of how long a particular individual's disability lasts. Rather, they are an effort to determine when SSA should review the records to see if an individual has regained any functionality and, because it is simply a review, are often skewed extremely narrowly to prevent fraud. For example, a Government Accountability Office (GAO) analysis found that only five percent of beneficiaries in the Medical Improvement Expected (MIE) diary category, two levels below the MINE level,[35] had actually undergone medical improvement to the point of being able to

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[31] Sophie Mitra et al., *Extra Costs of Living with a Disability: A Review and Agenda for Research*, Disability and Health Journal (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967775.

[32] Scott Fullwiler, Stephanie Kelton, Catherine Ruetschlin, and Marshall Steinbaum, Levy Econ. Inst. of Bard College, The Macroeconomic Effects of Student Debt Cancellation (Feb. 2018), www.levyinstitute.org/pubs/rpr_2_6.pdf.

[33] 34 C.F.R. § 685.213(b)(2)(ii); *see* 84 Fed. Reg. 228, 65,000 (Nov. 26, 2019) (regulatory discussion in the Final Rule).

[34] 20 C.F.R. § 404.1590 ("If your disability is considered permanent, we will review your continuing eligibility for benefits no less frequently than once every 7 years but no more frequently than once every 5 years.").

[35] There are three diary categories under current regulation, MIE, Medical Improvement Possible (MIP), and MINE. Each requires review after a certain number of years, but none are evidence that a particular individual has had a disability under the SSA definition for at least 5 years. *DI 26525.001 Scheduling Continuing Disability Reviews (CDRs)*, Social Security Program Operations Manual System (POMS), https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525001.

work again upon their review.[36] To be placed in the MINE category indicates that the person has a long-term, extremely work-limiting disability that is very unlikely to medically improve, but MINE is extremely underinclusive of all SSA beneficiaries with disabilities for 60 months or more.[37]

As a result of ED's misunderstanding of the purpose of diary categories and inexplicable decision to only accept SSA documentation from beneficiaries categorized as MINE, many beneficiaries who meet the statutory TPD standard are not currently considered eligible for discharge on the basis of SSA data. Indeed, the SSA Office of Inspector General has identified an additional "648,000 Federal student loan borrowers receiving Disability Insurance benefits" who may or may not have met the statutory durational requirement.[38] This is likely an undercount since it is limited to just SSA Title II disability insurance and does not include some of the lowest income SSA disability beneficiaries who only receive payments under the SSI program.

In addition, as SSA's own Inspector General has noted, ED's requirements for documentation of disability do not align with the way the SSA benefits are administered. One example is that when an SSA beneficiary reaches full retirement age,[39] disability benefits are converted to retirement benefits, creating an added set of obstacles for the borrower to easily demonstrate an existing disability.[40] Borrowers face significant difficulty in trying to obtain proof of disability after they reach full retirement age,[41] often resulting in their loans being reinstated.[42]

Limiting student loan relief to SSA recipients who can produce documentation that were coded as MINE inappropriately eliminates eligibility for numerous individuals whose SSA information unquestionably

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[36] U.S. Gov't Accountability Off., Report to the Chairman, Subcommittee on Social Security, Committee on Ways and Means, House of Representatives: Social Security Disability, Reviews of Beneficiaries' Disability Status Require Continued Attention to Achieve Timeliness and Cost-Effectiveness, at 18 (2003), https://www.gao.gov/new.items/d03662.pdf.

[37] U.S. Gov't Accountability Off., Clear Guidance Could Help SSA Apply the Medical Improvement Standard More Consistently (Oct. 2006), https://www.gao.gov/new.items/d078.pdf (noting that 1.4 percent of all the people who left disability insurance over a 6 year span did so because SSA found that they had improved medically, suggesting that the vast majority of claimants' disabilities are long-term).

[38] 2020 OIG Report, *supra* note 9.

[39] This age is between 66 and 67 depending on a beneficiary's date of birth. *Learn about Retirement Benefits*, Soc. Sec. Admin., https://www.ssa.gov/benefits/retirement/learn.html#:~:text=The%20full%20retirement%20age%20is,are%20payable%20at%20age%2067.

[40] 2020 OIG Report, *supra* note 9.

[41] Consumer Fin. Prot. Bureau, Snapshot of Older Consumers and Student Loan Debt (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf. SSA OIG identified over 40,000 beneficiaries who had converted from disability to retirement benefits who had not been included in SSA and ED data sharing. 2020 OIG Report, *supra* note 9 at 3.

[42] *See infra* text accompanying notes 51-61. 2016 GAO Report, *supra* note 10 ("[T]he vast majority—95 percent—of defaulted borrowers age 65 and older received retirement or survivor benefits in fiscal year 2015.").

A recent OIG report indicates there are more than a million SSA disability beneficiaries who have federal student loan debt, but only 400,000 were identified as being in the MINE category by SSA in 2019.

demonstrates that they meet the statutory requirements for discharge. This presents a problem of considerable size. A recent OIG report indicates there are more than a million SSA disability beneficiaries who have federal student loan debt, but only 400,000 were identified as being in the MINE category by SSA in 2019.[43]

ED must act to better identify and provide loan relief for SSA disability beneficiaries whose SSA records demonstrate that they meet the statutory standard.

B. Applying for Discharge

The disability discharge application process is also challenging. Under the current regulatory scheme, most borrowers apply for disability discharge online or via a paper form.[44] Borrowers must provide either a physician's certification that they meet the statutory requirements or they can provide documentation from the Social Security Administration (SSA)[45] or the Department of Veterans Affairs (VA).[46] Once the application is received, ED will suspend the borrower's loan payments for 120 days.[47] Following approval of an application, if the borrower provided a physician's certificate or documentation from SSA, the borrower is subject to a three-year post-discharge monitoring period.[48] Borrowers whose loans are discharged because they receive service-connected VA disability benefits are not subject to the monitoring period. Borrowers subject to the monitoring period, however, are required to submit regular earnings reports to ED during the monitoring period. Only if the

[43] 2020 OIG Report, *supra* note 9.

[44] 34 C.F.R. § 685.213(b); *see also*, OMB No. 1845-0065. Currently, Nelnet handles all TPD applications for ED.

[45] Before 2013, borrowers needed to prove a total and permanent disability through either a VA rating or documentation by a licensed physician. In 2013, ED amended the regulations to allow a limited group of disabled student loan borrowers to use documentation from SSA as proof of disability. However, this new process did not improve access to discharge. By 2016, nearly 420,000 borrowers with TPD had not accessed loan discharge. By 2019, this number still hovered above 400,000. 77 Fed. Reg. 212, 66,087 (Nov. 1, 2012), https://www.govinfo.gov/content/pkg/FR-2012-11-01/html/2012-26348.htm.

[46] *Id.*

[47] 34 C.F.R. § 685.213(b)(1)(ii).

[48] 34 C.F.R. § 685.213(b)(7).

borrower meets all of these requirements—the application, documentation, and monitoring period—will the loans be permanently discharged. If the borrower misses any of these requirements, or if a servicing breakdown affects the borrower's paperwork, the loans will be reinstated.[49] That is exactly what has happened to thousands of applicants.[50]

This extensive and burdensome process is particularly difficult for people with disabilities who meet the TPD standard. By definition, people with disabilities eligible for TPD have long-term, extremely work-limiting disabilities. Many of the same skills required to work are skills that are required to successfully discharge loans. To obtain a loan discharge, borrowers must first learn or be told about the program. They must gather information; work with their physician, SSA, or VA to obtain documentation dated within the past 90 days; and fill out a complex government form.

Because of ED's regulatory choices to limit acceptable SSA documentation to MINE notices, many other beneficiaries who could easily establish that they met the 60-month durational requirement necessary to obtain a TPD discharge cannot do so. Under the current regulations, a beneficiary who has been receiving disability benefits for 15 years but who is not categorized by SSA as being in the MINE diary category would be required to seek out a physician and obtain a certification to have their loans forgiven. This requirement duplicates the disability assessment process of SSA and stands in opposition to simpler alternatives, such as the option for ED to engage in a data matching process with SSA (the agencies have had a data sharing arrangement since 2015).[51]

The application process is not accessible to the people it is intended to help. ED must simplify and automate the process as much as possible. Additionally, ED should take comprehensive action to ensure that borrowers who were previously harmed by this process receive access to this critical relief.

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[49] 2016 GAO Report, *supra* note 10 (including data on reinstatement due to paperwork failures).

[50] *Id.*

[51] 2020 OIG Report, *supra* note 9 (discussing long term data sharing arrangement).

C. Post-Discharge Monitoring Period

The regulatory monitoring period created by ED creates extensive burdens on people with disabilities that are not required by statute. During the monitoring period, borrowers may have their loans reinstated if they 1) earn more than approximately $17,000 in income;[52] 2) receive a change in review period from the SSA; or 3) take out a new federal student loan.[53] Notably, this income requirement is a duplicative and unnecessary replication of the current rigorous requirements that people receiving SSA disability benefits must satisfy to continue receiving benefits.[54] As discussed above, review categories are not a statutory eligibility requirement and are overly narrow and ineffective. And while ED can take whatever fraud prevention steps it deems necessary to prevent people with disabilities who have had loans discharged from taking out additional loans, this requires no action on the part of borrowers.

The statute permitting disability discharges requires no monitoring period. In fact, in creating the monitoring period, ED seems to have misunderstood their authority. SSA determines if someone is disabled. ED may determine if an individual has been disabled under SSA's criteria for 60 months, but when SSA has already made the disability determination, ED has no authority (let alone expertise) to determine whether or not someone is "sufficiently" disabled. Congress explicitly referenced SSA's disability standard as a basis for TPD discharge—the only addition was a durational requirement—and ED's regulations should recognize this intent. Congress did authorize the Secretary of Education to install safeguards to prevent "fraud and abuse" in the discharge process such as ensuring that loans are not issued to those who have had previous loans discharged.[55] But if an individual has been eligible for SSA disability benefits for 60 months or a physician has certified that their condition as meeting that standard, no additional evidence should be required.[56]

[52] Based on poverty guideline for family of 2. U.S. Dep't of Health & Hum. Services, Poverty Guidelines (2020), https://aspe.hhs.gov/poverty-guidelines.

[53] 34 C.F.R. § 685.213(b)(7)(i).

[54] To be eligible for SSA disability benefits, people with disabilities cannot have income above $1,260 per month or $15,120 per year (in 2020, the number is slightly adjusted for inflation every year). *Whats New In 2020*, Soc. Sec. Admin, https://www.ssa.gov/redbook/newfor2020.htm#:~:text=Substantial%20Gainful%20Activity%20(SGA),Decide%20If%20You%20Are%20Disabled.

[55] 20 U.S.C. § 1087(a)(1).

[56] Borrowers who are approved for TPD based on a Veterans Administration determination are not subject to the post-discharge monitoring period. *3-Year Post-Discharge Monitoring Period*, Fed. Student Aid, https://disabilitydischarge.com/MonitoringPeriod (last accessed Nov. 21, 2020); 34 C.F.R. § 685.213(b)(7)(i).

Not only has ED misconstrued its authority, but monitoring periods require documentation that is not readily available for many and borrowers must provide this documentation multiple times over the course of three years.[57] As mentioned above, this documentation is duplicative of information tracked by SSA. In addition, the monitoring period requires borrowers to have a stable address and an ability to respond promptly to complex requests. People with disabilities face increased housing instability, and many rely on assistance to be able to respond to complex governmental paperwork because of their disability. Maintaining eligibility when faced with onerous documentation requirements is particularly challenging for people with cognitive or mental health disabilities.[58]

The burdensome monitoring period is particularly concerning because if borrowers fail to submit the appropriate paperwork or miss a piece of mail that they needed to respond to during the monitoring period, their loans can be reinstated. If someone has moved and their address has changed, they may remain unaware of the reinstatement of their loans, and the loans may enter default, leaving many people with disabilities eventually owing more than they owed before they applied for discharge of the loans.[59]

While Social Security disability benefits are largely exempt from debt collection for private debts, federal law authorizes the attachment of federally guaranteed student loan debt.[60] The statute provides a very meagre exemption of $750 a month ($9,000 for a 12-month period).[61] This exemption is static and not adjusted for inflation. Notably, it is even lower than the current federal Supplemental Security Income (SSI) amount, a program for the lowest income people with disabilities who are exempt from the same kind of debt attachment

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[57] 34 C.F.R. § 685.213(b)(7).

[58] Judge David L. Bazelon Center for Mental Health Law, *Making the Connection: Meeting Requirements to Enroll People with Mental Illnesses in Healthcare Coverage* (June 2014), https://nationaldisabilitynavigator.org/wp-content/uploads/resources-links/Bazelon_Making-the-Connection.pdf.

[59] *See, e.g.*, Consumer Fin. Prot. Bureau, Consumer Complaint No. 2710464, https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/2710464 ("I began receiving [Social Security Disability] benefits. . . . Soon afterwards I applied for a discharge of my (FFELP) loan based on total & permanent disability . . . . I recieved noticed (XX/XX/XXXX) that my application had been received & was complete. . . . . The next notice regarding my student loan is dated XX/XX/XXXX & indicated that the Dept of Education intended to collect my defaulted student loan by Treasury Offset of my monthly XXXX XXXX XXXX benefit. I requested a hearing in this decision & received notice stating that in XX/XX/XXXX Nelnet approved application for disability discharge, but had reinstated the loan in XX/XX/XXXX due to not receiving required documents during the 3 year post-discharge monitoring period. As previously stated, I did not receive any communication from Nelnet or the Dept of Education . . . . After numerous phone calls I was informed by Nelnet that the 3-yr post discharge documents had been mailed to the address where I resided 18 yrs ago (XX/XX/XXXX). I have moved 5 times in the past 18 years. I have lived at my current address since XX/XX/XXXX, which is the address where the the XXXX XXXX notice regarding my XXXX discharge application was mailed to.").

[60] 31 U.S.C. § 3716.

[61] *Id.*

now allowed for Social Security benefits and is below 75 percent of the 2020 federal poverty level for one person.[62] Unfortunately, Social Security disability beneficiaries whose income is far below the federal poverty level are subject to the attachment of student loan debt. A recent Office of the Inspector General report found that "from May 2016 to November 2019, [ED] used Treasury offset to collect approximately $20.3 million from 20,740 SSA beneficiaries that both SSA and ED agree are eligible for relief even under the current overly restrictive rules and will collect an additional $5.7 million from these beneficiaries over a 12-month period."[63] Collecting payments from people who ED already knows are eligible for TPD discharge of their loans is completely unacceptable.

A recent Office of the Inspector General report found that "from May 2016 to November 2019, [ED] used Treasury offset to collect approximately $20.3 million from 20,740 SSA beneficiaries that both SSA and ED agree are eligible for relief . . .

Solutions

The Secretary of Education can and should take immediate action to discharge student loans for borrowers eligible for TPD discharge and take steps to improve access to this protection for future borrowers, including automatically discharging loans for all SSA disability benefits recipients who meet the statutory TPD standard, simplifying the Physician Assessment Form, and eliminating the post-discharge monitoring period.

A. Ensure That ED's Regulations Comply with the Statutory Definition

As discussed, ED inappropriately and needlessly narrowed the evidence necessary to demonstrate that a person has a total and permanent disability. As a result, ED has left many vulnerable borrowers struggling with student debt. The Department should take immediate action to recognize *all* borrowers covered by the statute and detail

[62] $783 per month in 2020. *Understanding Supplemental Security Income SSI Benefits*, Soc. Sec. Admin, https://www.ssa.gov/ssi/text-benefits-ussi.htm#:~:text=Effective%20January%201%2C%202020%20the,levels%20higher%20in%20those%20States.

[63] 2020 OIG Report, *supra* note 9.

the appropriate evidentiary standard. Borrowers with disabilities who can provide documentation that they fall into one of the following categories should be eligible for TPD discharge.

1. Compassionate Allowance SSA Beneficiaries

Any individual who has been found eligible for SSA benefits through the "compassionate allowance" system should also automatically have their loans discharged. SSA's "compassionate allowance" system is for individuals with extreme medical conditions that most often result in death.[64] Compassionate allowances include stage 4 cancers, amyotrophic lateral sclerosis (ALS), and other catastrophic conditions that are likely to cause death before the expiration of 60 months.[65] Forcing such individuals who are struggling to even remain alive to endure a difficult bureaucratic process is beyond cruel.

2. SSA Beneficiaries with an Onset Date Five or More Years Ago

Even though the statutory standard contains a substantive durational requirement, the current system for analyzing whether SSA benefit recipients are eligible for a student loan discharge relies upon a coding system for review of eligibility which excludes countless numbers who meet the durational requirement.[66] For example, countless SSA disability benefits recipients have been found to be disabled more than five years before requesting loan discharge, but are denied under the current system because SSA has not coded them as having a disability that should be reviewed every 60 months.[67] Regardless of how SSA has coded these individuals, it is readily apparent that they meet the statutory standard because they have been found to be disabled and their disability has lasted for more than 60 months. They face the same bureaucratic burdens that prevented the veterans who were helped by the 2019 regulation from seeking discharge, and they should be eligible for the

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[64] *Compassionate Allowances*, Soc. Sec. Admin., https://www.ssa.gov/compassionateallowances/.

[65] *See DI 23022.080 List of Compassionate Allowance (CAL) Conditions*, Social Security Program Operations Manual System (POMS), https://secure.ssa.gov/apps10/poms.nsf/lnx/0423022080.

[66] SSA also recently proposed regulatory changes that would significantly alter the definitions of these codes. *See generally* 84 Fed. Reg. 63588 (Nov. 18, 2019). These changes would increase the number of "codes" from 3 to 4. Most significantly, the code for Medical Improvement Not Expected (MINE) would increase the time from 5-7 years to 6 years. This change would likely decrease the number of individuals coded as MINE and also would extend the duration requirement beyond that required by TPD. Restricting TPD loan discharges to SSA benefits recipients coded as MINE is completely inappropriate given its lack of accuracy and lack of statutory basis. We also would note that if SSA's proposed changes to the diary categories are finalized, DOE would need to update their regulations regardless of the emergency authority since the basis for the regulations has changed.

[67] Clare Lombardo & Cory Turner, *Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised*, NPR (Dec. 4, 2019), https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve.

same relief. Just as with eligible veterans, SSA can identify such individuals, and their loans can be automatically discharged subject to an opt out provision for those who affirmatively choose not to participate.

3. Individuals Currently Receiving SSA Benefits Aged 62 or Older Who Were Receiving Benefits Based on Disability at the Time They Began Receiving Retirement Benefits

As previously discussed, some disabled beneficiaries move from their disability benefit program onto the Old Age Social Security Benefits at age 62—the earliest retirement age.[68] It is almost inconceivable that individuals who were receiving benefits based upon disability immediately before reaching retirement age will suddenly become not disabled or that such disability will not be expected to last 60 months. Nevertheless, because SSA does not conduct medical reviews at that age, it is unlikely these borrowers will be coded by SSA as having a disability that is expected to last 60 months or longer. These individuals should be entitled to TPD discharge. A recent SSA OIG report identified over 40,000 beneficiaries in this category who were not accurately identified by the current data matching system.[69]

4. Older SSA Beneficiaries Who Will Not Be Reviewed Again for Disability

SSA recognizes that medical improvement is unlikely as one gets older. Unless medical improvement is expected, any recipient is not subject to a medical review after age 54 ½.[70] Any people with disabilities not coded as Medical Improvement Expected (MIE) who have attained the age of 54 ½ should be found eligible for TPD discharge because SSA has acknowledged that they will have a disability for at least 60 months.

5. Individuals Continuing to Receive Disability Benefits from SSA while Maintaining the Ability to Engage in Limited Work Activity

While data is scarce, studies show that fewer than five percent of individuals who are awarded Social Security benefits are able to secure sufficient employment to return to work at a level that results in the termination of

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[68] 2016 GAO Report, *supra* note 10 at 6.

[69] 2020 OIG Report, *supra* note 9.

[70] *See DI 26525.020 The MIE Diary – General*, Social Security Program Operations Manual System (POMS), https://secure.ssa.gov/apps10/poms.nsf/lnx/0426525020.

their benefits.[71] That percentage is lower for older individuals and also includes individuals who have been receiving benefits for less than 5 years. Because attempts to return to work should be encouraged and incentivized, loan discharges should not be denied to individuals who are receiving disability benefits and have not medically improved even though they may be working. Under all SSA disability programs, recipients who begin to work are still considered disabled under some circumstances even if their cash benefits have been suspended. Even after cash benefits may have ceased, some continue to receive Medicaid/Medicare based on their disability. Such individuals remain disabled under SSA's rules and have not medically improved. They should also be entitled to TPD discharge so long as they meet the 60-month duration requirement.

6. SSA Beneficiaries Classified as MINE

While the MINE diary category does not reflect the duration of a particular person's disability, it should be retained as one of several ways to demonstrate eligibility for a loan discharge. It does reflect that SSA believes that people with disabilities in this category will be disabled for *at least* 60 months and any SSA disability beneficiary who has been receiving benefits for less than 60 months and has been placed in the MINE diary category should be able to use the MINE placement to demonstrate their eligibility for TPD discharge. In addition, it will help address the needs of older disability beneficiaries as discussed above.

B. Automate the Discharge Process for Eligible Borrowers

There are simply no significant or persuasive reasons not to extend automatic discharge to all borrowers who meet the statutory definition for TPD discharge. ED should use the national emergency authority provided by the HEROES Act of 2003 to "cancel the balance of interest and principal" of outstanding federal student loans when the program's requirements are met and issue an interim final rule authorizing the automatic discharge of SSA beneficiaries' debt.[72] The COVID-19 pandemic has created a national public health emergency that has already led the Secretary of Education to delay student loan payments for all federally held loans, and relief is particularly

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[71] *Chart Book: Social Security Disability Insurance*, Ctr. on Budget and Policy Priorities (Sept. 6, 2019), https://www.cbpp.org/research/social-security/chart-book-social-security-disability-insurance.

[72] 20 U.S.C. § 1087e(m). For an expanded discussion of this authority, please *see* Michael Pierce & Rebecca Maurer, *Relief for Public Service Workers*, *supra at* 27. The 2019 rule utilized the Secretary of Education's discretionary power provided under section 482(c) of the HEA to authorize the change via interim final rule. Sec 482(c) requires ED to publish all regulations affecting programs under Title IV of the HEA in final form by November 1, but we believe the authority discussed above is more directly applicable to this situation.

crucial given the disproportionate impact this pandemic has had on low-income people and people with disabilities.[73]

As discussed above, automation was the most successful method by which to forgive student debt that ED has attempted so far, and all borrowers with work-limiting disabilities, whether veterans or civilians, share the same statutory right to relief and should have their debt discharged automatically. ED already has a data matching program in place with SSA which can quickly be adjusted to incorporate the new populations detailed above and the same systems and protocols for individuals matched through the VA data can easily be applied to individuals matched through SSA data.

It is also important that ED continue to work with VA and SSA to ensure that this automatic process continues. Each individual, whenever they are found eligible under one of the categories detailed above, should be eligible for TPD discharge. Regular data sharing and automatic discharges should be processed daily or as frequently as possible.

Failure to automate discharges for eligible SSA disability benefits recipients will inevitably result in many thousands of eligible individuals not being able to have their loans discharged. The evidence from veterans before automation conclusively demonstrates this problem. Moreover, obtaining the needed documentation from the SSA is a cumbersome and difficult hurdle which often proves insurmountable. There is no simple piece of paper that a recipient can request from SSA to accomplish this verification. The only result from failure to automate will be unnecessary denials and hardship for individuals who are entitled to relief under the statute.

C. Improve the Physician's Certification Process

The changes discussed above do not eliminate the need for a physician certification process for individuals with work-limiting disabilities but who do not qualify under the methods described above. This process should also be streamlined. The relevant form needs to be simplified to remove unnecessary bureaucratic barriers to eligibility. For example, the current form requires that the certifying doctor complete a section that assesses the "severity" of impairment. If this section is not "properly" completed by the physician, the borrower will be denied TPD. For example, in one client case, the physician of an individual with two below the knee amputations receiving Social

[73] Center on Budget and Policy Priorities, *Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships* (Nov. 13, 2020), https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and.

Security disability benefits (but not coded as MINE) set forth her impairments accurately but inadvertently failed to complete the section on severity. The form was returned as incomplete despite the specific description of the impairments. The physician redid the form and indicated that the impairments were "very severe," and discharge was granted. Adding the words "very severe" provided no meaningful information that was not already included on the form, but claims are automatically denied if the form is not filled out "properly."

D. Eliminate the Monitoring Period

The current post-discharge monitoring system is unwieldy and exceedingly difficult for individuals with disabilities to navigate. It is also unnecessary and not required in any way by the statute. Tens of thousands of individuals have had their loans reinstated because they were unable to comply with the monitoring requirements.[74] Given that the statute contains no mention of a monitoring system, the entire monitoring system should be eliminated forthwith. ED should also review all loans which were reinstated during a monitoring period and, where appropriate, refund payments on loans made after a person with a disability qualifies for TPD discharge.

Conclusion

People with disabilities live in poverty at twice the rate of non-disabled people but face substantial bureaucratic and regulatory barriers in discharging their student loans. The Secretary of Education has the authority to eliminate this debt and should use that authority immediately, especially in light of the COVID-19 pandemic. The Secretary should take swift action to issue an immediate Interim Final Rule to make the needed changes discussed above to the existing TPD discharge process.

[74] 2016 GAO Report, *supra* note 10 ("Education's data show that a large number of those approved for a TPD discharge had their loans reinstated during the 3-year monitoring period. According to summary data provided by Education's TPD servicer, in fiscal year 2015, 61,536 borrowers initially approved for a TPD discharge had loans reinstated during the 3-year monitoring period with a total value of about $1.2 billion.").

RELIEF FOR BORROWERS WHOSE SCHOOLS CLOSED

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Introduction

From the beginning of 2014 through the end of 2018, close to half a million students were blind-sided by the sudden closure of over 1,200 college campuses.[1] According to a study by the *Chronicle of Higher Education*, 88 percent of these campuses were operated by for-profit colleges.[2] These closures included Corinthian Colleges in 2015 (28 campuses),[3] ITT Tech in 2016 (130 campuses),[4] and Vatterott College (15 campuses), Education Corp. of America (70 campuses), and Dream Center Education Holdings (41 campuses of the Art Institutes and Argosy University) in 2018.[5] In total, five years of school closures upended the lives of 451,270 students, who were disproportionately women, low-income Pell-Grant recipients, and people of color. [6]

From the beginning of 2014 through the end of 2018, close to half a million students were blind-sided by the sudden closure of over 1,200 college campuses.

These students are not alone. Since the Higher Education Act (HEA) was first amended to make financial aid available to for-profit postsecondary schools, hundreds of thousands of other students have been displaced by school closures.[7] The exponential growth in the for-profit school sector started in 1978, after the HEA was amended to provide financial aid eligibility to students who had not earned a high school diploma or equivalent, as long as they demonstrated an "ability to benefit" from the training offered

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[1] Michael Vasquez & Dan Bauman, *How America's College-Closure Crisis Leaves Families Devastated*, Chron. of Higher Educ. (Apr. 4, 2019), https://www.chronicle.com/article/how-americas-college-closure-crisis-leaves-families-devastated/.

[2] *Id*.

[3] Goldie Blumenstyk & Casey Fabris, *Abrupt Closing of Corinthian Campuses Leaves 16,000 Students Scrambling*, Chron. of Higher Educ. (Apr. 28, 2015), https://www.chronicle.com/article/abrupt-closing-of-corinthian-campuses-leaves-16-000-students-scrambling/.

[4] Vasquez & Bauman, *supra* note 1.

[5] Ashley A. Smith, *The End of ITT Tech*, Inside Higher Educ. (Sept. 7, 2016), https://www.insidehighered.com/news/2016/09/07/itt-tech-shuts-down-all-campuses.

[6] Vasquez & Bauman, *supra* note 1.

[7] *See, e.g.*, David Whitman, The Century Found., Vietnam Vets and a New Student Loan Program Bring New College Scams (Feb. 13, 2017), https://tcf.org/content/report/vietnam-vets-new-student-loan-program-bring-new-college-scams/?session=1 (describing for-profit school fraud in early 1970s, including a description of for-profit Advance Schools, Inc. which opened in 1970, enrolled 80,000 students at its peak, and closed in April 1975, "leaving behind more than $100 million in outstanding [federal student] loans (almost $450 million in today's dollars)").

by the college.[8] More unscrupulous schools proliferated in 1986, when Congress increased the annual and aggregate federal student loan limits and removed additional borrower and school limitations.[9]

These changes opened the floodgates to for-profit schools more eager to fill their pockets than provide educations. After 1978, for-profit schools began aggressively recruiting low-income students and people of color outside of homeless shelters, welfare and unemployment offices, and housing projects.[10] They later expanded their aggressive sales tactics in 1988, targeting a new market of recruits—3 million undocumented immigrants who were granted amnesty.[11] Between 1982 and 1988, loan volume at for-profit schools increased from $684 million to $4.15 billion.[12]

During that same time, many of these schools closed, leaving tens of thousands of low-income students, primarily people of color, with student debt that they were unable to repay, through no fault of their own. The Inspector General of the U.S. Department of Education estimated that between October 1985 and June 1988, 53 schools (some of which had multiple campuses) suddenly closed, leaving about 10,000 students with $30 million (equal to over $57 million today) worth of loans they had to repay.[13]

Problems

Until Congress took notice of widespread for-profit school closures and the harm they inflicted on students in 1992, the remedy for these students was largely out of reach. Through 1986, Department of Education ("ED") regulations for Federally Insured Student Loans (FISLs) allowed students to raise a school's closure as a defense

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[8] S. Rep. No. 102-58, at 6 (1991), https://files.eric.ed.gov/fulltext/ED332631.pdf [hereinafter "Nunn Report"]; Middle Income Student Assistance Act, Pub. L. No. 95-566, § 6, 92 Stat. 2403 (1978) (codified at 20 U.S.C. § 1088), https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg2402.pdf#page=1.

[9] Nunn Report, *supra* note 8, at 6.

[10] *Schools for Scandal*, Consumer Rep. 303, 304 (May 1992) (Appendix A).

[11] *Id.*

[12] Nunn Report, *supra* note 8, at 7.

[13] *Abuses in Fed. Student Aid Programs: Hearings Before the Permanent Subcomm. on the Investigations of the Comm. on Gov't Affairs*, 101st Cong. 32 (1990), https://catalog.hathitrust.org/Record/007609802 (testimony of James Thomas, Inspector General, U.S. Dep't of Educ.) [hereinafter "IG Testimony"].

to repayment if the school made the loan.[14] Although regulations governing pre-1986 Stafford Loans never had such an explicit provision, ED adopted a policy encouraging guaranty agencies to excuse a portion or all of a student's Stafford Loan when a school closed while the student was still enrolled, if the school made the loan.[15]

As a practical matter, these defenses were difficult for students to assert. Most students were unaware they could raise school closure as a defense to repayment because neither ED nor guaranty agencies notified them about their rights or created processes through which borrowers could assert this defense. As a result, borrowers typically needed attorney representation in order to assert school closure as a defense to federal debt collection lawsuits.

Borrower Highlight

In 1978, Ms. Hilda Fernandez* was in the 6th grade when she was removed from her home and placed in the foster care system. For the next seven years, Ms. Fernandez moved between foster homes so frequently that she never completed another grade level. As a result, Ms. Fernandez was, and still is, unable to read or write. In 1985, when she turned 18, Ms. Fernandez aged out of the foster care and became homeless. At this time, a recruiter from for-profit Adelphi Business College recruited her off the street, promising that she would be able to complete its computer program and obtain a high-paying job. She obtained $2500 in federal student loans and enrolled. Shortly after she enrolled, Adelphi suddenly closed. For the next 6 years, she was frequently homeless. In 1986 and 1989, she obtained federal student loans after she was recruited by Pacific Coast College and National Technical College. She dropped out of both programs because she could not read or write. Both the Department and California Attorney General determined that these schools engaged in widespread fraud. Now Ms. Fernandez is unemployed and continues to struggle with homelessness. She remains responsible for paying all these loans. ED recently denied her application for a false certification discharge for the loans she obtained to attend National Technical College.

* The name in this story has been changed to preserve confidentiality

In 1990, the Senate Permanent Subcommittee on the Investigations of the Committee on Government Affairs began an 18-month investigation into the cause of the spike in Guaranteed Student Loan Program ("GSLP") defaults. The cost of defaults, as a percentage of all GSLP program costs, "rose from about 10 percent in FY 1980

[14] 34 C.F.R. § 682.518 (1982) (since rescinded) (Appendix B); *see also* United States v. Griffin, 707 F.2d 1477 (D.C. Cir. 1983).

[15] U.S. Dep't of Educ., Dear Colleague Letter, 89-G-159, Compromise and Write-off Procedures (1989), https://library.nclc.org/sites/default/files/may1989dearcoll.pdf.

to 36 percent in FY 1989, and to more than 50 percent in FY 1990."[16] During this investigation, the Inspector General testified that in the 3-year period ending in 1988, ED had certified 2,000 schools.[17] Of the 500 schools it had put on a watch list, 150 went out of business (including the 53 noted above), "where a large number of students were harmed along the way."[18] The IG and others testified about numerous instances of widespread fraud among many of these schools.[19] ED, however, had *not* decertified a single one of these 500 schools.[20]

Based on this and other testimony, the Subcommittee placed the blame for the widespread fraud and school closures on ED. It concluded that "through gross mismanagement, ineptitude, and neglect in carrying out its regulatory and oversight functions, [ED] had all but abdicated its responsibility to the students it is supposed to service . . . ."[21] The Subcommittee determined that the student loan default spike was caused by the "complete breakdown in effective regulation and oversight," which had opened the door for "major fraud and abuse . . . , particularly at proprietary schools."[22]

The Senators were struck by the injustice of students' continuing obligation to repay their federal loans, even when they were unable to complete their education due to school closures and . . . the criminal convictions of school management and employees.

The Senators were struck by the injustice of students' continuing obligation to repay their federal loans, even when they were unable to complete their education due to school closures and, in some cases, the criminal convictions of school management and employees.[23] Senator Nunn and other Senators specifically asked about school closures:

[16] Nunn Report, *supra* note 8, at 1.

[17] IG Testimony, *supra* note 13, at 41-42.

[18] *Id.* at 42.

[19] IG Testimony, *supra* note 13, Parts 1 & 2.

[20] *Id.*

[21] Nunn Report, *supra* note 8, at 33.

[22] *Id.* at 11.

[23] *Id.* at 11.

Sen. Nunn: So, even if the student had nothing to do with the problem, went in, in good-faith, borrowed the money, went to school, attended classes, worked hard, and the school goes out of business, they still owe the money?

Mr. Thomas: That is correct, sir.[24]

The Subcommittee further recognized the suffering this policy caused closed school students, stating "should the student eventually default, he or she is no longer eligible for Title IV student financial aid and can encounter future credit problems, tax refund seizures, and/or difficulties with collection agencies."[25]

. . . [I]n 1992 Congress enacted the closed school discharge provision to hold students harmless for the debts incurred if their school shut down.

Based on these findings, in 1992 Congress enacted the closed school discharge provision to hold students harmless for the debts incurred if their school shut down.[26] Through the HEA amendments of 1992, Congress mandated that ED "*shall* discharge a borrower's liability on a loan" if the student "is unable to complete the program in which such student is enrolled due to the closure of the institution . . . ."[27] The HEA's closed school discharge mandate applies to loans disbursed on or after January 1, 1986, and covers Federal Family Education Loan Program (FFEL) Loans and Direct Loans, including Parent PLUS Loans, as well as Perkins Loans.[28]

[24] IG Testimony, *supra* note 13, at 32.

[25] Nunn Report, *supra* note 8, at 11; *see also id.* at 10. ("[T]hese students have to pay for an education they never received. Lacking proper training, [they] are not able to get jobs by which they can repay [their] federally guaranteed loans and thus suffer the added humiliation of seeing their credit ratings destroyed in the process.") (quoting Sen. Roth).

[26] *See, e.g.*, H.R. Rep. No. 102-447, at 52 (1992), *reprinted in* 1992 U.S.C.C.A.N. 334, 385 ("The Committee heard testimony that many institutions of higher education have closed over the past several years, leaving thousands of low-income students unable to complete their education and yet obligated to repay student loans, which the institutions received on their behalf. These students did not receive any credentials and in fact often received little or no training. . . . The Committee is concerned that these students are in double jeopardy: they are deprived of the training for which they incurred the original loan obligation and they are also barred from receiving the future Federal aid necessary to acquire training to obtain a job in order to repay the loan. . . . The Committee desires in cases where a school closes during the middle of a borrower's course of instruction . . . the Secretary shall discharge the borrower's liability by repaying the amount owed on the loan.").

[27] 20 U.S.C. § 1087(c)(1) (emphasis added).

[28] *Id.* (FFEL Loans); 20 U.S.C. § 1087e(a)(1) (Direct Loans have the same terms and conditions as FFEL Loans unless otherwise specified); 20 U.S.C. § 1087dd(g)(1) (Perkins Loans, including National Direct Student Loans).

A. Regulatory Narrowing

Given Congress's clear intent to rectify the harms perpetrated upon thousands of vulnerable students by the sudden closure of for-profit schools, the HEA's affirmative discharge mandate is remedial. As such, ED should have liberally and expansively construed the provision to effectuate Congress's intent.[29] Instead, ED adopted regulations in 1994 that imposed an affirmative application requirement for closed school discharge eligibility.[30] It did so even though ED and guaranty agencies were able to identify, based on their own records, students who were eligible for loan discharges due to school closures between January 1, 1986 and August 29, 1994.[31] In imposing an application requirement, ED impermissibly narrowed the remedial impact of the closed school discharge provision and disregarded the plain wording of the HEA, which does not in any way pre-condition discharge eligibility on the submittal of an application.

In imposing an application requirement, ED impermissibly narrowed the remedial impact of the closed school discharge provision and disregarded the plain wording of the HEA.

ED also went against the recommendations of the participants of three regional meetings conducted prior to the promulgation of the final discharge regulations in 1994. These participants recommended that ED grant closed school discharges to borrowers who are eligible based upon the records of ED or guaranty agencies, without any application requirement.[32] Legal aid organizations commented that the low-income students whose schools had closed between January 1986 and late 1994 would likely be difficult to locate because they tended to move frequently (by virtue of housing costs, evictions, homelessness, etc.).[33] In addition, to the extent students received notice of their new discharge eligibility, many would likely have difficulty

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[29] Cortez v. Trans Union, L.L.C., 617 F.3d 688, 722 (3rd Cir. 2010) (Fair Credit Reporting Act); *see also* Atchison v. Buell, 480 U.S. 557, 562 (1987) (Federal Employers' Liability Act); Avila v. Riexinger & Assocs., L.L.C., 817 F.3d 72, 75 (2nd Cir. 2016) (Fair Debt Collection Practices Act); Zimmerman v. Puccio, 613 F.3d 60, 71 (1st Cir. 2010) (Credit Repair Organization Act); Begala v. PNC Bank, Ohio, Nat'l Ass'n, 163 F.3d 948, 950 (6th Cir. 1998) (Truth-in-Lending Act).

[30] 59 Fed. Reg. 22,462 (Apr. 29, 1994).

[31] *Id.* (The final FFEL Loan regulation 34 C.F.R. § 682.402(d)(6) required guaranty agencies to identify and notify all borrowers eligible for a discharge due to a school closure between Jan. 1986 and Aug. 24, 1994.).

[32] 59 Fed. Reg. 2,486, 2,487 (Jan. 14, 1994) (the record is unclear as to whether the participants in the 4th regional meeting addressed this issue). ED rejected this recommendation primarily on the grounds that it needed sworn statements from borrowers to pursue claims against closed schools. *Id.* at 2,491.

[33] *See* Stanley Hirtle & Elizabeth Hurst, Legal Aid Society of Dayton, Ohio, Comments on Proposed Rulemaking, 34 C.F.R. pt. 682, 59 Fed. Reg. 2,486 (Feb. 11, 1994) (on file with author).

understanding the notices or applications, or would distrust the notices due to years of collection harassment by government servicers and collection agencies.[34] For these reasons, any application requirement was likely to significantly reduce the number of eligible students who would actually receive the closed school discharges mandated by Congress. This is exactly what happened. Legal services organizations across the country continue to see clients whose schools closed as many as 35 years ago and who have no idea they are eligible for a discharge.[35]

Borrower Highlight

When she was just 18 years old in 1991, Ms. Julie Dolber* saw flyers posted in her Central Los Angeles neighborhood offering security guard training. Ms. Dolber visited the school, the for-profit college Brookline Technical Institute in Anaheim. Based on its promises of providing a high-quality education and job placement program that would lead to a lucrative career in private security, Ms. Dolber obtained $4,625 in federal student loans to enroll in its security guard program. During the few months that she attended, various signs indicated that the school was struggling financially. The buses used to transport the students from her neighborhood to Anaheim were downgraded from privately chartered coach buses to standard yellow school buses, and then to passenger vans. She also heard teachers complaining that their paychecks were bouncing. A few months later, Ms. Dolber arrived at the school and found herself locked out. The school had closed. Ms. Dolber sought the assistance from a legal services organization in 2016, after the government had seized a federal income tax refund to repay her defaulted federal loans.

Although the organization applied for a closed school discharge on Ms. Dolber's behalf, ED denied it on the grounds that Ms. Dolber had no proof that she was enrolled at Brookline Technical Institute when it closed. The legal services organization was able to obtain an old document, from the now-defunct California agency that had guaranteed her student loans, with the dates of her attendance. After the organization submitted this additional evidence, ED finally granted Ms. Dolber's closed school discharge application. The Department discharged approximately $19,000 in outstanding student loan debt and refunded Ms. Dolber $7,800.

* The name in this story has been changed to preserve confidentiality

[34] *Id.*

[35] *See* Nat'l Consumer Law Ctr., Comments from the Legal Aid Community to the U.S. Dep't of Educ. re: Proposed Regulations on Borrower Defenses and Use of Forced Arbitration by Schools in the Direct Loan Program, and Proposed Amendments to Closed School and False Certification Discharge Regulations, at 53 (Aug. 1, 2016), https://www.nclc.org/images/pdf/special_projects/sl/comments_legal_aid_docketid-ED-2015-OPE-0103.pdf.

For schools that closed after 1994, low rates of students who are eligible for closed school discharges actually receive them due to ED's application requirement. In 2016, ED admitted that although it and guaranty agencies attempt to notify all eligible borrowers of their closed school discharge rights, "[m]any borrowers eligible for a closed school discharge do not apply."[36] In May 2019, ED data showed that low percentages of eligible borrowers from each of the following schools, all of which closed in the last 7 years, had received closed school discharges:

Institution	Percent of Eligible Borrowers Who Received Closed School Discharges[37]
Charlotte Law School	47%
ITT Tech	34%
Dream Center Education Holdings	28%
Vatterott College	19%
Education Corporation of America	16%

Prior to the 2010s, when ED and guaranty agencies had far less access to up-to-date student contact information and fewer ways to contact them, the application and discharge rates were probably much lower. In 2014, an ED official stated that prior to 2014 ED typically received closed school discharge applications from only 6 percent of eligible borrowers.[38]

B. Reluctance to Exercise Automatic Discharge Authority

The closed school discharge regulations explicitly give ED, guaranty agencies (with ED permission), and Perkins Loan holders (also with ED permission) discretion to grant automatic closed school discharges, without any borrower applications, if they determine that an individual borrower or a group of borrowers is eligible based on

[36] 81 Fed. Reg. 39,330, 39,369 (June 16, 2016).

[37] U.S. Dep't of Educ., Responses to Questions Submitted by Sen. Patty Murray: Post-Publication QFR Responses for Sen. Appropriations Comm., at 1 (May 16, 2019), https://www.help.senate.gov/imo/media/doc/SenMurrayQFRresponses32819LHHShearing.pdf.

[38] 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.

information in their possession.[39] Yet, despite the abysmal application response and closed school discharge rates, we are aware of no instances in which ED exercised the authority under these regulations.

ED exercised its discretion for the first time by enacting an automatic closed school discharge regulation in 2016. This regulation required automatic discharges for all students who, according to ED records, were unable to complete their programs due to a school closure on or after November 1, 2013 and who had not re-enrolled in another Title IV eligible postsecondary institution within 3 years of the school closure.[40] It enacted similar regulations applicable to FFEL Loans and Perkins Loans.[41] As of December 2019, ED had provided over $300 million in automatic closed school discharges to about 30,000 borrowers.[42]

In 2014, an ED official stated that prior to 2014 ED typically received closed school discharge applications from only 6 percent of eligible borrowers.

Notably, this data demonstrates the need for automatic closed school discharges—30,000 is an enormous number of borrowers who were eligible, but failed to apply for, closed school discharges. Absent ED's decision to grant automatic discharges, they would be suffering from the burden of loan repayment and the consequences of default.

ED repealed this provision in 2019, such that the regulations will no longer require ED to provide automatic discharges to students whose schools close on or after July 1, 2020.[43] This is especially troubling given that thousands of colleges, struggling with the adverse economic impacts of the COVID-19 pandemic, are likely to close in the coming months.

[39] 34 C.F.R. § 682.402(d)(8)(i) (FFEL Loans); 34 C.F.R. § 685.214(c)(2)(i) (Direct Loans); 34 C.F.R. § 674.33(g)(3)(i)(B) (Perkins Loan).

[40] 34 C.F.R. § 685.214(c)(2)(ii) (Direct Loans).

[41] 34 C.F.R. §§ 682.402(d)(8)(ii) (FFEL Loans), 674.33(g)(3)(ii) (Perkins Loans).

[42] Federal Student Aid, Federal Student Aid Posts New Reports to FSA Data Center, U.S. Dep't of Educ. (Feb. 19, 2020), https://ifap.ed.gov/electronic-announcements/021920fsapostsnewreportstofsadatacenter.

[43] 84 Fed. Reg. 49,788, 49,889 (Sept. 23, 2019).

C. Reluctance to Expand Pre-Closure Withdrawal Eligibility Period

Current regulations require ED to discharge the loans of all borrowers who withdraw within 120 or 180 days, whichever is applicable, of school closure.[44] The regulations also grant ED broad discretion to extend the pre-withdrawal eligibility period, or "look-back period," based on extenuating circumstances, for as long as it deems necessary.[45] The regulations do not define extenuating circumstances, but provide examples of the type of conduct or events that cause or indicate significant deterioration in educational services prior to closure, such as loss of accreditation or the discontinuance of a majority of a school's programs.[46] These examples are explicitly non-exhaustive.[47]

The extenuating-circumstances provision was enacted to ensure that students who withdraw prior to a school's closure due to the deterioration of educational services are able to obtain discharges.[48] In anticipation of closing, schools often fail to maintain necessary equipment and facilities, stop paying instructor wages, fail to replace instructors who depart, and discontinue programs before students have completed them. As the GAO recently noted, "research has indicated that a school's financial struggles can have negative effects on its operations. For example, two studies that we reviewed found that financial shortfalls can cause schools to reduce course offerings and increase class sizes. Two other studies have also found that declines in schools' resources per student can result in reduced student supports and lower rates of graduation."[49]

In anticipation of closing, schools often fail to maintain necessary equipment and facilities, stop paying instructor wages, fail to replace instructors who depart, and discontinue programs before students have completed them.

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[44] 34 C.F.R. § 682.402(d)(1)(i) (withdrawal period of 120 days for FFEL Program Loans); 34 C.F.R. §§ 685.214(c)(1)(i)(B), (c)(2)(i)(B) (for Direct Loans disbursed prior to July 1, 2020, withdrawal period of 120 days; for Direct Loans disbursed or after that date, withdrawal period of 180 days); 34 C.F.R. § 674.33(g)(4)(i)(B) (withdrawal period of 120 days for Perkins Loans).

[45] 34 C.F.R. §§ 682.402(d)(1)(i) (FFEL Loans); 685.214(c)(1)(i)(B), (c)(2)(i)(B) (Direct Loans); 674.33(g)(4)(i)(B) (Perkins Loans).

[46] 34 C.F.R. § 685.214(c)(1)(i)(B) (Direct Loans for schools that closed prior to July 1, 2020).

[47] 34 C.F.R. §§ 682.402(d)(1)(i) (FFEL Program Loans); 685.214(c)(1)(i)(B), (c)(2)(i)(B) (Direct Loans); 674.33(g)(4)(i)(B) (Perkins Loans).

[48] 59 Fed. Reg. 2,486, 2,488 (Jan. 14, 1994).

[49] U.S. Gov't Accountability Off., GAO-17-555, Higher Education: Education Should Address Oversight and Communication Gaps in its Monitoring of the Financial Condition of Schools, at 28 (2017), https://www.gao.gov/products/GAO-17-555 (citations omitted).

Schools also engage in misconduct designed to keep them in business and reduce liability for closed school discharges.[50] They often conceal their financial precarity by refusing to pay living "stipends" from Title IV funds to students, while reporting that those funds have been paid; reporting that students have completed their programs, when in fact they have not; concealing that students have withdrawn in order to keep Title IV funds that should be refunded; and failing to report students who are on leaves of absence when the school closes. In his testimony before the Senate Subcommittee in 1990, the Inspector General detailed multiple schools that had illegally reported that students were enrolled, when in fact they had withdrawn, in order to keep Title IV funds they were legally required to refund.[51] More recently, before it closed, Argosy University kept over $13 million in Title IV living stipends intended for students, and spent it on payroll and other overhead expenses, while concealing this fraud from ED by altering financial records.[52]

ED rarely lengthens the 120- or 180-day look-back period. It has done so only in extreme circumstances, such as after the implosion of Corinthian Colleges.[53] This means that many students aware of these look-back periods are forced to stay enrolled, even when they cannot afford to do so because they have not received their living stipends or they are unable to learn anything because instructors are absent, facilities are not available, computers and instructional equipment have broken down, or small classes are merged into large and unmanageable classes containing a mix of beginning and advanced students. Those who are unaware of the look-back periods and who drop out due to deterioration in their programs but do so before the look-back period is triggered, are ineligible for closed school discharges.

[50] The HEA requires ED to "pursue any claim available to any [borrower who has been granted a closed school discharge] against the institution and its affiliates and principals." 20 U.S.C. § 1087(c).

[51] IG Testimony, *supra* note 13, at 36 (testimony mentioned, among others, National Technical Schools in Los Angeles; and a barber school that had expanded into teaching masonry programs).

[52] Vasquez & Bauman, *supra* note 1.

[53] ED extended the pre-withdrawal eligibility period back to the date it first put Corinthian Colleges on heightened cash-monitoring status. *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education Heightens Oversight of Corinthian Colleges (June 19, 2014), https://www.ed.gov/news/press-releases/us-department-education-heightens-oversight-corinthian-colleges; Kelly Field, *Plan to Forgive Corinthian Students' Loans Gives Hope to Other Borrowers*, Chron. of Higher Educ. (July , 2015), https://www.chronicle.com/article/plan-to-forgive-corinthian-students-loans-offers-hope-to-other-borrowers/.

D. ED Has Denied Closed School Discharges Based on Evidence from Fraudulent Schools, While Disregarding the Sworn Testimony of Harmed Students

As noted above, closed for-profit schools often report false information regarding student completions and withdrawals in order to keep Title IV funds and avoid liability for closed school discharges. Schools have reported that students completed their education prior to closure, when in fact they either withdrew or were in attendance but had not completed their education when the schools closed. These schools also make mistakes and provide incorrect federal loan documentation—recording on a promissory note, for example, that a student attended a campus different than the one he or she attended, which may have a later closing date.

Borrower Highlight

In the spring of 1988, Ms. Elena Rogers* was raising a newborn daughter on her own. Hoping to get training for a stable job so that she could support her daughter, Ms. Rogers obtained $6,625 in federal student loans to enroll in a data entry program at American Business Institute ("ABI"). After about seven months, the school suddenly closed. A federal grand jury had indicted the CEO and 18 employees of Wilfred Education American Corporation, ABI's owner, for the misuse of federal funds and falsifying loan applications, among other criminal violations.†

Ms. Rogers did not know about her eligibility for a closed school discharge. For over 30 years she struggled to make her federal student loan payments. Ms. Rogers finally sought help from a legal services organization in 2018 because the government was demanding payment of over $26,000, and she was concerned about her wages being garnished. After discovering that a default judgment had been entered against her, the legal services organization submitted a closed school discharge application on Ms. Rogers' behalf. ED denied the application on the grounds that ABI had reported that she had completed her program. ED essentially disregarded Ms. Rogers' credible sworn statements and relied on completion information reported by a school run by administrators who were convicted of submitting false information to ED.

* The name in this story has been changed to preserve confidentiality

† Emily S. Rueb, *Suit Seeks Relief for Trade School Students with Years of Debt but No Career*, The New York Times (Feb. 25, 2014), https://www.nytimes.com/2014/02/26/nyregion/suit-seeks-relief-for-trade-school-students-with-years-of-debt-but-no-diploma.html.

Despite the fact that students testify under oath that they did not complete their educations while attending particular campuses, ED often disregards their testimony. Instead, ED relies on old electronic data reported by the school to deny discharges, even though ED officials should know, based on prior audits, program reviews, or investigations, that the school reported false information to ED regarding the payment of refunds, the reporting of student enrollment and completion dates, etc.

Solutions

ED's application requirements and reluctance to use its authority to provide widespread closed school discharges have hindered Congress's broad remedial intent in enacting the HEA's closed discharge mandate. It has caused decades of unnecessary suffering to thousands of students who are clearly eligible for discharges according to the records of ED, guaranty agencies, and Perkins Loan holders. ED's narrowly drafted regulations, combined with its reluctance to grant widespread automatic discharges, has trapped borrowers harmed by school closures in poverty and prevented them from obtaining quality higher educations that would give them the skills they need to find better jobs and improve the well-being of their families.

ED's narrowly drafted regulations, combined with its reluctance to grant widespread automatic discharges, has trapped borrowers harmed by school closures in poverty . . . .

As detailed above, ED has the obligation, under the mandatory language of the HEA discharge provision, to rectify this injustice by granting automatic discharges to these students. ED should use its existing statutory and regulatory authority to discharge, without borrower applications, all federal loans for students[54] who, according to information within its possession, or the possession of a guaranty agency or Perkins Loan holder, were unable to complete their educational programs due to school closures, as specified in this section.

ED's Federal Student Aid system, including the National Student Loan Data System, should include all the following information for Direct Loan, FFELP Loan and most Perkins Loan borrowers: (1) dates the loans were disbursed; (2) schools to which they were disbursed; (3) the last date of a borrower's attendance at the school, including whether a borrower withdrew or did not complete due to a school closure; (4) whether a borrower subsequently obtained Title IV financial aid to attend another postsecondary school and, if so, whether the

[54] ED should also grant discharges to any parents or guardians who obtained Parent PLUS loans on their behalves, which is also required by the HEA. *See supra* note 27.

borrower completed that program. ED, as well as guaranty agencies and Perkins Loans holders, should therefore have all the data necessary to identify eligible borrowers.

A. Automatic Discharges for Borrowers Whose Loans Were Disbursed Before January 1, 1986

As set forth in above, ED has authority to grant closed school discharges of FISL and Stafford Loans that were disbursed before January 1, 1986. Based on this authority, combined with its settlement and compromise authority,[55] ED should grant full loan discharges (cancellation of all outstanding debt, refunds of all amounts paid on loan by borrower, and removal of negative credit history) to FISL or Stafford Loan borrowers who (1) did not complete their programs and (2) were in attendance within one year prior to their school's closure or were in attendance on or after the date their schools lost Title IV eligibility, whichever date is earlier.

B. Automatic Discharges for Borrowers Whose Loans Were Disbursed in Whole or in Part on or After January 1, 1986 and Prior to July 1, 2020

The closed school regulations governing FFEL, Direct, and Perkins Loans allow ED, guaranty agencies (with ED permission), and Perkins Loan holders (with ED permission) to grant closed school discharges, *without an application*, if ED determines that an individual borrower or a group of borrowers are eligible based on information in their possession.[56] ED should use this existing authority to grant discharges as follows.

[55] *See* 34 C.F.R. § 30.70. For an in-depth description of ED's authority to settle and compromise student loans, *see* Letter to Sen. Elizabeth Warren from Eileen Connor, Deanne Loonin & Toby Merrill (Jan. 13, 2020), https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf.

[56] 34 C.F.R. §§ 682.402(d)(8)(i) (FFEL Loans), 685.214(c)(3)(i) (Direct Loans), 674.33(g)(3)(i)(B) (Perkins Loan).

1. Borrowers Whose Schools Closed Between January 1, 1986 and August 29, 1994[57]

ED should grant discharges to all students who (1) did not complete their programs due to the closure of one of the ten correspondence schools identified in a 1997 Dear Colleague Letter and (2) were enrolled in, or on a leave of absence from, the school during the extended pre-closure withdrawal periods set by ED.[58]

For all other schools that closed between January 1, 1986 and August 29, 1994, ED should provide closed school discharges to all borrowers who (1) did not complete their programs at the school due to its closure and (2) were enrolled in, or on a leave of absence from, their school after one of the following dates, whichever is earliest: within one year prior to their school's closure; within any longer look-back period prior to their school's closure previously set by ED; or within any longer period set by ED in the future based on evidence of school misconduct.

ED should liberally construe the remedial extenuating-circumstances regulation and extend the look-back period, for schools closed between January 1986 and August 1994, to at least one year prior to closure. The Senate Subcommittee heard testimony of multiple witnesses, including the Inspector General, detailing years of egregious for-profit school fraud that went undetected by ED.[59] The Subcommittee concluded that this fraud and the subsequent school closures were caused by ED's "gross mismanagement, ineptitude, and neglect in carrying out its regulatory and oversight functions."[60] Many students likely withdrew long prior to these school closures because the fraudulent schools provided little or no actual training. ED should also extend the pre-withdrawal eligibility period beyond one year whenever it has evidence of misconduct prior to school closure.

Current regulations bar closed school discharge eligibility if a student completes the same or comparable program through a teach-out or after the transfer of even one credit to another institution.[61] These teach-out and

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[57] Guaranty agencies and lenders were required by the 1994 regulations to identify and notify all borrowers who were eligible for discharges based on the closure of schools between January 1, 1986 and August 29, 1994. 34 C.F.R. §§ 682.402(d)(8)(i). *See also*, U.S. Dep't of Educ., Dear Colleague Letter, 94-L-166/94-G-256, Guidance Concerning Closed School and False Certification Loan Discharges and Relief for Unauthorized Endorsements in the Federal Family Education Loan (FFEL) Program (Sept. 1994), http://library.nclc.org/companion-material/file/94-L-166.pdf.

[58] U.S. Dep't of Educ., Dear Colleague Letter, 97-L-197/97-G-300 (July 1997), https://ifap.ed.gov/dear-colleague-letters/07-01-1997-97-g-300-letter-provides-guidance-concerning-closed-school-loan.

[59] *See Abuses in Fed. Student Aid Programs*, *supra* note 20.

[60] Nunn Report, *supra* note 8, at 33.

[61] *See, e.g.*, 34 C.F.R. §§ 685.214(c)(1)(i)(C), (c)(2)(i)(C) (Direct Loans).

credit-transfer bars to discharge eligibility have unfairly prevented deserving students from receiving closed school discharges.

This regulation was applied retroactively to students whose schools closed prior to August 29, 1994. Doing so was contrary to both the intention and plain language of the HEA discharge provision, which included no language regarding teach-outs. It is likely that many students received little or no training from teach-outs they completed prior to 1994, when teach-outs were typically offered by the same for-profit schools that ED had allowed to engage in major fraud and abuse. In its comments to the 1994 proposed regulations, one legal aid office recommended that ED "be suspicious of teach-outs."[62] As an example, it cited a teach-out that "was voluntarily carried out by the school's teachers without support after management fled."[63]

While states and accreditors should oversee and approve teach-outs to protect already harmed closed school students, the Subcommittee hearings revealed that states and accrediting agencies had neglected their duty to oversee for-profit schools and allowed them to commit fraud.[64] There were no federal or state minimum requirements for teach-out schools, nor any definition of a teach-out in federal law. Because legal aid organizations were concerned about the lack of oversight of teach-outs based on their experiences, they commented that "certain minimum criteria must be present for a teach-out to be meaningful to the student and to provide a legitimate basis for excluding borrowers for discharge eligibility."[65] Recommended minimum criteria included review and approval by the state licensing agency.[66] Although ED rejected this proposal.

Moreover, few students were able to transfer all their credits to another school prior to 1994. At the time, schools typically only accepted a few credits and required students to re-earn the remaining credits they had already completed. While we do not have data for that period, the U.S. Government Accountability Office recently studied

[62] Hirtle & Hurst, *supra* note 33, at 5.

[63] *Id*.

[64] In his testimony, the IG also described how both states and accrediting agencies had failed to oversee schools, detect and stop fraud, or take any other actions to protect students. *See* IG Testimony, *supra* note 13 at 33, 41.

[65] Comments submitted by Nat'l Consumer Law Ctr. and Other Legal Services Organizations to Dep't of Educ. 10 (Feb. 14, 1994) (on file with author).

[66] *Id*.

the transfer of credits between 2004 and 2009. It reported that that only 4 percent of students were able to transfer credits from for-profit to public schools and that:

> . . . [S]tudents who transferred from for-profit schools to public schools lost an estimated 94% of their credits. Even if a student's credits transfer, they may not apply toward fulfilling degree requirements for their intended major. In these cases, a student will likely have to take additional courses at their new school, which could potentially delay graduation and result in additional costs to pay for repeated courses.[67]

Nonetheless, under ED's policies, students who transferred even just one credit were still on the hook for all the loans paid to the closed school, even when they were required by their new school to retake previously completed classes.

ED should therefore grant automatic discharges to students whose schools closed between 1986 and August 1994 *regardless* of whether the student completed the same or similar program through a teach-out or by transferring credits. The minimal potential cost of granting discharges to these borrowers, a few of whom may have completed decent teach-outs or transferred all their credits to another school, is counterbalanced by the enormous benefit of granting discharges to the large majority of borrowers who were truly harmed by for-profit school closures prior to August 29, 1994.

2. Borrowers Whose Schools Closed Prior between August 29, 1994 and the Present

For schools that closed between August 29, 1994 and the present, ED should provide automatic closed school discharges to all borrowers who (1) did not complete their programs at the school and (2) were enrolled or on a leave of absence when the school closed, or withdrew within 120 or 180 days, whichever is applicable, or any longer period specified by ED, prior school closure; (3) did not subsequently complete a program at another Title IV-eligible school; and (4) are not currently enrolled in a Title IV-eligible program.

[67] U.S. Gov't Accountability Off., GAO-19-553T, GI Bill: Veterans Affected by School Closures 9 (June 19, 2019), https://www.gao.gov/assets/700/699817.pdf.

In addition, using its extenuating-circumstances authority, ED should, at a minimum, extend the pre-closure withdrawal eligibility period for all closed schools to the date of the event, if any, that led to a school's financial instability and eventual closure. ED should undertake a review of all school closures to determine whether any meet the following criteria and, if so, extend the pre-withdrawal eligibility period to the date indicated:

(1) The date that ED put the school on heightened cash-monitoring (HCM) status, if the school was not subsequently restored to full eligibility without monitoring prior to closure. ED has done this before, including by extending the closed school pre-withdrawal eligibility period for Corinthian students back to June 20, 2014, the date upon which it placed Corinthian's schools on HCM status.[68] ED should do the same for the schools owned by Education Corporation of America (ECA), which was placed on HCM status in March 2015 and closed in December 2018, and ITT Tech, which was placed on HCM status in August 2014 and closed in September 2016;[69]

(2) The date that an institutional accrediting agency revoked accreditation or put the school on probation, issued an order to show cause, or took other adverse public action which was not lifted prior to the school's closure. This includes Charlotte Law School, whose accreditor, the American Bar Association, placed it on probation on February 3, 2016, and which subsequently closed on August 10, 2017.[70]

(3) The date of any adverse judgment, whether stipulated or based on a contested proceeding, obtained by ED, another federal agency, or by one or more state attorneys general against the school for state or federal violations that required a payment that adversely impacted the school's finances. This includes the Art Institutes, Argosy University, South University, and Brown-Mackie Colleges, which were owned by Education Management Corporation (EDMC). On November 16, 2015, a federal court entered a Consent Judgment ordering EDMC to pay $95.5 million to ED and several states for its illegal scheme to pay incentive compensation to recruiters based on the number of students they enrolled.[71] This judgment was the beginning of the end for these schools. It led to the closure of 22 Brown-Mackie campuses in

[68] *See supra* note 51.

[69] Alex Elson, Student Defense, Justice at Last 4-6 (Oct. 2020), https://www.defendstudents.org/news/body/docket/100-Day-Docket-Expanding-Debt-Relief.pdf (my thanks to Alex and the National Legal Defense Network for making similar recommendations and doing the research on these dates and the schools that started their descent to closure) (citations omitted).

[70] *Id.* at 3 (citations omitted).

[71] *Id.* at 4 (citations omitted).

June 2016, and the sale of most other campuses to the Dream Center Foundation. Most of these campuses closed in December 2018 and March 2019.[72]

(4) If ED denied a school's application seeking to renew Title IV eligibility (re-certification) or revoked a school's Title IV eligibility, the earliest date of the school's violations underlying these decisions. This includes Medtech College, which closed immediately upon ED's denial of its application for recertification on July 26, 2016. ED's denial was based on substantial misconduct that occurred in 2014 (and possibly earlier).[73]

C. Borrowers Previously Denied Closed School Discharges

To the extent that ED, a guaranty agency, or a Perkins Loan holder previously denied an application for any students who meet the criteria described above, ED should reassess those applications and grant discharges whenever a borrower's application establishes eligibility, regardless of any contradictory electronic information or incorrect paperwork provided by the school.

D. Closed School Discharge Notifications to Borrowers Who Do Not Meet the Above Criteria

ED should also notify borrowers who do not appear to meet the above eligibility criteria about their potential eligibility. This is necessary to account for past ED errors, as well as the possibility that ED, guaranty agencies, and Perkins Loan holders may miss borrowers who are eligible for automatic discharges per the above criteria. It is also necessary for students who would have been eligible, but who were denied discharges due to either (1) ED's overly narrow closed school discharge regulations or (2) ED's reliance on false or incorrectly reported information from fraudulent schools. Finally, there may be borrowers who completed a subsequent program by transferring credits to another school, but who should qualify for a discharge because that program was not the same or comparable to the program in which they were enrolled at the closed school.

[72] *Id.* (citations omitted).

[73] *Id.* at 6-7 (the evidence underlying ED's denial of Medtech College's application is not publicly available, and may pre-date 2014) (citations omitted).

ED should notify all students who attended closed schools within the applicable pre-withdrawal eligibility periods, but who do not meet the criteria outlined above according to ED, guaranty agency, or Perkins Loan holder records, of their potential eligibility for discharges. This includes students who were reported as completing their programs during that time period, as some schools falsely report student completions in order to illegally keep financial aid that they are required to refund and to avoid liability to ED.

ED should send a simple one-page closed school loan discharge application and one-page letter explaining eligibility criteria and submission instructions to all such students. The cover letter and application should be available in all languages in which closed schools provided instruction. The application should request only necessary information—the student's or borrower's Social Security number and contact information; the school the student attended; the last date of attendance; whether the student completed his/her program; and, if not, whether the student was in attendance when the school closed, was on an approved leave of absence when it closed, or had withdrawn within the applicable time period prior to the school's closure. ED, guaranty agencies, and Perkins Loan holders should suspend all collection activity for at least 90 days after sending the letter and application.

If such a borrower submits a sworn application that meets the discharge criteria described in this paper, ED should grant the discharge if (1) there is no evidence contradicting the borrower's statement or (2) the only evidence contradicting the borrower's application is information reported by a fraudulent school.

E. Borrowers Whose Schools Close on or After July 1, 2020

Finally, ED should immediately implement an automatic closed school discharge policy for students whose schools close on or after July 1, 2020, and who (1) do not re-enroll in any Title IV-eligible program within one year or (2) re-enroll in a Title IV-eligible program but withdraw within 1 year. While ED repealed the automatic discharge regulation it had enacted in 2016, it need not re-enact a similar regulation in order to implement this policy. As ED itself noted, it "already has the authority to grant a [closed school] discharge without an application . . . at [its] discretion, and, therefore, we do not believe that it is necessary to establish . . . a requirement that [ED] grant automatic closed school discharges."[74]

[74] 83 Fed. Reg. 37,242, 37,267 (July 31, 2018) (citing 34 C.F.R. §§ 682.402(d)(8) (FFEL Loans), 685.214(c)(2) (Direct Loans), and 674.33(g)(3)(ii) (Perkins Loans).

Conclusion

ED continues to engage in the onerous collection of student debt owed by thousands of borrowers who are or should be eligible for closed school discharges based on its own records, or the records of other loan holders. Many of these borrowers—for-profit school students who are primarily low-income people and people of color—have endured onerous debt collection for decades. Many have paid the principal and more on their loans through wage garnishment, Social Security offsets, and other types of involuntary collection, yet still owe ED far more than they ever borrowed in interest and collection fees.

There is little to be gained by continuing to wage this economic war on poor people who were harmed, through no fault of their own, by school closures caused by ED's neglect, mismanagement, and outdated monitoring tools.

There is little to be gained by continuing to wage this economic war on poor people who were harmed, through no fault of their own, by school closures caused by ED's neglect, mismanagement and outdated monitoring tools. Pursuing this largely impoverished group of students who were failed by ED and their schools costs the government time and money and is unlikely to produce substantial collections.

Instead of construing the closed school discharge provisions narrowly, ED should change course and comply with its statutory mandate to grant broad and automatic closed school discharges as initially intended by Congress.

RELIEF FOR BORROWERS WITH A DISQUALIFYING STATUS

Rye Salerno
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Introduction

A. Overview of the Program

The Higher Education Act provides that student loan borrowers are entitled to a loan discharge if their eligibility to borrow from the federal government was falsely certified by their school.[1] The statute, however, says little more than that, and it falls on the Department of Education (the Department) to define false certification and the implementation of a false-certification discharge program. One broad category of false certification discharge ostensibly recognized by the Department is improper certification by schools of prospective students' "ability to benefit" from an educational program.[2] The Department's regulations recognize that certain conditions or legal statuses of students can prevent them from obtaining the benefit of occupation-oriented educational programs, i.e., employment in that occupation. For Direct Loans disbursed prior to the effective date of the DeVos borrower defense regulations, July 1, 2020:

The Higher Education Act provides that student loan borrowers are entitled to a loan discharge if their eligibility to borrow from the federal government was falsely certified by their school.

> The Secretary considers a student's eligibility to have been falsely certified by the school if the school . . . (iv) Certified the eligibility of the *student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary, would not meet State requirements for employment* (in the student's State of residence when the loan was originated) *in the occupation for which the training program supported by the loan was intended*.[3]

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[1] "[I]f such student's eligibility to borrow under this part was falsely certified by the eligible institution . . . then the Secretary shall discharge the borrower's liability on the loan (including interest and collection fees) by repaying the amount owned on the loan." 20 U.S.C. § 1087(c).

[2] 20 U.S.C § 1091(d) explicitly refers to the ability to benefit of students certified for a federal student loan who have neither a high school diploma nor its equivalent. The statute, however, does not refer to the ability to benefit of those with disqualifying conditions or legal statuses who, as a result, would be excluded from certain occupations.

[3] 34 C.F.R § 685.215(a)(1) (emphasis added). The regulations contain the same operative language with regard to Federal Family Education Loans. 34 C.F.R § 682.402(e) ("(1)(i) A student's or other individual's eligibility to borrow shall be considered to have been falsely certified by the school if the school (A) Certified the student's eligibility for a FFEL Program loan on the basis of ability to benefit from its training and the student did not meet the applicable requirements . . . (13)(iii) . . . a student did not have the ability to benefit from training offered by the school if . . . (B) At

Pursuant to these regulations, to qualify for loan discharge, a student must face a legal bar to employment in their state as a result of their condition.[4] For example, a state statute or regulation could bar persons with certain felony convictions from employment in specified occupations. Alternatively, a state statute or regulation could require all persons in a certain occupation to have a specified certification or license, and the certifying or licensing organization could preclude people with the student's condition from obtaining the credential. More directly, a state statute or regulation may directly bar persons with the student's condition from the occupation the education was intended for (e.g., prohibiting the visually impaired from driving-based professions). In sum, while there are certainly instances of disqualifying status that are covered by these regulations, the far larger category of students who face *de facto* bars to employment are excluded from relief, as discussed below.

The Department also requires that a student's mental, physical, or legal condition existed at the time that a school certified their eligibility for federal loans.[5] In practice, the Department has also required a showing that the school was aware of the condition at the time it certified the loans,[6] and, at least in some cases, that the school told the student that the condition would not hinder the student in obtaining employment after graduation.[7]

In new regulations promulgated in 2019, the Department eliminated false certification disqualifying status discharges for loans disbursed on or after July 1, 2020.[8] While this paper focuses on the regulations applicable to loans disbursed prior to July 1, 2020—as these regulations apply to the vast majority of student borrowers who are in desperate need of relief—we likewise advocate for the restoration of the disqualifying status discharge for

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the time of certification, the student would not meet the requirements for employment (in the student's State of residence) in the occupation for which the training program supported by the loan was intended.").

[4] *See Washington v. Duncan*, No. 13-C-1080, 2016 WL 324989, at *4 (E.D. Wis. Jan. 26, 2016) (concluding that the borrower must provide proof of a state statute or regulation barring his employment in order to satisfy the requirements for a disqualifying status discharge); *see also*, Appendix A, Sample Denial Letter for False Certification, Disqualifying Status Discharge (Sept. 15, 2010).

[5] "If schools do not have knowledge of the disqualifying condition that precludes the student from meeting State requirements for employment in the occupation for which the training program supported by the loan was intended, then schools cannot falsely certify a student's eligibility for Federal student aid under title IV." 84 Fed. Reg. 49,788, 49,859–49,860 (Sept. 23, 2019). Implicit in this requirement is that the borrower had a disqualifying status at the time of certification.

[6] The U.S. District Court for the Eastern District of Wisconsin has upheld this practice in APA review of a denial of loan discharge by the Department. *See Duncan*, 2016 WL 324989 at *4.

[7] *See* Appendix A.

[8] 34 C.F.R § 685.215(e).

present and future borrowers. The Department should re-institute the disqualifying status discharge for present and future borrowers under the regulatory framework we explicate below.

B. Failing Ceela Harris

In 2013, Ceela Harris was exiting her local Winn Dixie grocery store when she was approached by a recruiter from the Medical Institute of Palm Beach, located 48 miles away from Ms. Harris's town. Ms. Harris hoped to secure stable employment with an increased salary, as high-paying jobs in her community were scarce—especially for those with criminal records. Ms. Harris communicated her anxiety to the recruiter about the likelihood of securing employment due to her former felony convictions. But the recruiter expelled Ms. Harris's hesitation. She assured Ms. Harris that her fifteen-year-old felonies would not impede her placement as a medical assistant in one of the Institute's associated doctor's offices. In fact, Ms. Harris would purportedly receive substantial assistance with her externship hunt, and, with the Institute's network of doctors, job placement was a sure thing. After more coaxing by the admissions office, Ms. Harris decided to enroll, and the school certified her for $9,500 in federal student loans and $5,500 in federal grants to cover the cost of the program.

After more coaxing by the admissions office, Ms. Harris decided to enroll, and the school certified her for $9,500 in federal student loans and $5,500 in federal grants to cover the cost of the program.

None of those benefits materialized. Ms. Harris, through her own grit, secured an externship and lined up a job offer, but the clinic ultimately declined to offer her a paid position, explaining that they had a policy against hiring people with criminal records. Ms. Harris heard that same refrain repeatedly over the course of four in-person interviews and eight months of fruitlessly searching for a job. In total, she lost more than a year of time and wages. Instead of a job as a medical assistant, Ms. Harris has been left with a ballooning debt balance that she struggles to pay due to her familial obligations and continued difficulties in the workforce.

The Medical Institute of Palm Beach should never have certified Ceela Harris's federal student loan eligibility for vocational training that would yield her no practical value. But on the grounds that the state of Florida has no explicit law barring those with former felony convictions from joining the medical assistant profession, the Department of Education has deemed Ms. Harris ineligible for relief.

Problems

The present regulations and policies narrow the statute's mandate unjustifiably and deny discharge to a large group of borrowers. The current regulatory and sub-regulatory regime leaves unprotected a group of student borrowers—those with criminal records or with mental or physical conditions—who are unable to find employment after completing vocational training at a state accredited school. The Department provides relief only to borrowers who are *legally* barred from employment, unconscionably denying relief to those who are *practically* barred. These borrowers are denied discharges simply because they cannot point to a state law or regulation that explicitly prohibits their employment in a certain occupation.[9] Such a result is contrary to the stated end of the regulations: the provision of "essential consumer protection" to student loan borrowers.[10] In addition to this regulatory narrowing of the statutory mandate, the Department's sub-regulatory policies impose severe evidentiary burdens that make it difficult for many borrowers to receive debt relief even when they are qualified under the letter of the regulation.

A. Regulatory Narrowing

The Higher Education Act gives the Department a broad mandate to provide relief to student borrowers who were falsely certified for federal loans by their school, stipulating only that "if such student's eligibility to borrow under this part was falsely certified . . . the Secretary shall discharge the borrower's liability."[11] Based on the statutory language, this discharge should cover any student who, at the time of borrowing, was objectively unlikely to find employment in the occupation for which the educational program was intended. For example, a student would have been falsely certified if they were ineligible for necessary licensing due to a prior criminal conviction, or if they lacked physical qualifications that all employers in the field looked for, regardless of whether the state creates a legal barrier to employment.

[9] The vast majority of these borrowers likely do not even apply for false certification discharge because the Department has made them ineligible under its current regulations, making it difficult to estimate their total number.

[10] Federal Family Education Loan Program, 59 Fed. Reg. 61210-01 (Nov. 29, 1994).

[11] 20 U.S.C. § 1087(c).

Instead of following this broad statutory mandate, the Department severely limited which borrowers are eligible for relief. The implementing regulations require that a state statute or regulation legally bar the student from employment in the specific occupation due to their condition or status.[12] This stringent requirement of a *de jure* bar to employment unjustifiably leaves unprotected the many borrowers who face *de facto* bars. From a borrower's perspective, there is no principled distinction between (1) inability to find employment because state law bars those with their condition or status from working in a particular occupation and (2) inability to find employment because employers in a particular occupation in the state don't hire those with their condition or status. The outcome is the same and, in both cases, the schools that train students to work in those occupations are well positioned to identify barriers to employment and only certify for federal loans students who can meaningfully benefit from their programs.

By limiting student loan discharge to only those borrowers who can cite a statutory or regulatory bar to employment, the Department fails to provide relief to a significant body of students.

Consider the following illustrations of students whom these regulations leave unprotected:

Scenario A, where widespread employer preferences prohibit employment:

> A prospective student with a felony conviction is recruited into a medical assistant (MA) program by a local for-profit school. Upon completing the program, the student fails to find a job. There is no state statute or regulation prohibiting individuals with a prior felony from working as MAs, but there is an informal, industry-wide preference against hiring MAs with criminal records. The student is left with tens of thousands of dollars in debt, 12 months of lost wages, and no basis for a false certification-disqualifying status discharge.

Scenario B, where an ad hoc decision by a licensing board prohibits employment:

> A student with a felony conviction fails to get licensed as a registered nurse (RN) by the state's licensing board after completing an RN program. Despite the licensing board's decision as to this student, there is no state law or regulation with a per se prohibition on the licensing and employment of individuals with a prior felony as RNs. The student is left with tens of thousands of

[12] 34 C.F.R. §§ 608.402(e)(1)(i), (13)(iii); 685.215(a)(1)(iv).

dollars in debt, 2 years of lost wages, and no basis for a false certification-disqualifying status discharge.

These scenarios (which are far from exhaustive) demonstrate the narrowness of the Department's regulations. By limiting student loan discharge to only those borrowers who can cite a statutory or regulatory bar to employment, the Department fails to provide relief to a significant body of students who, regardless of state law, are practically excluded from the occupation for which they have trained and incurred debt.

B. Sub-Regulatory Narrowing

The Department of Education's sub-regulatory regime further denies loan cancellation to borrowers. In processing discharge applications, the Department has imposed a series of additional requirements that illogically place significant burdens of past risk avoidance and proof onto students, preventing many from obtaining relief. The Department has required:

- That the school knew about the condition or status (i.e., that the student notified them);[13]
- That the school represented to the student that said condition or status would not prevent employment;[14]
- That the program be "so narrowly focused" on a specific occupation that "no benefit of any kind" is provided if the student cannot obtain employment in that occupation;[15] and
- That the student provide documentary evidence in support of these claims.[16]

Each of these qualifications reflects a choice by the Department to place the burden of preventing ineligible students from receiving federal loans on those prospective students, and to exclude the vast majority of debt-encumbered borrowers from relief.

[13] *See* Appendix A; *see also Duncan*, 2016 WL 324989, at *4.

[14] *See* Appendix A.

[15] *See id.*; *see also* Johnson v. U.S. Dep't of Educ., 580 F. Supp. 2d 154, 157 (D.D.C. 2008) (endorsing this sub-regulatory requirement).

[16] *See* Appendix A.

- *First*, by placing the burden of having notified the school on the student, they require that students were aware of the conditions or statuses that would prevent their employment in the intended occupation even though at the time they enrolled, students likely had little knowledge of the requirements for employment. More likely, they relied on the school recruiting them to provide the information they needed.

- *Second*, by rejecting discharge applications when schools have told students that their condition or status could prevent employment, the Department could imply to schools that they will not face negative repercussions if they broadly disclaim any guarantee of employment for persons with potentially limiting conditions or statuses.

- *Third*, students who attended schools with programs that do not correspond to one specific job are categorically prevented from obtaining relief, even when they are unable to obtain employment in the occupations for which the program was marketed as preparation. For example, if a schooled coupled training for police officers and paralegals under the umbrella of a "forensic studies" program, students in need of relief could never satisfy the Department's "specific occupation" requirement for a discharge, even if recruiters verbally assured them that the program would prepare them for those occupations.

- *Fourth*, even a student who meets all these sub-regulatory requirements is still burdened by the need to provide documentary evidence backing up their claims, as the Department has chosen not to give significant weight to borrower testimony. This immediately excludes from relief even those students who, despite having the exceptional foresight and caution to ask about the effect of their condition or status on future employment, did so verbally, and likewise received assurances from the school verbally.

Consider the following scenario, Scenario C, which illustrates just one way in which these sub-regulatory policies prevent discharge for students who should be eligible for relief under the regulations:

> A prospective student with a prior felony is recruited into an X-Ray Technician program by a local for-profit school. After the student shares that she has a prior felony, the school recruiter verbally assures the student that a felony will not be a barrier to future job-placement. Upon successfully completing the program, the student fails to find a job as an X-Ray Technician because of a state regulation blocking individuals with a prior felony from working in the medical field. When applying

for a loan discharge, the student cannot provide documented evidence that she was assured her felony would not be a barrier to employment. Her application is denied.

As this scenario illustrates, even when students qualify under the Department's regulation, the sub-regulatory regime erects more barriers. In requiring borrowers to demonstrate that the school was aware of a condition or status and that the school assured the borrower that it would not affect employment, the Department limits discharge to the few (if any) borrowers who had the foresight to ask about the implications of their felony status, adequately document the school's response, and save that evidence for future production. The Department seems to expect that persons seeking to better their lives through education approached the endeavor like a corporation preparing for future litigation.

In sum, the current disqualifying status regulations and sub-regulatory policies evince a concerted effort to deny relief to borrowers who fall within the Higher Education Act's protections. Such a stance leaves many borrowers in need of relief without any avenue to obtain discharge. These are borrowers who, like Ceela Harris, enrolled in training programs and took out federal student loans believing that they would be able to obtain employment in the field, and only later found out that persons with their condition or status are excluded from the occupation. The Department's regulations exclude borrowers facing *de facto* bars to employment from relief, and their sub-regulatory policies even make it difficult for borrowers facing legal bars to employment to obtain loan discharge.

In sum, the current disqualifying status regulations and sub-regulatory policies evince a concerted effort to deny relief to borrowers who fall within the Higher Education Act's protections.

Solutions

We propose three changes:

- *First*, the regulatory regime must recognize that borrowers can be disqualified from employment for both legal and non-legal reasons. If borrowers are unable to obtain a job in the occupation they trained for, then the program provided them no economic value, regardless of whether they face a legal or *de facto* bar to employment, and their loans should be discharged. Changing the regulations will allow these borrowers to successfully apply for false certification disqualifying status discharge. In addition, the

Department should review past applications for false certification or borrowers defense discharge, identify those borrowers who would qualify for disqualifying status discharge under the changed regulations, and discharge their debts without requiring reapplication.

- *Second*, the regulations must be supported by a more permissive sub-regulatory policy. At the sub-regulatory level, the Department should ease the evidentiary burden currently placed on borrowers seeking discharges, so as to not unjustifiably exclude borrowers who are eligible under the letter of the regulation.

- *Third*, an improved regulatory regime must recognize that schools, as knowledgeable repeat players, are far better positioned than prospective students to be aware of the barriers to employment in the occupations for which they train students. Beyond our proposed changes to make discharges available to the borrowers who need them, the Department should add two requirements to its Program Participation Agreements (PPAs).[17] The Department should require that schools actively consider which statuses would be disqualifying, and that they take steps to inform themselves about prospective students' potentially disqualifying characteristics.

A. Allowing Relief for Borrowers Facing *de facto* Bars to Employment

Pursuant to our first proposal, the following modification should be made to 34 C.F.R §685.215(a)(1):[18]

> The Secretary considers a student's eligibility to have been falsely certified by the school if the school . . .
>
> (iv) Certified the eligibility of the student who, because of a physical or mental condition, age, criminal record, or other reason accepted by the Secretary[19], would not meet State requirements for employment***, or would otherwise be unlikely to obtain employment*** (in the student's State of

[17] *See* 20 U.S.C. § 1094; 34 C.F.R. § 668.14.

[18] As well as corresponding changes to 34 C.F.R. § 682.402(e)(13)(iii).

[19] In light of the expansion of this regulation, the Secretary should consider discharges for additional disqualifying statuses—e.g., borrowers who face language barriers.

residence when the loan was originated) in the occupation for which the training program supported by the loan was intended.

This minor regulatory change unlocks relief for a large swath of students who—despite attending training programs that provided them no benefit due to a preexisting condition or status—are currently punished by the federal student loan system.

This minor addition to the Department's regulations could unlock necessary relief for a large swath of borrowers who are unable to find employment in the occupation for which they attended school and obtained federal loans, due to a condition or status that already existed when they went into debt to finance their education.

There is no principled reason to distinguish between inability to obtain employment due to legal bars and inability due to *de facto* bars. Allowing discharges for borrowers who face *de facto* bars to employment restores fairness to a system that aims to provide "essential consumer protection" to students who were falsely certified.[20] Revisiting Scenario A from above demonstrates how this plays out:

> A prospective student with a prior felony is recruited into a medical assistant (MA) program by a local for-profit school. Upon completing the program, the student fails to find a job. There is no state statute or regulation prohibiting individuals with a prior felony from working as MAs, but there is an informal, industry-wide preference against hiring MAs with criminal records. *With testimonial evidence of this practical bar to employment, they successfully apply for false certification-disqualifying status discharge and are relieved from tens of thousands of dollars in debt.* The student still lost 12 months of wages and must search for employment in another field but can confront these and future challenges without an unmanageable debt burden.

The same improvement occurs in Scenario B. This minor regulatory change unlocks relief for a large swath of students who—despite attending training programs that provided them no benefit due to a preexisting condition or status—are currently punished by the federal student loan system.

[20] *See* Federal Family Education Loan Program, 59 Fed. Reg. 61210-01 (Nov. 29, 1994).

B. Easing Sub-Regulatory Requirements and the Evidentiary Burden

To ensure that borrowers who should be eligible for relief are able to obtain loan discharges, the Department should remove those sub-regulatory evidentiary policies which restrict the group of eligible borrowers beyond the letter and spirit of the regulations. Requirements that the school knew about the condition or status and represented that it would not prevent employment should be discarded. Neither bears on whether a student is in debt for an education that provided them no tangible benefit.

Further, the Department should eliminate the requirement that a program have been "so narrowly focused" on a specific occupation that "no benefit of any kind" is provided if a student cannot obtain employment in that occupation. If a student is unable—due to their condition or status—to obtain employment in the occupation *or* occupations a training program is intended for, they should be eligible for false-certification discharge. Students who attended ostensibly generalized training programs should not be excluded from relief when they are unable to obtain employment in that field.

Finally, the Department should tailor the evidentiary standard for proof of *de facto* bars in a way that makes relief under this part of the regulations practicable for borrowers. A prohibitively high evidentiary threshold (e.g., requiring students to produce documentary evidence of oral misrepresentations or empirical data) risks hollowing out the provision.[21] To ensure that relief is available to those who need it, the Department should accept the borrower's own testimonial statements, made under penalty of perjury, in the discharge application. Any requirements for additional evidence should be limited to proof that is available to borrowers. For example, the Department might request documentary evidence to substantiate borrower claims of current unemployment, current employment in an occupation different from the one the borrower trained for, or failed attempts to secure a job in the occupation they trained for, if necessary.

C. Recognizing the Need for School Responsibility

In addition to removing its restrictive sub-regulatory policies, the Department should amend outstanding and future Program Participation Agreements (PPAs) to require schools to inquire into disqualifying statuses before

[21] The Bureau of Labor Statistics, state licensing boards, and independent policy think tanks scarcely produce statistics that reflect how individuals' legal statuses interact with state-specific employment rates in particular occupations. Asking for that sort of evidence would be tantamount to an automatic denial.

certifying loans, in order to discourage the certification of federal student loans for students who will be foreclosed from employment because of a disqualifying status.[22] Importantly, these requirements do not affect borrowers seeking loan discharges—a student who, in the past, was falsely certified despite a disqualifying status will not be barred from relief. Rather, the requirements affect only schools and are designed to improve future enrollment practices.

This approach better reflects the spirit of the Higher Education Act, as well as being superior regulatory policy. First, it eliminates key sub-regulatory roadblocks that prevent otherwise eligible borrowers from receiving a discharge. It is unjust and unrealistic for the Department to expect that students, at the time they were considering a training program, were fully aware of the impact of their statuses or conditions on their employment prospects. That onus should not fall on students.

Second, it rightly places that screening responsibility on schools—the party to the transaction with the institutional knowledge and capacity necessary to prevent false certifications. Unlike students, schools are well-positioned to (and likely do) explore the state laws and regulations that limit eligibility for the occupations their training programs target, and to conduct market research into how students with different statuses and conditions fare when applying for jobs in the occupation, including with data on their own employment outcomes. It is an easy step to ask incoming students if they have any of these limiting conditions or statuses, and to responsibly screen out those who would face legal or *de facto* bars to employment even after completing the program. Through this intervention, the Department institutes another stopgap measure against the abuse students suffer at the hands of predatory for-profit schools, who, because of their disinterest in whether students are well-disposed to employment upon program completion, leave students "responsible for loans that they cannot repay."[23]

Looking to the future . . . the Department should take a strong enforcement role against schools that fail to comply with these requirements.

This inquiry requirement should not raise concerns about the Department penalizing schools for past practices which were not explicitly proscribed at the time. In any situation in which imposing liability on a school would

[22] These requirements can be added to the Department regulations specifying the requirements for PPAs, 34 CFR § 688.14.

[23] "Abuses in Federal Student Aid Programs," S. Rpt. 102-58, Report made by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, U.S. Senate at 37 (May 17, 1991).

be unfair, it is well within the Secretary's discretion to choose not to seek recovery from schools for past practices contrary to the new PPA regulations.[24] Looking to the future, however, the Department should take a strong enforcement role against schools that fail to comply with these requirements. Should the Department reinstate disqualifying status discharge regulations, it should consider a large number of discharge applications coming from any given school as a reason to investigate that school's compliance.

Conclusion

The current regulatory regime for disqualifying status discharges denies a significant group of borrowers—those unable to find employment due to a mental or physical condition or legal status that existed when they enrolled in a training program—the debt relief which they should be able to access under the Higher Education Act. The current regulations restrict discharge to borrowers who face *de jure* bars to employment, ignoring the reality that many students with these conditions or statuses are unable to obtain employment in the occupation they trained for due to *de facto* bars. And current Department sub-regulatory and evidentiary policy further restricts discharge by requiring students to prove that they identified their status and asked their school about its effect on employment before enrolling.

The Department should correct these flaws with the direct revisions to the regulations and its sub-regulatory policies proposed in this paper, and in so doing unlock necessary relief for the borrowers who were certified for a loan despite having a condition or status that would prevent their employment and are still saddled with the debt. The Department should also recognize the role that schools play in creating the need for disqualifying status discharge and strengthen the PPA regulations to ensure that schools are avoiding enrolling students who will be unlikely to obtain employment.

[24] Similar concerns of overreach were raised when these regulations were originally enacted, and the Department responded that the Secretary would exercise their discretion in a way that those concerns would remain hypothetical. Schools had suggested that they could potentially be held liable for false certifications even when they were unaware of a disqualifying status (a liability this paper argues should explicitly exist). The Department responded that "the Secretary will not consider the school liable in any respect if the borrower later qualifies for a false certification loan discharge based on a disqualifying status unknown to the school." Federal Family Education Loan Program, 59 Fed. Reg. 61210-01 (Nov. 29, 1994).

Appendix A

SEPTEMBER 15, 2010

[redacted]
FORT LAUDERFALE FL [redacted]

DEBT ID	APPLICATION TYPE	SCHOOL NAME
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY
[redacted]	DISQUALIFYING STATUS APPL	KEISER UNIVERSITY

This letter acknowledges receipt of your sworn statement requesting discharge of your student loan(s). After a thorough review of your application, the U.S. Department of Education (ED) has denied your request for discharge for the following reason(s):

Schools are required only to certify that student borrowers have sufficient ability to benefit from the training offered. Employment in the field of study, however, is not guaranteed, and the student's inability to find employment in the field of study may not be used as a condition of repayment.

You failed to provide documentation to support your claim of a disqualifying status you had at the time the school certified or originated your loan and that the school was made aware of it at the time of enrollment.

Student borrowers who had a physical, mental, or legal status or condition at the time of enrollment that would have prevented the student from satisfying the requirements for employment in his or her field of study may be eligible for false certification loan discharge. The legal status must be long term and unchangeable. The exemptions from disqualification for employment screening (435.07) that you sent to this office includes: felonies committed more than 3 years prior to the date of disqualification. Your legal status is therefore not long term and unchangeable.

FEDERAL STUDENT AID START HERE. GO FURTHER.℠

It is the responsibility of the applicant to provide evidence that, at the time of enrollment, a status existed that by reason of a State regulation, barred his or her employment in the field of study. Such evidence includes:
1) Documentation demonstrating a status or condition based on a physical or mental condition, age, or criminal record that would bar employment in the field of study;
2) A copy of a State statute or regulation that provided that the condition or status would prevent satisfaction of the requirements of the State in which the student resided for performance of the occupation for which the program of instruction was designed to prepare the student; and
3) Evidence that the condition or status in question existed at the time of enrollment, that the school was aware of it, and that you were told by the school it would not be a hindrance to you in seeking employment after graduation from the school.

The concept of the disqualifying status regulation, 34 C.F.R. § 682.402(e)(13)(iii), is that certain training programs are so narrowly focused on a specific occupation that, for persons who are legally disqualified from employment in that occupation (long term), such programs provide no benefit of any kind, either in terms of transferable educational credit or transferable occupational skills.

To be eligible for federal student aid, including loans, non-degree educational "training" must "prepare a student for gainful employment in a recognized occupation," defining "recognized occupation" as one which is "listed in an `occupational division' of the latest edition of the Dictionary of Occupational Titles, published by the U.S. Department of Labor."

You have not shown evidence that you have been denied employment based on your stated disqualifying status.

The Department's role in the various student loan programs is to make funds available to students to defray the cost of an education. The Department does not set the curriculum or guarantee the quality of education delivered. The selection of the school is the responsibility of the student.

Finally, the promissory note signed in the process of procuring the loans is independent of the enrollment agreement made with the school. Repayment is not contingent upon the student's satisfaction with the training, services, equipment, or placement facilities. For these reasons, the Department considers these loans to be an outstanding, legal obligation.

This determination covers only the loan(s) held by the U.S. Department of Education, listed above. The Department has made no determination regarding loans held by guarantee agencies, servicers, lenders, or educational institutions. If you believe that you may be eligible for discharge of other loans, you should contact the holder of the loans.

You are responsible for paying any outstanding balance due on your loan(s). Please call 800-621-3115 to make arrangements for repayment of the loan(s).

Operations Services Processing Division

RELIEF FOR SERVICEMEMBERS AND VETERANS

Michael Saunders
Director of Military and Consumer Protection, Veterans Education Success
Military Affairs Fellow, Student Borrower Protection Center

Introduction

Policymakers have long acknowledged the link between financial readiness and military readiness and that unique financial stresses imposed by military life can impede America's national security.[1] In fact, Congress has repeatedly taken steps to mitigate the acute financial burden servicemembers face by crafting military-specific protections during repayment of consumer debt, including interest rate caps and servicing requirements when military consumers are on active duty.[2] Over the last two decades, as the student debt crisis has emerged within the ranks of the military, Congress has targeted repayment benefits and protections to servicemembers with student debt.[3]

For example, after the tragedy of September 11th, 2001, Congress sought to give the Secretary of Education the authority to alleviate repayment problems faced by military borrowers through the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).[4] Under the HEROES Act, the Secretary has extraordinary authority to waive administrative requirements needed to access critical student loan repayment protections during times of war, military operation, or national emergency in order to provide servicemembers with student debt much needed "assistance and flexibility."[5]

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[1] *See, e.g.*, Holly Petraeus, *Hollister K. Petraeus Before the U.S. Senate Committee on Commerce, Science & Transportation*, Consumer Fin. Prot. Bureau (Nov. 20, 2013), https://www.consumerfinance.gov/about-us/newsroom/hollister-k-petraeus-before-the-u-s-senate-committee-on-commerce-science-transportation/ (quoting Admiral Mike Mullen as stating "A sailor's financial readiness directly impacts unit readiness and the Navy's ability to accomplish its mission."); Reuters, *U.S. military sounds alarm over mountings student loan debt* (Oct. 18, 2012), https://www.reuters.com/article/us-usa-military-studentloans/us-military-sounds-alarm-over-mounting-student-loan-debt-idUSBRE89H1I220121018 ("Defense Secretary Leon Panetta told reporters that the No. 1 reason troops lose security clearances was financial troubles, which include things like overwhelming debt for mortgages, credit cards and student loans."); *Alleged Violations of the Servicemembers Civil Relief Act: Hearing Before the H. Comm. On Veterans' Affairs*, 112th Cong. (Feb. 9, 2011) (statement of Chairman Jeff Miller, ". . . [O]ur Nation's war fighters and their families should not have to fight to keep their piece of the American dream while fighting on foreign soil defending the fundamental right that each and every one of us has.").

[2] *See, e.g.*, Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835; Post-9/11 Veterans Education Assistance Act of 2008 (title V of Pub. L. No. 110-252); Military Lending Act, Pub. L. No. 109-364, 120 Stat. 2266 (2006).

[3] *See U.S. military sounds alarm*, *supra* note 1 ("'I think the problem may be greater with student loans than it was with mortgages,' Petraeus, wife of CIA Director David Petraeus, said, explaining that 'many more young servicemembers enter active duty with student loans than with a mortgage.'"); 20 U.S.C. § 1087e(f)(2)(C) (authorizing federal student loan deferment for borrowers serving on active duty, called *military deferment*); 20 U.S.C. § 1087e(o) (ceasing interest accrual on federal Direct Loans for military borrowers serving in areas of hostilities for which they are receiving special pay).

[4] 20 U.S.C. § 1098ee.

[5] 149 Cong. Rec. 48, 12 (daily ed. Mar. 25, 2003) (statement of Rep. John Kline), https://www.congress.gov/congressional-record/2003/03/25/extensions-of-remarks-section/article/E561-4.

Congress also took action to help servicemembers by establishing the Public Service Loan Forgiveness (PSLF) program, which provides debt relief to borrowers working in public service, including members of the military, after ten years of payments.[6] In practice, the PSLF program has proven to be an essential recruiting and retention tool across each of the military services that supports the financial readiness of our nation's armed forces.[7] Many servicemembers plan both their financial lives and military careers around the promise of loan forgiveness. But as discussed in an accompanying piece in this compendium, the promise of PSLF has been broken, including for individuals in uniform.[8]

While the broken promise of PSLF will undoubtedly harm millions of borrowers, this article focuses specifically on the acute harm military borrowers face in seeking to access vital student loan protections, largely due to needless administrative burdens that are exacerbated by poor servicing practices. Additionally, this article examines the legal authority under which the Secretary of Education can effectuate the intent of Congress to use the HEROES Act to remedy these harms by providing relief for hundreds of thousands of servicemembers and veterans with student debt.

Problems

To date, hundreds of thousands of public service workers, including individuals in uniform, have applied to have their loans forgiven through PSLF.[9] Despite the fact that all of these borrowers planned their financial futures around the promise of loan forgiveness, only two percent of applicants have successfully had their loans

[6] 20 U.S.C. § 1087e(m).

[7] *See, e.g.*, Dep't of Def. Info. Paper, HR4508, The Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER Act), U.S. Dep't of Def. (Jan. 2018), https://edlabor.house.gov/imo/media/doc/2018-01-10%20DoD%20Opposition%20to%20HR450811.pdf ("DoD opposes this legislation because the Public Service Loan Forgiveness (PSLF) program has been an important recruitment and retention tool for the military to compete with civilian sector. . . .").

[8] The Public Service Loan Forgiveness program offers outsized benefits to servicemembers and veterans as discussed in this paper. It also promises widespread relief to a broad range of public service workers with student debt. In addition to the problems discussed in this paper, millions of other public service workers across the country have encountered similar and different obstacles to unlocking PSLF—the result of more than a decade of government mismanagement and industry abuse. For further discussion of these obstacles and the opportunity to unlock promised debt relief for all borrowers working in public service *see* Michael Pierce & Rebecca Maurer, *Relief for Public Service Workers*, *supra* at 27.

[9] *See* U.S. Dep't of Educ., Off. of Fed. Student Aid, September 2020 PSLF Report (2020), https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data (last accessed Nov. 7, 2020).

discharged through PSLF.[10] As the Student Borrower Protection Center (SBPC) has repeatedly documented in its PSLF Investigations series,[11] the widespread mismanagement of the program by the Department of Education (ED) and shoddy servicing practices of ED's contracted servicers tasked with implementing the program have caused millions of borrowers, including servicemembers, to forfeit their right to debt relief.[12]

The Consumer Financial Protection Bureau (CFPB) estimates that 200,000 servicemembers collectively owe more than $2.9 billion in student debt.[13] These figures suggest that relatively high numbers of military borrowers should be in pursuit of PSLF. However, in analyzing recently obtained data from ED about which borrowers have certified an intent to pursue PSLF,[14] the SBPC identified only 17,534 military borrowers.[15] In other words, based on available government data, fewer than nine percent of military borrowers are on track for PSLF. This disparity suggests that military borrowers may not be receiving adequate information about how to pursue PSLF. In fact, the servicing problems and misinformation are so pervasive that military borrowers face breakdowns tied to each requirement of the PSLF program, including having the right type of loan, the right type of employer, the right repayment plan, and the right number of payments.

In other words, based on available government data, fewer than nine percent of military borrowers are on track for PSLF.

[10] *See id.*

[11] Student Borrower Prot. Ctr., *Public Service Loan Forgiveness*, https://protectborrowers.org/public-service-loan-forgiveness/ (last accessed Nov. 20, 2020).

[12] *See, e.g.*, Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs., Keeping the Promise of Public Service Loan Forgiveness (Dec. 2018), https://protectborrowers.org/wp-content/uploads/2020/01/SBPC-AFT-PSLF-Investigation.pdf; Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs., Broken Promises: Employer Certification Failures (Aug. 2020), https://protectborrowers.org/wp-content/uploads/2020/08/ECF-Failures.pdf; Student Borrower Prot. Ctr. & Am. Fed'n of Tchrs., Broken Promises: The Untold Failures of ACS Servicing (Oct. 2020), https://protectborrowers.org/wp-content/uploads/2020/10/Broken-Promises_ACS.pdf.

[13] Consumer Fin. Prot. Bureau, *Prepared Remarks of Seth Frotman, Assistant Director and Student Loan Ombudsman at the Judge Advocate General's Legal Center and School* (Oct. 17, 2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_Frotman-Remarks-JAG-School.pdf.

[14] Student Borrower Prot. Ctr., Protecting Military Borrowers: How the Department of Education Can Restore the Promise of Public Service Loan Forgiveness for American Servicemembers 7 (Nov. 2020) https://protectborrowers.org/wp-content/uploads/2020/11/Protecting-Military-Borrowers_SBPC.pdf ("While submitting an ECF prior to making 120 payments is not mandatory to earn PSLF, a borrower can choose to submit an ECF to document his or her intent to pursue PSLF and receive an accounting of qualified payments made to date.").

[15] *See* Mike Saunders & Seth Frotman, *Why So Many Servicemembers are Missing Out on Student Loan Forgiveness, and How the Secretary of Education Can Fix It*, Student Borrower Prot. Ctr. (Nov. 11, 2020), https://protectborrowers.org/heroes-act/.

A. The Right Type of Loan

Only Direct Loans are eligible for forgiveness under PSLF,[16] but borrowers with older loans made under the Federal Family Education Loan Program (FFELP) can consolidate these loans into Direct Loans in order to qualify for PSLF.[17] Borrowers rely on their student loan servicers to advise them about this requirement, but servicers have a long history of misleading borrowers about the need to consolidate ineligible loans.[18] This problem is particularly acute for servicemembers, where their status as a military borrower is known to customer service representatives[19] and their employment is necessarily eligible for PSLF.[20] The most recently available government data suggest that tens of thousands of borrowers with FFELP loans have been identified by servicers as serving in the military but have not consolidated their loans to pursue PSLF.[21]

[16] 34 C.F.R. § 685.219(a).

[17] 20 U.S.C. § 1087e(m)(3). When military borrowers consolidate pre-service debt to pursue PSLF, their new consolidation loan is ineligible to the interest rate cap offered under the Servicemembers Civil Relief Act, making PSLF even more critical to their long-term financial security. *See* Consumer Fin. Prot. Bureau, Tackling Student Loan Debt (2016), https://files.consumerfinance.gov/f/documents/201604_cfpb_servicemember-student-loan-guide.pdf ("While consolidating may help you qualify for PSLF, remember that consolidating while you are on active duty may mean you lose the ability to request an interest rate reduction under the SCRA, because your loan will no longer be considered a pre-service loan.").

[18] *See* Consumer Fin. Prot. Bureau, Staying on Track While Giving Back: The Cost of Student Loan Servicing Breakdowns for People Serving their Communities 21 (Jun. 2017), https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf; *see also* Student Borrower Prot. Ctr. and Am. Fed'n of Tchrs, Broken Promises: How the Department of Education's Failures and Industry's Abuses Deny FFEL Borrowers Public Service Loan Forgiveness (forthcoming 2020) (on file with the author).

[19] In 2014, following enforcement actions from the Department of Justice and FDIC against ED's contracted servicers for violations of the SCRA, ED modified its contracts to require servicers to affirmatively check borrower accounts against the Defense Manpower Data Center (DMDC) to "identify[] borrowers who are, or who have been, in military service and by confirming the dates of that service." U.S. Dep't of Educ., Off. of Fed. Student Aid, *Improved Administration of the Servicemembers Civil Relief Act for Borrowers Under the William D. Ford Direct Loan and Federal Family Education Loan Programs*, DCL ID:GEN- 14-16 (Aug. 25, 2014), https://ifap.ed.gov/dear-colleague-letters/08-25-2014-gen-14-16-subject-improved-administration-servicemembers-civil. As a result, servicers are notified of borrowers who are in military service and as such, would potentially be eligible for PSLF. Additionally, servicers are responsible for processing borrowers' requests for military deferment. When a borrower contacts his or her servicer to enroll in military deferment, the servicer would become aware of the borrower's military status and potential eligibility for PSLF.

[20] 20 U.S.C. § 1087e(m)(3).

[21] *See* Gov't Accountability Off., *Oversight of Servicemembers' Interest Rate Cap Could Be Strengthened* 18, GAO-17-4 (Nov. 2016), https://www.gao.gov/assets/690/681010.pdf (providing the number of military borrowers with FFELP loans). All FFELP loan borrowers are eligible to consolidate their non-qualifying federal student loans into qualifying Direct Loans. However, some borrowers, particularly those who expect to repay their loan in full in fewer than ten years, may choose to maintain their FFELP loan rather than consolidate into a Direct Loan.

B. The Right Type of Employer

The Department of Education advises all student loan borrowers to confirm their eligibility for PSLF by submitting an Employer Certification Form (ECF), which allows ED (via its contracted servicer) to confirm a qualifying employer and then assess the number of qualified payments made by the borrower to date.[22] For borrowers serving in the military, this process should be easy—under law, all members of the United States military, including those serving full time on active duty or National Guard duty, have eligible employment for Public Service Loan Forgiveness purposes.[23] But according to the SBPC, nearly one quarter of ECFs submitted by servicemembers have been denied, despite the employer being clearly identified as a branch of the U.S. military.[24] The SBPC and American Federation of Teachers have previously documented how a lack of guidance from ED to borrowers and inconsistent processing by contracted servicers often result in improper ECF denials for borrowers.[25] For military borrowers, particularly those on active duty or on deployment, the ECF process has an added hurdle. ED requires that ECFs be signed by an "authorized official" of the employer but provides very limited guidance as to who may be considered to have such authority.[26]

C. The Right Type of Repayment Plan

In addition to certifying qualifying employment, servicemembers also struggle with maintaining the right repayment plan needed to qualify for PSLF. Active duty servicemembers are entitled to military deferment which, like forbearance, is intended to provide servicemembers repayment flexibility in discrete, short-term periods of

[22] *Public Service Loan Forgiveness Form*, Fed. Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/public-service-loan-forgiveness-application (last accessed Nov. 18, 2020).

[23] 34 C.F.R. § 685.219(b) ("Military service, for uniformed members of the U.S. Armed Forces or the National Guard, means 'active duty' service or 'full-time National Guard duty' as defined in section 101(d)(1) and (d)(5) of title 10 in the United States Code. . . .").

[24] *See* Saunders & Frotman, *supra* note 15.

[25] *See Employer Certification Failure*, *supra* note 12.

[26] U.S. Dep't of Educ., Public Service Loan Forgiveness (PSLF): Employment Certification Form, OMB No. 1845-0110 (exp. May 31, 2020), https://studentaid.gov/sites/default/files/public-service-employment-certification-form.pdf ("An authorized official is an official of a qualifying employer who has access to the borrower's employment or service records and is authorized by the employer to certify the employment status of the organization's employees or former employees, or the service of AmeriCorps or Peace Corps volunteers."); Student Borrower Prot. Ctr., Protecting Military Borrowers, *supra* note 14.

financial distress.[27] However, in practice, military deferment is often used for extended periods of time. The CFPB reports that the average military deferment lasts 30 months, costing the borrower as much as $19,000 in lost savings.[28]

As of December 2019, at least 10,000 servicemembers were enrolled in military deferment—many of these borrowers were likely eligible for $0 payments under an income-driven repayment (IDR) plan, which would also allow them to accrue credit towards PSLF.[29] However, because borrowers can be enrolled in military deferment over the phone, servicers may by directing them towards this option rather than IDR.[30]

D. The Right Number of Payments

Even when borrowers *can* enroll in IDR, servicing breakdowns impede their progress towards PSLF. Servicers often fail to maintain borrowers' continuous enrollment in IDR[31]—a critical component to successfully earning PSLF. Continuous enrollment through a process called recertification ensures that the borrower is on the

[27] *See* Fed. Student Aid, *For Members of the U.S. Armed Forces: What you need to know about your federal student loan benefits* (2016), https://studentaid.gov/sites/default/files/military-student-loan-benefits.pdf.

[28] *See* Consumer Fin. Prot. Bureau, *Prepared Remarks of Seth Frotman, Assistant Director and Student Loan Ombudsman at the Judge Advocate General's Legal Center and School* (Oct. 18, 2016), https://files.consumerfinance.gov/f/documents/201610_cfpb_Frotman-Remarks-JAG-School.pdf. The average length of time in military deferment is based on information released by the CFPB in 2016. *Id.* Since then, the Department of Education has not released updated information about average length of time in military deferment.

[29] *See* Fed. Student Aid., *Direct Loan Portfolio by Deferment Type*, https://studentaid.gov/sites/default/files/fsawg/datacenter/library/DLbyDefermentType.xls (last accessed Nov. 9, 2020). Estimates are based on FY 2020 Q1 because in March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act, Pub. L. No. 116-136), which, in part, resulted in all federally held student loans being placed in forbearance status. Between FY 2015 Q1 and FY 2020 Q1, the number of borrowers in military deferment remained remarkably consistent, suggesting potentially long-term use of military deferment despite the availability of IDR and perhaps a lack of efforts by servicers to enroll these borrowers in IDR plans rather than military deferment.

[30] Enrollment in income-driven repayment requires borrowers to submit a completed application and recent proof of income. Accordingly, the enrollment process cannot be completed in a single phone call. Federal and state law enforcement investigations have repeatedly found that student loan servicers steer borrowers towards quicker but ultimately more costly options like forbearance in order to minimize the amount of time spent on calls with borrowers. *See, e.g.*, Complaint, CFPB v. Navient Corp., No. 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017); Complaint, Pa. v. Navient Corp., No. 3:17-cv-1814-RDM (M.D. Pa. June 19, 2019); Complaint, Cal. v. Navient Corp., No. CGC-18-567732 (Cal. Oct. 16, 2018); Complaint, Ill. v. Navient Corp., No. 2017- CH-00761 (Ill. July 10, 2018); Complaint, Miss. v. Navient Corp., No. G2108-98203 (Miss. July 24, 2018); Complaint, Wash. v. Navient Corp., No. 17-2-01115-1 SEA (Wash. Jan. 18, 2017).

[31] The soonest a borrower can earn PSLF is ten years, or 120 consecutive qualified payments. 34 C.F.R. § 685.219(c)(1)(iii). However, the CFPB has reported about the delays borrowers face when seeking to recertify the IDR plans, thus causing additional months and years of payments in their pursuit of PSLF. *See, e.g.*, Staying on Track, *supra* note 18; Consumer Fin. Prot. Bureau, Midyear Update on Student Loan Complaints (Aug. 2016), https://files.consumerfinance.gov/f/documents/201608_cfpb_StudentLoanOmbudsmanMidYearReport.pdf.

shortest path to loan forgiveness.[32] However, the IDR enrollment and recertification often requires borrowers to spend hours on the phone with their servicer and repeatedly send in paperwork to document their income,[33] something military borrowers are often unable to do.[34] As a result, their IDR enrollment may lapse, causing unaffordable payments and missed months of credit toward PSLF.[35] The CFPB estimates that roughly 6,000 servicemembers have suffered direct economic hardship as a result of problems with IDR recertification.[36]

The CFPB estimates that roughly 6,000 servicemembers have suffered direct economic hardship as a result of problems with IDR recertification.

The problems continue as servicing breakdowns and delays can often derail payment progress.[37] In particular, when servicemembers seek to apply certain military student loan repayment benefits to their loans, they risk

[32] Borrowers must annually recertify their income and family size to maintain their IDR payment amount. Borrowers must make 120 qualified payments to earn PSLF. While these payments need not be consecutive, maintaining IDR enrollment for 10 years ensures borrowers can earn PSLF in the shortest amount of time permitted by the program.

[33] Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Finds Consumers Complain Of Needless Hurdles In Applying For Lower Student Loan Payments (Aug. 18, 2016) https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-finds-consumers-complain-needless-hurdles-applying-lower-student-loan-payments/; *see* Midyear Update, *supra* note 31; *see also* Seth Frotman & Paul Kantwill, *Tips for servicemembers with student debt*, Consumer Fin. Prot. Bureau (Nov. 6, 2017), https://www.consumerfinance.gov/about-us/blog/tips-servicemembers-student-debt/ ("After leaving school, most student loan borrowers enter a six month grace period in which no payments are due. Generally, student loan borrowers must wait until close to the end of their grace period to enroll in an alternative repayment plan, like an IDR plan. Military borrowers report that when they leave college and enlist in the military, this delay often coincides with basic training. By the time servicemembers are eligible to submit their applications for IDR enrollment, they may be in the middle of training and therefore have severely limited access to computers and phones. Military borrowers report that as a result, they are not able to seek assistance from their servicer to navigate the IDR enrollment process. These servicemembers state that they enter repayment and immediately find themselves in financial distress.").

[34]Accurate servicing is even more critical for military borrowers because, "depending on the location of a military borrowers' deployment, finding an opportunity to transact with the servicer in real-time can be difficult." Consumer Fin. Prot. Bureau, Overseas & Underserved: Student loan servicing and the cost to our men and women in uniform (July 2015) https://files.consumerfinance.gov/f/201507_cfpb_overseas-underserved-student-loan-servicing-and-the-cost-to-our-men-and-women-in-uniform.pdf. This is certainly the case for deployed servicemembers, when operations can last weeks or months at a time with little or no communication with the outside world available. Submarines can spend six months under the ocean, never surfacing, and certainly not giving any of the sailors on board a chance to communicate with their student loan servicer. Even stateside, soldiers are often required to deploy to training missions at the Joint Rotational Training Center in Ft. Polk, Louisiana or National Training Center at Ft. Irwin, California that can cause difficulties communicating with their servicers. *See also* Frotman & Kantwill, *supra* note 33.

[35] *See* Midyear Update, *supra* note 31.

[36] *See* Consumer Fin. Prot. Bureau, *Prepared Remarks of Seth Frotman, Assistant Director and Student Loan Ombudsman at the Judge Advocate General's Legal Center and School* (Oct. 17, 2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_Frotman-Remarks-JAG-School.pdf.

[37] *See, e.g.*, Consumer Fin. Prot. Bureau, Consumer Complaint No. 3182585 (Mar. 2019), https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3182585 ("I am [a] military member. Been working towards being eligible for PSLF program. . . . When the loans [were] transferred from Great Lakes . . . that payment history was lost. . . . I am almost at the 10 year mark of service, but am unable to get that history from Great Lakes. Without it I would essentially lose close to 2 years' worth of eligible payments. I need them to give me that payment history." [edited for clarity]); Consumer Fin. Prot. Bureau, Consumer Complaint No. 3180539 (Mar. 2019),

jeopardizing all of their progress toward PSLF.[38] Prior to 2020, if a borrower pursuing PSLF paid more than what was owed under an IDR plan, her loans would be placed in "paid ahead" status in which the payment overage was applied to a future payment. When a payment would advance such that no payment was due in future months, the borrower would not receive PSLF credit for those months.[39]

Solutions

Military borrowers rely on the range of consumer protections passed by Congress to mitigate their student debt burden, but a lack of transparency from the Department of Education raises questions about whether these borrowers are actually receiving the relief intended by Congress.[40] When servicemembers can successfully

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https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3180539 ("I served in the US Military. . . . This is considered qualifying service under the Public Service Loan Forgiveness (PSLF) program. During this time, I made 45 required monthly payments. . . . I certified my employment before leaving military service. . . . [M]y student loan servicer, only credited me with 16 PSLF-qualifying payments. . . . I confronted [my servicer] about the huge discrepancy, the reply was that I made extra payments once or twice a year and that was causing them confusion. . . . As my student loan servicer, they have an obligation to ensure my loan records are correct and to take action to correct them when they are not. They have failed to do this."); Consumer Fin. Prot. Bureau, *The Next Front?*: *Student Loan Servicing and the Cost to Our Men and Women in Uniform* (Oct. 2012), https://files.consumerfinance.gov/f/201210_cfpb_servicemember-student-loan-servicing.pdf; Overseas and Underserved, *supra* note 34.

[38] In 2015, the Department of Education engaged in negotiated rulemaking in an attempt to fix this problem. *See* Proposed Rule on Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,607 (proposed July 9, 2015) (to be codified at 34 C.F.R. §§ 668, 682, 685), https://www.federalregister.gov/documents/2015/07/09/2015-16623/student-assistance-general-provisions-federal-family- education-loan-program-and-william-d-ford.

[39] *See* Public Service Loan Forgiveness, Fed. Student Aid (accessed Mar. 9, 2017), studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service ("If you make a monthly payment for more than the amount you are required to pay, you should keep in mind that you can receive credit for only one payment per month, no matter how much you pay. You can't qualify for PSLF faster by making larger payments. However, if you do want to pay more than your required monthly payment amount, you should contact your servicer and ask that the extra amount not be applied to cover future payments. Otherwise, you may end up being paid ahead, and you can't receive credit for a qualifying PSLF payment during a month when no payment is due."). In 2020, the Department of Education took steps to change this policy but has not indicated it will fix this problem retroactively. *See What's New with Public Service Loan Forgiveness*, Fed. Student Aid. https://studentaid.gov/articles/see-whats-new-pslf-program/?_ga=2.223811035.1730340501.1606006105-1855905892.1540743868 (last accessed Nov. 20, 2020).

[40] Military borrowers have historically been denied access to the most critical protections. For example, in 2014, the Federal Deposit Insurance Corporation and the Department of Justice took action against Sallie Mae and Navient for violating servicemembers' rights under the Servicemembers Civil Relief Act (SCRA) after the government found that companies had failed to provide military members with the six percent rate cap that they were guaranteed, systematically overcharging borrowers serving in active duty. An order was entered for $60 million in compensation for the 77,000 servicemembers who were impacted. Fed. Deposit Ins. Corp., FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act (May 13, 2014), https://www.fdic.gov/news/pressreleases/2014/pr14033.html; Dept. of Just., Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans (May 13, 2014), https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging.

However, due to a lack of public data and transparency from the Department of Education, the full scope of harm incurred by military borrowers after being denied these protections is unknown, despite repeated concern from advocates, policymakers, and regulators. *See, e.g.*, Letter from Cal. Att'y Gen. Xavier Becerra to Sec'y of Educ. Elisabeth DeVos and Acting Sec'y of Def. Christopher C. Miller (Nov. 11, 2020), https://oag.ca.gov/sites/default/files/Becerra%20to%20Secs%20DeVos%20and%20Miller%20re%20Combat%20Veterans%20Student%20Loa access these protections, they provide invaluable relief. But far too often, these protections are illusory.[41] Since the creation of the PSLF program, military borrowers have struggled to access the promise of loan forgiveness. As previously discussed, servicemembers face a wide range of unnecessary pitfalls, often stemming from the same type of administrative requirements expressly contemplated by the HEROES Act.[42]

. . . [T]he HEROES Act explicitly provides the Secretary with the authority to waive or modify *any* provision that stands in the way of servicemembers' financial readiness, including their ability to access the critical financial relief offered through PSLF.

Being in the military is a 24-hours a day, seven days a week job. It is often said that from the moment you arrive at Basic Training or Officer Candidate School (OCS), or enroll in a Reserve Officer Training Corps (ROTC) or Service Academy that you are on "Uncle Sam's time."[43] The implication is that wherever servicemembers are stationed around the globe, they are beholden to the needs of someone else. It is the very embodiment of the Core Value that the Air Force calls service before self, and the Army calls selfless service.[44] There simply is not time in the day to spend hours on the phone with your student loan servicer, particularly when on a weeks- or months-long Field Training Exercise (FTX), training for months at the Joint Rotational Training Center (JRTC), National Training Center (NTC), on

n%20Interest%2011%2011%202020.pdf ("[I]n 2008 Congress waived all interest charges for direct student loans for servicemembers, including members of the National Guard, who are serving on active duty during a war, military operation, or national emergency, and who are receiving hostile fire or imminent danger pay. However, as has all too often been the case with other forms of federal student loan debt relief, including closed school discharges, borrower defense to repayment, and the Public Service Loan Forgiveness program, the Department of Education has historically failed to deliver on this right." Citations omitted); *Prepared Remarks of Seth Frotman*, *supra* note 28; Overseas and Underserved, *supra* note 34.

[41] For example, military borrowers with Perkins loans struggle to access debt cancellation protections expressly provided for under law. Specifically, to earn debt relief, military borrowers must serve in areas of hostility continuously for one year. In practice, continuous military deployments typically last less than eight months, rendering this specific protection out of reach for most military borrowers. Comm. on the Assessment of the Readjustment Need of Military Personnel, Veterans, and Their Families, et al., Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families, ch. 3 (Mar. 12, 2013), https://www.ncbi.nlm.nih.gov/books/NBK206861/ (finding that the average length of deployment was 7.7 months).

[42] 20 U.S.C. § 1098bb(a)(2)(A) ("The Secretary is authorized to waive or modify any provision described in paragraph (1) as may be necessary to ensure that recipients of student financial assistance under title IV of the Act who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals").

[43] *See* Erik Larson, *Use These Three Military Lessons To Be Decisive In Business*, Forbes (Apr. 25, 2017), https://www.forbes.com/sites/eriklarson/2017/04/25/three-things-the-military-taught-me-about-being-decisive-in-business/?sh=5745d1b72ff9.

[44] *See generally* Dep't of Def., *Department of Defense Core Values*, https://diversity.defense.gov/Portals/51/Documents/Resources/Commission/docs/Issue%20Papers/Paper%2006%20-%20DOD%20Core%20Values.pdf.

a year-long deployment or spending six months at sea on a ship—or underneath it on a submarine. Another immutable fact of life in the military is that every two to three years a servicemember must undergo a "Permanent Change of Station" (PCS), where you pack up your things and move to a new duty station. Packing up your household and moving yourself, not to mention a spouse and potentially children, across the country is an extremely disruptive process that when combined with years-long deployments makes life in the military incomparable to that of government or private sector counterparts.

Recognizing these realities, the HEROES Act grants the Secretary of Education authority to "waive or modify any statutory or regulatory provision applicable" to Title IV programs, including the PSLF program, "as the Secretary deems necessary in connection with a war or other military operation or national emergency. . . ."[45] In particular, the Secretary is granted express authority to waive any provision "as may be necessary to ensure" that servicemembers with student debt "are not placed in a worse position financially" as a result of their service during a time of war or military operation, and to ensure that "administrative requirements . . . are minimized . . . to ease the burden on such students and avoid inadvertent, technical violations or defaults."[46] In other words, the HEROES Act explicitly provides the Secretary with the authority to waive or modify *any* provision that stands in the way of servicemembers' financial readiness, including their ability to access the critical financial relief offered through PSLF.

The Secretary of Education's broad discretion under the HEROES Act may be applied to help any "affected individual," which includes anyone who "is serving on active duty during a war or other military operation."[47] Since September 18, 2001, following the Authorization for Use of Military Force (AUMF) by Congress in response to the September 11th attacks,[48] the United States has maintained a continuous state of military authorization.[49]

[45] 20 U.S.C. § 1098bb(a)(1).

[46] 20 U.S.C. § 1098bb(a)(2)(A).

[47] 20 U.S.C. § 1098ee (defining an affected individual as an individual who: "(1) is serving on active duty during a war or other military operation or national emergency; (2) is performing qualifying National Guard duty during a war, operation, or emergency; (3) resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency; or (4) suffered direct economic hardship as a direct result of a war or other military operation or national emergency.").

[48] Authorization for Use of Military Force, S. J. Res. 23 (H. J. Res. 64), 107th Cong. (2001) (enacted), https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf. Should Congress revoke the AUMF, the Secretary of Education can still retroactively authorize HEROES Act waivers to cover all periods in which the AUMF was in effect.

[49] Note that Congress has not declared war since 1942. *Official Declarations of War by Congress*, U.S. Sen., https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last accessed Nov. 9, 2020). However, the legislative intent of the HEROES Act was to treat Authorized Use of Military Force as the equivalent of a "war or military operation" as described in the law—the same military operations that have been continuously in effect since October, 2001. On October 7, 2001, President

As a result, our nation's military has continuously been called to service, creating acute financial distress for individuals in uniform.[50] This stress is particularly prevalent among servicemembers with student debt.[51]

Maintaining enrollment in IDR and staying on track for PSL often requires extensive outreach and personal advocacy by the borrower, a luxury typically inaccessible to those on active duty.[52] Where military borrowers cannot spend hours independently navigating the administrative hurdles of IDR and PSLF and reconciling conflicting information from servicers, they suffer "direct financial hardship"—the failures of the student loan servicing system can add thousands or tens of thousands of dollars to borrowers' loans.[53]

In fact, this financial hardship was exactly the type of harm Congress contemplated in passing the HEROES Act. Where military borrowers are placed in a "worse position financially" because of their service to our country, Congress authorized the Secretary to take action to remedy this. And for decades, servicemembers with student debt have been financially harmed by a student loan system that fails borrowers at every stage of repayment.

Bush initiated Operation Enduring Freedom, which lasted until December 2014. In January 2015, President Obama initiated Operation Freedom's Sentinel, which is still in effect at the time of publication of this report. As of October 2019, more than 184,000 troops were deployed globally. Thomas Gibbons-Neff & Eric Schmitt, *Despite Vow to End 'Endless Wars,' Here's Where About 200,000 Troops Remain*, N.Y. Times (Oct. 21, 2019), https://www.nytimes.com/2019/10/21/world/middleeast/us-troops-deployments.html. As described by Representative John Kline, the HEROES Act is intended to address the financial burden imposed by student debt as military borrowers served our country following the September 11th attacks, stating "As families send loved ones abroad to defend our Nation, the Higher Education Relief Opportunities for Students Act will allow the Secretary of Education to reduce some of the effects of that upheaval here at home." 149 Cong. Rec. 48, 12 (daily ed. Mar. 25, 2003) (statement of Rep. John Kline), https://www.congress.gov/congressional-record/2003/03/25/extensions-of-remarks-section/article/E561-4; *see also* Cong. Res. Serv., *Instances of Use of United States Armed Forces Abroad, 1798-2020*, R42738 (July 2020), https://fas.org/sgp/crs/natsec/R42738.pdf (detailing multiple deployments every year from 2001 – 2020). Should the Authorized Use of Military Force (AUMF) be rescinded by Congress, the Secretary still retains authority to retroactively execute waivers for all periods in which the AUMF was in effect.

[50] *See, e.g.*, Reuters, *supra* note 1 ("Some 41 percent of America's armed forces are holding student debt, according to one recent survey, and Pentagon officials say financial troubles are among the top sources of anxiety among troops -- sometimes even topping war itself."); Sharon Epperson, Katie Young & Jessica Dickler, *Military families say this is their top concern*, CNBC (May 25, 2019), http://www.cnbc.com/2019/05/24/for-military-families-financial-concerns-outweigh-deployment-issues.html; David Frank, *Financial Concerns Especially Stressful for Military Families*, AARP (Feb. 6, 2019), https://www.aarp.org/home-family/voices/veterans/info-2019/survey-family-stress.html; Holly Petraeus, Testimony of Holly Petraeus before the House Committee on Veterans Affairs, Consumer Fin. Prot. Bureau (Feb. 9, 2011), https://www.consumerfinance.gov/about-us/newsroom/testimony-of-holly-petraeus-before-the-house-committee-on-veterans-affairs/.

[51] Holly Petraeus & Rohit Chopra, Consumer Fin. Prot. Bureau, *The Next Front?: Student Loan Servicing and the Cost to Our Men and Women in Uniform* (Oct. 18, 2012), https://files.consumerfinance.gov/f/201210_cfpb_servicemember-student-loan-servicing.pdf.

[52] *See supra* note 34.

[53] *See supra* text accompanying note 28.

This harm has been well documented by federal and state law enforcement officials, investigators, and regulators.[54]

As this article describes, military borrowers are experiencing "direct economic hardship" that is suffered "as a direct result of a war." Instead of being provided with clear and helpful information from their student loan servicers about the protections available to them under federal law, many military members have been denied the benefits they are owed and put in a worse financial position than before they began their military careers.

- **The Secretary must execute broad-based HEROES Act waivers to ease the burden on military borrowers.** The HEROES Act is not limited to individualized relief, permitting the Secretary to authorize waivers for classes of affected borrowers suffering from economic harm because of their student loans.[55] Accordingly, the Secretary should take immediate action to ensure that any military borrower who served on or after October 2007 is not penalized for a broken servicing system that has historically denied them access to one of the most vital consumer protections offered to military borrowers.[56]

- **The Secretary should use the Defense Manpower Data Center to provide any active duty or veteran borrowers with qualified payment credit toward PSLF based on their time in service.** In 2014, the Department of Justice and Federal Deposit Insurance Corporation took action against Navient, one of the largest federal student loan servicers, for failing to apply the interest rate cap mandated under the

[54] Student loan servicers—the companies responsible for helping all borrowers, including servicemembers, navigate repayment— have engaged in widespread illegal practices that have derailed military borrowers during repayment, including consistently mismanaging payments, misinforming borrowers, and failing to implement the protections that servicemembers are owed under federal law. *See, e.g.*, Press Release, Fed. Deposit Ins. Corp., FDIC Announces Settlement with Sallie Mae for Unfair and Deceptive Practices and Violations of the Servicemembers Civil Relief Act (May 13, 2014), https://www.fdic.gov/news/press-releases/2014/pr14033.html; Press Release, Dep't of Just., Justice Department Reaches $60 Million Settlement with Sallie Mae to Resolve Allegations of Charging Military Servicemembers Excessive Rates on Student Loans (May 13, 2014), https://www.justice.gov/opa/pr/justice-department-reaches-60-million-settlement-sallie-mae-resolve-allegations-charging; Consumer Fin. Prot. Bureau, Prepared Remarks of Seth Frotman, Deputy Assistant Director and Acting Student Loan Ombudsman at the CFPB (Oct. 2015), https://protectborrowers.org/wpcontent/uploads/2019/04/prepared-remarks-of-seth-frotman.pdf (finding that as of June 2015, only 633 military borrowers had their student loan interest rate reduced to zero percent while serving in an area of hostility and estimating that "more than $100 million in unnecessary interest charges since this benefit was created."); Massachusetts v. Pa. Higher Educ. Assistance Agency, No. 1784CV0682, 2018 WL 1137520 (Mass. Super. Ct. Mar. 1, 2018) (alleging that the Pennsylvania Higher Education Assistance Authority (PHEAA) systematically misled and mishandled accounts for borrowers pursuing PSLF); Vullo v. Conduent Educ. Servs., LLC, Consent Order (N.Y. Dep't of Fin. Servs. Jan. 4, 2019), https://www.dfs.ny.gov/system/files/documents/2019/01/ea190104_conduent.pdf.

[55] *See* 20 U.S.C. § 1098bb(b)(3) ("The Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis").

[56] Following the passage of the PSLF program, October 2007 was the first month in which a borrower could make a qualified payment.

Servicemembers Civil Relief Act on active duty servicemembers' loans.[57] Following this action, the Secretary of Education mandated a portfolio-wide review of military borrowers' loans, both current and historical, to ensure these borrowers were granted their interest rate cap. Servicers were able to complete this review by cross referencing accounts against the Defense Manpower Data Center, which includes dates of active duty service for all members of the military. The Secretary should use this same process to identify military borrowers with any type of federal student loan who served on active duty at any point after October 2007. The Secretary should then use his or her authority under the HEROES Act to ensure that these borrowers receive qualified payment credit for each month in which they served on active duty regardless of their payment status, repayment plan, or loan type. For example, a borrower who served on active duty for four years but remained in military deferment for the duration of his or her service should receive 48 months of qualifying payment credit toward PSLF.

- **The Secretary should grant immediate, retroactive loan forgiveness to any military borrower who served on active duty for at least 10 years by waiving the administrative requirements to apply for PSLF.** Unlike automatic loan forgiveness through income-driven repayment, borrowers seeking to earn PSLF must affirmatively apply to have their loans forgiven.[58] Borrowers report that the process of actually applying for loan forgiveness can stretch months and often requires additional paperwork.[59] After ensuring that all military borrowers receive credit toward PSLF as described above, the Secretary should then waive the administrative requirements associated with applying for PSLF. In effect, all military borrowers with federal student loans who have served for at least 120 months on active duty since October 2007 should have their loans immediately, automatically forgiven.[60] By doing so, the Secretary can ensure that the HEROES Act is effectuated as intended—by relieving military borrowers of the economic hardship imposed by their service to our country.

[57] *See supra* note 54.

[58] Note that despite the fact that loan forgiveness under the PSLF program is not treated as income for tax purposes, the Department of Education has declined to automate this process.

[59] *See, e.g.*, Consumer Fin. Prot. Bureau, Consumer Complaint No. 3712095 (June 2020), https://www.consumerfinance.gov/dataresearch/consumer-complaints/search/detail/3712095.

[60] *See supra* note 56.

- **After identifying PSLF-eligible military borrowers, the Secretary should review all subsequent ECFs and forgive the loans of veterans who continued in public service.** Nearly a quarter of veterans continue to work in public service after leaving military service.[61] Many of these veterans are still pursuing PSLF and as such, may continue to submit ECFs. The Secretary should immediately, and then continuously, cross-reference the historical active duty military borrowers against outstanding civilian ECFs. Where borrowers have completed ten years of combined service, the Secretary should automatically forgive these loans. Where military borrowers have entered civilian service but have not yet completed ten years of service, the Secretary should notify these borrowers of their qualified payments to date and provide them with additional information about how to earn PSLF. For example, if a veteran has been identified and granted 48 months of qualifying payments for his or her time on active duty, the Secretary should look to see if he continued his or her public service. If the veteran became a civilian nurse and has submitted ECFs documenting 72 months of service (bringing his or her cumulative months of service to the required 120), the Secretary should forgive his or her loans immediately. If the veteran has fewer than 72 months in civilian service, the Secretary should provide him or her with an updated accounting of his or her qualified payments to date. Finally, if the veteran's current employment status or sector cannot be ascertained, the Secretary should inform him or her that his or her military service satisfied part of the requirements to earn PSLF and provide all information necessary should the borrower want to continue on track for PSLF.

Conclusion

Thanks to the HEROES Act, the Secretary of Education has the authority to do away with all of the administrative requirements that have prevented servicemembers from accessing PSLF. Even better, the HEROES Act allows the Secretary to waive or modify PSLF requirements for servicemembers all at once, providing that "[t]he Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis."[62]

[61] *See* Cong. Budget Off., The All-Volunteer Military: Issues and Performance (July 2007), https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/07-19-militaryvol_0.pdf.

[62] *See* 20 U.S.C. § 1098bb(b)(3).

We owe it to our servicemembers and their families to provide a better path towards loan forgiveness. While the HEROES Act cannot make up for all of the servicing failures that have wreaked havoc on servicemembers' financial lives, it can go a long way towards fulfilling the promise of loan forgiveness for many of the 1.3 million military personnel currently serving our country, as well as those who have already gotten off of active duty, while also strengthening America's national security.

THE TAX TREATMENT OF STUDENT LOAN DISCHARGE AND CANCELLATION

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Introduction

Many of the proposals and reforms in this volume call for expanding the availability and amount of student debt cancellation,[1] by either streamlining or clarifying existing law, or by providing new regulatory pathways for debt cancellation consistent with the text and purpose of the Higher Education Act (HEA). But debt cancellation also raises some tricky tax issues, which in some circumstances could undermine much of the benefits of debt cancellation to individual borrowers.[2] Moreover, uncertainty about the tax treatment of the cancellation of debt has been used by policymakers to resist efforts to expand the availability of debt discharge and cancellation.[3] To be truly successful, student debt reform needs to also incorporate clarification and simplification of the tax treatment of student debt cancellation and discharge. Fortunately, this is not that hard to do.

To be truly successful, student debt reform needs to also incorporate clarification and simplification of the tax treatment of student debt cancellation and discharge. Fortunately, this is not that hard to do.

The problem stems from the general tax principle that cancellation of indebtedness is treated as gross income for tax purposes.[4] In the context of a typical commercial debt relationship, the logic behind this principle is simple: not having to pay back a debt is an economic gain to a person in the same way as if the person, say, won a lottery and used that money to pay off the debt.[5] Borrowing money is not considered income, since there is an offsetting liability. But cancel that liability and now the person has a net gain that the tax system recognizes.

[1] Debt "cancellation," "forgiveness," and "discharge" are used interchangeably herein, reflecting the fact that different legal authorities use different language.

[2] *See, e.g.,* Greg Crespi, *Should We Defuse the "Tax Bomb" Facing Lawyers Who Are Enrolled in Income-Based Student Loan Repayment Plans?*, 68 S.C. L. Rev. 117 (2016); Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, N.Y. Times, June 18, 2016 https://nyti.ms/24VmZec ("Yet in financial terms, there is almost no way for Mr. Acosta to climb out of the crater he dug for himself in law school, when he borrowed over $200,000. The government will eventually forgive the loan—in 20 years—if he's unable to repay it, as is likely on his small-town lawyer's salary. But the Internal Revenue Service will probably treat the forgiven amount as income, leaving him what could easily be a $70,000 tax bill on the eve of retirement, and possibly much higher.").

[3] *See, e.g.,* John R. Brooks, *Why is the Department of Education Dragging Its Feet on Debt Relief for Disabled Veterans?*, Student Borrower Prot. Ctr. (Dec. 13, 2018), https://protectborrowers.org/why-is-the-department-of-education-dragging-its-feet-on-debt-relief-for-disabled-veterans.

[4] *See* I.R.C. § 61(a)(11).

[5] *See, e.g.,* U.S. v. Kirby Lumber, 284 U.S. 1 (1931).

But applying this rule to student debt is problematic. Suppose a person borrowed heavily to go to law school—let's say an initial debt of $250,000. Suppose further that this person enters a relatively low-paying job, but one that does not qualify for Public Service Loan Forgiveness, say as a private immigration attorney serving a low-income community. If that person enters income-driven repayment (IDR), she could keep her monthly loan payments at an affordable level and then have the remaining balance of her loan discharged after 20 or 25 years. If her principal in 20 years is still $250,000 (and it could be quite a bit more), then applying this tax rule would mean she would have $250,000 of gross income in the year of the cancellation, in addition to her other income. Under today's tax rates, that "income" would most likely be taxed at rates between 22% and 35%, depending on her marital status and other factors, and that tax would be immediately due.[6]

Even if we assume a relatively low average tax rate of, say, 25%, then in effect, the government did not cancel 100% of the loan—it cancelled 75% of the loan and then accelerated repayment of the rest. There is no good logic for such a policy—it undermines the whole purpose of student loan cancellation and causes hardship at exactly the time that the law is trying to provide relief. This is not just about lawyers and doctors. Social workers, teachers, nurses, members of the clergy, and others have relatively expensive graduate degrees and low salaries, but could still easily have to pay back over 20% of their otherwise-cancelled loan in taxes. And this problem is not limited to a few individuals. As of the third quarter of 2020, over half of all federal student loans in repayment were enrolled in an IDR plan—$530 billion, owed by nearly 9 million borrowers.[7]

Moreover, the perceived risk of causing that hardship has led to reluctance among administration officials to extend debt cancellation more widely. For example, before Congress added a tax exclusion of total and permanent disability ("TPD") discharge (more on tax exclusions in a moment) there were cases of disabled veterans getting hit with unexpected tax bills for $70,000 or more.[8] The difficult politics of that outcome may have

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[6] For current tax rates and brackets *see* Rev. Proc. 2020-45, 2020-46 I.R.B 1016.

[7] *Direct Loan Portfolio by Repayment Plan*, Fed. Student Aid (2020), https://studentaid.gov/data-center/student/portfolio (last accessed Nov. 18, 2020). These statistics likely undercount the number of borrowers who qualify for these plans, given the difficulties of enrolling and continuing to stay on the plans. Conversely, given these challenges, it is possible that a substantial share of borrowers who have enrolled in IDR to date will struggle to persist for 20 or 25 years, and therefore may never qualify to have their debts cancelled. *See, e.g.,* Consumer Fin. Prot. Bureau, Midyear Update on Student Loan Complaints: Income-Driven Repayment Plan Application Issues (Aug. 2016), https://files.consumerfinance.gov/f/documents/201608_cfpb_StudentLoanOmbudsmanMidYearReport.pdf.

[8] *See, e.g.,* Judy Putnam, *Wounded Army Vet Wins the Battle But Loses the Tax War*, Lansing State J. (Oct. 20, 2017), https://www.lansingstatejournal.com/story/opinion/columnists/judy-putnam/2017/10/20/putnam-wounded-army-vet-wins-battle-but-loses-tax-war/781458001/.

led to reluctance at Federal Student Aid to make disability discharge automatic.[9] And even after Congress added the TPD tax exclusion to the Internal Revenue Code in 2017, FSA still worried publicly about *state* tax implications (though incorrectly, in my view).[10]

Compounding the problem further is that, as just noted, not all student debt cancellation is currently taxable. As I discuss below, Congress and the IRS have created a patchwork of exclusions without any coherent reasons for treating some forms of student debt discharge differently than others. This just muddies the water further, creating more confusion and complication, as well as real human hardship.

The whole notion that student debt cancellation should be taxable at all is actually a misreading of the tax law.

None of this is necessary. Congress can, of course, easily solve this problem—and its action on TPD discharge in 2017 shows that this can be a bipartisan issue. But even in the absence of affirmative legislation, Treasury and the IRS have sufficient tools to exclude from gross income all forms of student debt cancellation. Indeed, as I discuss below,[11] the whole notion that student debt cancellation should be taxable at all is actually a misreading of the tax law. Fundamentally, student debt cancellation should be treated like a non-taxable scholarship—and was for many years, until a flawed ruling of the IRS in 1973 confused the issue. Since the IRS created this problem, it can also fix it. Furthermore, under other law that applies to debt instruments and to the taxation of debt cancellation, the IRS and Treasury should have sufficient legal authority to rule that student debt cancellation is not taxable. Finally, any cancellation can also be treated as an excluded payment for the promotion of the general welfare, particularly if granted as a disaster relief program related to COVID-19.

Problems

As noted above, the general tax rule is that discharge of indebtedness creates income for tax purposes. But that general rule is subject to many exclusions and exceptions, some of which apply explicitly to student debt. In this

[9] *See, e.g.,* Daniel Uria, *Lack of Info, Fear Causing Thousands of U.S. Vets to Default on Student Loans*, UPI, Nov. 20, 2018 (quoting a Department of Education spokesperson: "The last thing we want to do is cause unintended consequences—like impact future federal student aid or create a state or local tax liability—for men and women who have given so much.").

[10] *See* Brooks, *supra* note 3.

[11] *See* "Solutions," *infra.*

section, I summarize some of these exclusions and exceptions to illustrate how much of a patchwork the current treatment of student debt cancellation is. In this next section, I discuss why this patchwork is both a mistake and unnecessary.

- **Public Service Loan Forgiveness.** Section 108(f)(1) of the Internal Revenue Code excludes from gross income student debt discharge "if such discharge was pursuant to a provision of such loan under which all or part of the indebtedness of the individual would be discharged if the individual worked for a certain period of time in certain professions for any of a broad class of employers."[12] A similar provision applies to loan repayment or cancellation under certain programs for healthcare professionals.[13] The statutory wording is of course pretty broad, but the exclusion depends on the provisions of the loan itself, and as of now, that language only describes loans in PSLF or the equivalent,[14] including "loan repayment assistance programs" at law schools and elsewhere.[15]

- **Disability Discharge.** Section 108(f)(5) excludes from gross income debt discharged on account of the death or total and permanent disability of the borrower. This provision was added only in 2017,[16] and under current law it expires in 2026, at which point disability discharges would again become taxable.[17]

- **Closed School Discharge.** The Higher Education Act, in a roundabout and obscure way, provides an exclusion for debt discharged due to a closed school by cross-referencing the provision that applies to Public Service Loan Forgiveness.[18] Indeed, this reference was so obscure that Treasury appeared not to

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[12] I.R.C. § 108(f)(1).

[13] I.R.C. § 108(f)(4).

[14] Section 465 of the Higher Education Act also provides for a tax exclusion for certain forms of public service loan cancellation, which may be more or less extensive than the explicit exclusion in I.R.S. § 108(f). 20 U.S.C. 1087ee(a)(5).

[15] *See, e.g.,* Rev. Rul. 2008-34, 2008-2 C.B. 76 (LRAP programs can qualify for § 108(f) exclusion).

[16] Pub. L. No. 115-97, sec. 11,031, § 108(f), 131 Stat. 2054, 2081 (2017) (codified at I.R.C. § 108(f)(5)(A)(iii)).

[17] I.R.C. § 108(f)(5)(A).

[18] *See* 20 U.S.C. § 1087ee(a)(5) (PSLF loans); *id.* § 1087(c)(4) (incorporating § 1087ee(a)(5) for FFEL loans); *id.* § 1087e(a)(1) (incorporating FFEL terms for Direct Loans).

know about this exclusion until some Democratic Senators, including Sen. Elizabeth Warren, pointed it out in 2015.[19]

- **Borrower Defense Discharge.** There is no specific statutory exclusion for borrowers who have loans discharged because they assert a defense against repayment because a school's actions give rise to a state law cause of action. However, the IRS announced in early 2020 that it would provide a "safe harbor" in which it would not assert taxation against borrowers who had loans discharged by the Education Department under borrower defense or against borrowers who had private loans discharged under similar state law actions.[20] This general safe harbor grew out of narrower rulings that had originally applied only to former students of the closed for-profit Corinthian Colleges and American Career Institute chains.[21] The IRS's rationale is that many, if not all, of the borrowers whose loans were discharged under borrower defense could claim an exclusion either because they were insolvent (for which a statutory exclusion applies)[22] or because some general fraud or misrepresentation claim could be used to challenge whether the loan was valid in the first place.[23] The IRS reasoned that if it tried to figure out who should incur tax liability from among these borrowers, it "would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result,"[24] and thus the IRS has declined to assert taxation against all borrowers covered by the safe harbor. Importantly, however, the announcements are phrased only as an administrative decision by the IRS not to "assert" taxation due to discharge, not that the law clearly excludes the discharge from gross income. Moreover, it is not clear if the safe harbor applies to all borrower defense discharges.

[19] *See* John R. Brooks, *Treasury Should Exclude Income From Discharge of Student Loans*, 152 Tax Notes 751, 753 (2016).

[20] Rev. Proc. 2020-11, 2020-6 I.R.B. 406.

[21] *See* Rev. Proc. 2015-57, 2015-51 I.R.B. 863 (Corinthian Direct Loans); Rev. Proc. 2017-24, 2017-7 I.R.B. 916 (ACI Direct Loans); Rev. Proc. 2018-39, 2018-34 I.R.B 319 (private loans for both).

[22] I.R.C. § 108(a)(1)(B).

[23] *See, e.g.*, Rev. Proc. 2015-57. The rulings are vague on the legal authority for the latter point, but likely were referring to something like the contested liability doctrine at issue in Zarin v. Comm'r, 916 F.2d 110 (3d Cir. 1990).

[24] Rev. Proc. 2020-11.

- **Bankruptcy.** If a borrower has her debt reduced or cancelled in bankruptcy as an "undue hardship"[25] or because non-dischargeability otherwise does not apply,[26] then the Internal Revenue Code excludes that cancellation from gross income.[27]

- **Income-Driven Repayment.** Debt discharged under an IDR plan (other than PSLF) does not have an explicit statutory exclusion and thus is currently considered taxable, according to the Treasury Department.[28]

- **False Certification.** Debt can also be discharged if the borrower was falsely certified by a school as being eligible for student loans.[29] The same exclusion in the HEA for closed school discharge also applies here,[30] but to my knowledge the IRS has not ruled on this issue.

- **Settlement and Compromise.** As with IDR, there is no clear statutory exclusion on point. If a borrower is able to renegotiate the amount of their loan—or if ED uses its settlement and compromise authority to unilaterally cancel some amount of student debt[31]—the IRS will need to determine whether the amount of the cancelled debt is taxable, considering, for example, whether some other exclusion (like insolvency) applies.

- **Interest Subsidies.** Under most of the IDR plans, the government covers some portion of the loan's interest if a borrower's payment is too small to pay it all. For example, under REPAYE, the government will cover half of any charged but unpaid interest.[32] The government also covers some of the interest for Direct Subsidized Loans. This could be viewed as the government cancelling debt that would otherwise

[25] 11 U.S.C. § 523(a)(8).

[26] *See, e.g.*, Austin Smith, *Not All Student Loans Are Non-Dischargeable in Bankruptcy and Creditors Know This*, Student Borrower Prot. Ctr. (March 18, 2019), https://protectborrowers.org/not-all-student-loans-are-non-dischargeable-in-bankruptcy-and-creditors-know-this.

[27] I.R.C. § 108(a)(1)(A).

[28] *See* Letter from Eric Solomon, Assistant Sec'y for Tax Policy, Dep't of Treasury, to Hon. Sander Levin, U.S. House of Representatives 4 (Sept. 19, 2008) (on file with author).

[29] 20 U.S.C. § 1087(c)(1).

[30] *See* 20 U.S.C. § 1087(c)(4); *supra* note 18.

[31] *See* 20 U.S.C. § 1082(a)(6); *see also* Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 658 Buff. L. Rev. 281, 341–97 (2020).

[32] 34 C.F.R. § 685.209(c)(2)(iii)(B).

be accruing, or perhaps as the government paying part of a bill the borrower owes. Under either theory, standard tax law would say that the payment should be taxable.[33] The IRS has ruled that interest subsidies paid to private lenders under the old Federal Family Education Loan Program should be considered non-taxable "scholarships,"[34] but as far as I can tell it has not ruled on the more modern interest subsidies under IDR or the Direct Loan Program generally. That said, no one is claiming that interest subsidies are taxable.

In general, Congress, ED, and the IRS have been moving in the right direction, slowly plugging holes and providing relief where they can, starting first with the rediscovery of the exclusion for closed school (and false certification) discharge in 2015, then the statutory exclusion for TPD discharge in 2017, and then the IRS's borrower defense safe harbor in 2020. But the law still lacks necessary clarity and remains fragile—especially in the cases of TPD and borrower defense. Moreover, there is still no explicit exclusion that applies to IDR or to a possible debt cancellation under settlement and compromise, either of which would be vastly bigger than other types of cancellation. More is needed.

Solutions

Congress can fix this problem, of course, simply by expanding the applicability of section 108 of the tax code. But assuming Congress will act is, sadly, usually a mistake. While legislation is not impossible given some of the bipartisan interest in the issue and in reauthorization of the Higher Education Act, the Biden Administration will likely have to act through regulation and other administrative action on this issue. But they should do so clearly and confidently, because the entire assumption that student debt cancellation should be taxable is based on a flawed reading of the tax law rooted in a bad decision of the IRS in 1973.[35]

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[33] *See, e.g.,* Old Colony Tr. Co. vs. Comm'r, 279 U.S. 716, 729 (1929) ("The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed.").

[34] Rev. Rul. 75-537, 1975-2 C.B. 32; *see* I.R.S. Gen. Couns. Memo 33,721 (Jan. 4, 1968) (student loan interest subsidies would be income to the borrower but for § 117).

[35] For a detailed history of the IRS's back-and-forth on this question, *see* Richard C.E. Beck, *Loan Repayment Assistance Programs for Public-Interest Lawyers: Why Does Everyone Think They Are Taxable?*, 40 N.Y.L. Sch. L. Rev. 251, 258–71 (1995); *see also* John R. Brooks, *Treasury Should Exclude Income From Discharge of Student Loans*, 152 Tax Notes 751, 752–53 (2016).

A typical tax law analysis of this issue would go something like this: cancellation of indebtedness is taxable unless there is an exception in the tax code. The only clear exception is for debt cancelled due to public service (and now also death or disability). Therefore, all other student debt cancellation is taxable. But that thinking gets backwards *why* section 108(f) exists. It exists not to provide a narrow exception to taxability. Rather, it exists to plug a hole in the broader *non-taxability* of student debt forgiveness. Understanding why requires unpacking some history.

Student loan cancellation programs are likely as old as student loans themselves. They extend at least back to the 1950s, when some states provided loan cancellation for doctors, teachers, and others who worked in specific under-served geographic areas.[36] National Defense Student Loans (the predecessor of Perkins Loans) also provided an early form of loan cancellation for teachers.[37] The IRS ruled on several occasions in the 1950s and 60s that the loan cancellation from these programs was *not* taxable, because the cancellation should be considered a non-taxable "scholarship" under Internal Revenue Code section 117.[38] Under then-current regulations, a payment could not qualify as a "scholarship" if it was actually compensation for services, but since the services in question—such as working in a rural medical clinic or school—were not for the lender, the loan cancellation was better described as a condition for receiving a scholarship grant, the IRS ruled.[39]

The IRS ruled on several occasions in the 1950s and 60s that the loan cancellation from these programs was not taxable, because the cancellation should be considered a non-taxable "scholarship" under Internal Revenue Code section 117.

The Supreme Court complicated the issue in 1969 by ruling in Bingler v. Johnson[40] that an employee on paid leave while pursuing a graduate degree could not exclude that payment as a "scholarship" under section 117, because he was required to return to work for two years after receiving his degree. The Court held that section 117 applied only to "no-strings

[36] *See, e.g.,* I.R.S. Priv. Ltr. Rul. 5604265200A (Apr. 26, 1956) (describing a typical state program).

[37] National Defense Education Act of 1958, Pub. L. No. 85-864, § 205(b)(3), 72 Stat. 1580, 1585 (1958).

[38] I.R.S. Gen. Couns. Memo 31,871 (Jan. 19, 1961). I.R.S. Priv. Ltr. Rul. 6004275330A (Apr. 27, 1960); I.R.S. Priv. Ltr. Rul. 5807039700A (July 3, 1959) (reversing I.R.S. Priv. Ltr. Rul. 5604265200A (Apr. 26, 1956)); I.R.S. Gen. Couns. Mem. 30,700 (May 27, 1958).

[39] *See, e.g.,* I.R.S. Priv. Ltr. Ruling 6004275330A.

[40] 394 U.S. 741 (1969).

educational grants, with no requirement of any substantial quid pro quo from the recipients."[41] Although the facts of that case were still consistent the IRS's prior interpretation—that a scholarship does not include payments contingent on providing services *to the grantor*—the IRS used *Bingler* to reverse its earlier loan cancellation rulings. In 1973 the IRS ruled instead that loan cancellation dependent on, for example, the borrower working in rural medicine was "primarily for the benefit of the grantor" and therefore could not qualify as a non-taxable scholarship.[42] Congress quickly responded to overrule the IRS legislatively,[43] ultimately adding the section 108(f) exclusion mentioned above for PSLF-type loan cancellation.[44]

But regardless of whether the IRS was correct to read *Bingler* as applying to PSLF-type loans, that issue is irrelevant to the question of whether IDR or other loan cancellation should be taxable. Loan cancellation under income-driven repayment or settlement and compromise does *not* require any sort of quid pro quo—no one is required to work in a particular field or geographical area, or really do anything other than make their required payments. In those circumstances, we should default to the IRS's original treatment of student loan cancellation as a non-taxable scholarship. In passing section 108(f), Congress was not indicating that all other forms of student debt cancellation should be taxable; instead, it was plugging a hole in order to keep the general policy of non-taxability intact. Section 108(f) was only needed to cover loan cancellation that section 117 did not cover.[45]

Student loans and section 117 have both changed somewhat in ways that complicate this argument today, but do not contradict the core point. At the time section 108(f) was added, PSLF-type forgiveness was the dominant

[41] *Id.* at 750.

[42] Rev. Rul. 73-256, 1973-1 C.B. 56.

[43] *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2117, 90 Stat. 1520, 1911–12; Revenue Act of 1978, Pub. L. No. 95-600, § 162 92 Stat. 2763, 2810. In its report on the 1976 Act, Congress specifically stated that the statutory exception was in response to Rev. Rul. 73-256. *See* S. Rep. No. 94-938, at 430.

[44] *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1076(a), 98 Stat. 494, 1053; Joint Committee on Tax'n, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, JCS-41-84, at 1199–1201 (1984), https://www.jct.gov/publications/1984/jcs-41-84/.

[45] Richard Beck has argued persuasively that the language of 108(f) explicitly acknowledges that other kinds of student debt cancellation outside of 108(f) could also be non-taxable, and that "Congress did not intend to change the law by enacting I.R.C. § 108(f), but rather to clarify it by purging the IRS' erroneous interpretation in Revenue Ruling 73-256." Beck, *supra* note 35, at 279–83. *See also* S. Rep. No. 94-938, at 430 (a reason for the statutory change was to make debt cancellation "consistent with the treatment of scholarships and fellowship grants which are not contingent upon the performance of needed services by the recipient").

form of cancellation; IDR did not appear until 1994[46] and did not really take off until after 2010.[47] So the tax code's silence on IDR should not be given much weight. Section 117 also changed somewhat in 1986,[48] especially by making it inapplicable to those who are not "candidate[s] for a degree."[49] While that might seem at first glance to foreclose scholarship treatment for those who have completed their degree or left school, the legislative history makes clear that the intent was only to remove scholarship treatment for nondegree *programs*.[50] This is further supported by the fact that the scholarship exclusion appears to be the reason interest subsidies are not taxable,[51] even though they also occur after the borrower leaves school.

However, it is also clear that section 117 can apply only to "qualified tuition and related expenses," i.e., only money to cover tuition and fees, not room, board, and other living expenses.[52] That could pose a problem especially for Grad PLUS Loans, which can cover up to the full cost of attendance. So while we should not read any of this as clear Congressional intent to tax student debt cancellation, these provisions do mean that Treasury and the IRS may need to take more affirmative steps to ensure that the promise of student debt cancellation is fulfilled.

As I lay out below, there are several overlapping legal arguments and regulatory steps that can ensure that cancelled debt is truly 100% cancelled. (Several of these arguments were first laid out in more detail in a letter from Sens. Warren, Brown, and Durbin, and Rep. Waters to the Treasury in 2015.[53] I also cover them in some

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[46] *See* Student Loan Reform Act of 1993, Pub. L. No. 103-66, § 4021, 107 Stat. 312, 341 (creating Income-Contingent Repayment Program).

[47] For more on the history and expansion of the IDR programs and Direct Loans, *see* John R. Brooks and Adam J. Levitin, *Redesigning Education Finance: How Student Debt Outgrew the "Debt" Paradigm*, 109 Geo. L.J. 5. 27–33 (2020).

[48] Tax Reform Act of 1986, Pub. L. No. 99-514, sec. 123(a), § 117, 100 Stat. 2085, 2112–13.

[49] I.R.C. § 117(a).

[50] *See, e.g.,* H. Rep. No. 99-841, at II-15 (distinguishing between "degree candidates" and "nondegree candidates"). The prior version of section 117 could apply to candidates who were "not . . . candidate[s] for a degree at an educational institution (as defined in section 151(e)(4))" only if the grantor otherwise qualified as a section 501(c)(3) tax-exempt organization. *See* I.R.C. § 117(b)(2) (1958). In other words, the emphasis was on whether the institution was an educational institution that could grant degrees, not on whether the student was currently enrolled. As noted above, the IRS used this version of section 117 to rule that early loan forgiveness programs should be excluded from income. *See supra* note 38. Furthermore, cancelling a loan essentially transforms part of the original loan into a grant—one that was made at the time at the time of the original loan, i.e., when the borrower was still a "candidate for a degree."

[51] *See* "Interest Subsidies," *supra*.

[52] I.R.C. § 117(b); Prop. Treas. Reg. § 1.117-6(c)(1).

[53] Letter from Senator Elizabeth Warren et al. to Jack Lew, Sec'y of the Treasury, and John Koskinen, Comm'r of the Internal Revenue Service (Aug. 11, 2015),

more detail in a 2016 *Tax Notes* article.[54]) Some of these arguments apply with more force than others or apply to some situations better than others. But like for the borrower defense safe harbor, the sum total of these approaches is more than sufficient to empower the IRS either to affirmatively rule that student debt cancellation is not taxable, or at a minimum to decline to assert taxation for administrative reasons.

- **General Welfare Exclusion.** Treasury and the IRS have the clear authority to conclude "that payments to individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare are not included in a recipient's gross income."[55] This exclusion applies to payments (1) made from a governmental fund, (2) for the promotion of the general welfare, and (3) that are not compensation for services.[56] The IRS has applied the general welfare exclusion to, *inter alia*, payments to the blind,[57] mortgage assistance payments,[58] replacement housing subsidies,[59] vocational training payments,[60] stipends to under-employed individuals under probation,[61] disaster relocation payments,[62] and payments to crime victims.[63] The primary justification for the general welfare exclusion is that taxing these benefits would undermine their social purpose—that the government would be giving with one hand and

The primary justification for the general welfare exclusion is that taxing these benefits would undermine their social purpose—that the government would be giving with one hand and taking with the other.

https://www.brown.senate.gov/imo/media/doc/2015.8.11%20Letter%20to%20Treasury%20and%20IRS%20re%20Corinthian%20student%20loan%20debt1.pdf.

[54] Brooks, *supra* note 19. Other extended treatments of the question include Beck, *supra* note 35; Herrine, *supra* note 31, at 402–10.

[55] Rev. Rul. 2005-46, 2005-2 C.B. 120.

[56] *Id.*

[57] Rev. Rul. 57-102, 1957-1 C.B. 26.

[58] Rev. Rul. 75-271, 1975-2 C.B. 23.

[59] Rev. Rul. 74-205, 1974-1 C.B. 20.

[60] Rev. Rul. 68-38, 1968-1 C.B. 446.

[61] Rev. Rul. 72-340, 1972-2 C.B. 31.

[62] Rev. Rul. 98-19, 1998-1 C.B. 840

[63] Rev. Rul. 74-74, 1974-1 C.B. 18.

taking with the other. That concern applies with equal force to student loan cancellation. This exclusion would be particularly relevant for IDR debt cancellation, as it is a legislatively provided program intended to support low-income borrowers, and the exclusion could possibly apply to settlement and compromise, since that power is also granted to ED by legislation.

- **Qualified Disaster Relief Payment.** The general welfare exclusion is also partially codified in the case of payments made by the government "in connection with a qualified disaster in order to promote the general welfare."[64] Because the COVID-19 pandemic has been declared a "qualified disaster" for tax purposes,[65] this provision would be particularly relevant for any one-time cancellation by the new administration under settlement and compromise.[66]

Because the COVID-19 pandemic has been declared a "qualified disaster" for tax purposes, this provision would be particularly relevant for any one-time cancellation by the new administration under settlement and compromise.

- **Scholarship Exclusion.** As discussed above, student debt cancellation should still be considered to fall within the general definition of a non-taxable "scholarship" under section 117. That said, the exclusion likely covers only loans for degree programs at educational institutions, which would leave out other types of programs for which federal student loans are available. It would also cover cancellation only to the extent the loans covered tuition and fees, not other living expenses. It would be fair to assume that undergraduate loans largely go to tuition and fees, given the relatively low borrowing limits,[67] but not graduate loans, which can be up to the full cost of attendance.[68] That said, a relatively small one-time cancellation, such as $10,000 per borrower, might be safely assumed to cover only tuition and fees.

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[64] I.R.C. § 139(a), (b)(4).

[65] The White House, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak.

[66] Calling debt cancellation a "qualified disaster relief payment" is particular useful, since the more common-law general welfare exclusion might not apply, if, e.g., cancellation under settlement and compromise is not considered to be "legislatively provided."

[67] *See* 20 U.S.C. §§ 1078-8(d)(1) (limit of $31,000 for undergraduate dependent students and $57,000 for undergraduate independent students).

[68] *See* 34 C.F.R. §§ 685.203(f), (g).

- **Insolvency Exclusion.** The tax code excludes income from the cancellation of debt to the extent that the borrower is insolvent at the time of the discharge, i.e., to the extent that their liabilities (including the liability about to be discharged) exceed their assets.[69] This was one of the theories for non-cancellation of debt for borrower defense.[70] For IDR, insolvency is less certain, but still likely, since by definition the borrower is not earning sufficient income to pay down his or her student debt. It would likely apply with the least coverage in the case of a broad one-time cancellation, but would still apply to many borrowers. To make this exception more likely to apply to more borrowers, Treasury and the IRS could issue regulations defining "insolvency" for purposes of student debt in a way that excludes some assets, such as a personal residence, tax-preferred retirement accounts, and assets exempt from creditors under state law.[71] This would be consistent with the Bankruptcy Code's definition of insolvency,[72] and there is evidence that Congress intended the section 108 insolvency exclusion to mirror bankruptcy law.[73]

- **Contingent Liabilities.** All student loans carry with them by law the right to cancellation under certain circumstances, whether because of income, disability, borrower defense, and so on. For example, if we view IDR not as some discretionary cancellation of debt by the lender, but rather as a fulfillment of the terms of the loan, then debt isn't really "forgiven" in a formal sense. The implicit terms of every student loan include the option to, instead of paying a fixed amount of principal and interest, pay a percentage of one's income for 20–25 years. Seen that way, the IDR debt instrument is really a contingent liability, where the amount that will be paid is not fully clear at the time the debt is entered into, and the borrower

[69] I.R.C. § 108(a)(1)(B), (d)(3).

[70] *See* Rev. Proc. 2020-11.

[71] *See, e.g.,* Cole v. Comm'r, 42 B.T.A. 1110 (1940); Marcus Estate v. Comm'r, T.C. Memo. 1975-9. *But see* Carlson v. Comm'r, 116 T.C. 87, 101 (2001) (holding that the section 108(d)(3) definition precludes the application of *Cole* and other earlier cases).

[72] 11 U.S.C. §§ 101(32)(A) and 522.

[73] S. Rep. No. 96-1035, at 10 (1980) ("The rules of the bill concerning income tax treatment of debt discharge in bankruptcy are intended to accommodate bankruptcy policy and tax policy . . . . The bill provides that . . . a debtor coming out of bankruptcy (or *an insolvent debtor outside bankruptcy*) is not burdened with an immediate tax liability.") (emphasis added).

does not ever legally "owe" the cancelled amount.[74] If there is no unconditional obligation to repay, then release of that obligation should not constitute income.[75]

- **Significant Debt Modification.** If, alternatively, entering into IDR is considered a change in the terms of the loan, then arguably tax should have been imposed at the time of opt-in, because a "significant debt modification" should be treated as a taxable exchange of one debt instrument for another.[76] In the case of cancellation under settlement and compromise, if the borrower still has debt remaining the cancellation could also be considered a significant debt modification under some circumstances.[77] Under this view, the proper measure of how much debt is cancelled is actually the difference in the fair market values of the two instruments at the time of that exchange.[78] But because the IDR options would be included in the both the old and new loan, the loan values would be so speculative and contingent that it would be effectively impossible to measure that difference and impose taxation.[79] Furthermore, the insolvency exclusion in section 108(a)(1)(B) would be *much more* likely to apply at the time of opt-in than on final discharge.[80]

[74] *See, e.g.,* Central Paper Co., Inc. v. Comm'r, 158 F.2d 131, 133–34 (1946); Corporacion de Ventas Etc. v. Comm'r, 130 F.2d 141, 143–144 (2d Cir. 1942) (no income for cancellation of payments that were contingent on future profits); I.R.S. Priv. Ltr. Rul. 201027035 (July 9, 2010) (prepayment to satisfy liabilities contingent on future profits does not give rise to cancellation of indebtedness income).

[75] This argument likely has relatively little purchase in the case of debt cancellation under settlement and compromise.

[76] Treas. Reg. § 1.1001-3(b), (e). Some additional IRS action would be helpful in shoring up this theory, since under current regulations, some alterations occurring by operation of the terms of the debt instrument are not considered "modifications," Treas. Reg. § 1.1001-3(c)(ii), which might describe entering IDR. Such an alteration would still be considered a "modification" if it were pursuant to exercising an option that is not unilateral, i.e., one that is subject to the other party's approval. Treas. Reg. § 1.1001-3(c)(2)(iii) & -3(c)(3). The Education Secretary ultimately has to approve the borrower entering IDR, at a minimum through determination of the borrower's income. *See, e.g.,* 34 C.F.R. 685.209(a)(5)(i) (income documentation must be "acceptable to the Secretary"). The IRS should make clear that this power of the Secretary is sufficient to make the option to enter IDR not unilateral (a fact which is also supported by the many accounts of the challenges borrowers have in getting approved for IDR).

[77] *See* Treas. Reg. § 1.1001-3(g), Example 3 (lowering of principal due at maturity can a "significant modification" if it causes a large enough change in the yield of the debt instrument).

[78] I.R.C. § 108(e)(10).

[79] *See Ventas*, 130 F.2d at 143 ("Whether the taxpayer made a profit or loss in buying up debentures at 45 percent discount from face value is as yet pure speculation."). Under I.R.C. section 108(e)(10), we value the loans for this purpose based on their "issue price" as defined in section 1273. The regulations under that section introduce a number of valuation complexities and uncertainties in cases of contingencies and situations where debt (and interest) is not unconditionally payable, etc. *See* I.R.C. § 1273(b)(4) ("issue price" is "stated redemption price at maturity"); Treas. Reg. § 1.1273-1(b) ("stated redemption price at maturity" is determined using payment schedule); *id.* § 1.273-1(c) (determining a payment schedule if subject to contingencies).

[80] In addition, for many borrowers currently in IDR, the implied exchange may be outside the three-year statute of limitations. I.R.C. § 6501(a).

- **Statutory Fixes.** Of course, the cleanest and simplest solution would be for Congress to step in. Congress could expand the tax exclusion in section 108(f) or the definition of "scholarship" in section 117. Alternatively, Congress could provide for an exclusion in the Higher Education Act (as it did for closed school discharge). Because the Higher Education Act is overdue for reauthorization anyway, changes there may actually be feasible.

The sum total of these arguments, in addition to providing sufficient authority to Treasury and the IRS, also illustrates why the entire logic of applying cancellation of indebtedness principles to student debt is flawed. Ultimately, many of these arguments come down to the fact the student debt in its current form is so unlike any other kind of debt that our standard approaches just do not fit well.[81] From its very beginnings, the student debt system has been primarily in service of the public good of expanding educational access and affordability.[82] In its current form, that system uses income-contingent government credit with no underwriting, statutory interest rates, baked-in interest subsidies, and multiple types of discharge and cancellation enshrined by law.[83] And that debt is used largely as a vehicle for the quasi-public funding of the higher education sector,[84] by paying schools a nominal tuition amount that is itself highly variable and contingent. The tax treatment of cancellation of indebtedness is based on a model of someone borrowing cash but not having to pay it back. That is emphatically not what is going on here.

[81] *See* Brooks & Levitin, *supra* note 47, at 33–47.

[82] *See* Jonathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 Law & Contemp. Probs. 89, 91–95 (2016).

[83] *See* Brooks & Levitin, *supra* note 81.

[84] *See* John R. Brooks, *Income-Driven Repayment and the Public Funding of Higher Education*, 104 Geo. L.J. 229, 230–32 (2016).

Conclusion

Providing student debt relief should be a top priority of the incoming administration and the incoming Congress. But the tax consequences of providing relief must be addressed at the same time. Policymakers will be forced to take a position on whether current law necessitates a tax bill in the event of student debt relief. Should this debt relief be treated as a tax liability, the consequences are substantial. And ironically, the greater the relief, the greater the tax bill. Furthermore, while that tax bill would certainly be less than the amount of debt discharged, the full bill would come due immediately. And the problem is not limited to immediate debt relief. Income-driven repayment has quickly become a backbone of the student debt system and is the primary tool to help low-income borrowers, but its effectiveness is undermined by the "tax bomb" looming at the end of the payment period. Tax law could impose substantial economic hardship at exactly the point when education law determines that relief is most necessary. That would be a perverse result.

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It would also be a result contrary to the historical view of how to treat student loan cancellation—that it should be considered like a scholarship, a non-taxable grant with the purpose of funding higher education. That purpose also dovetails with the general welfare exclusion, which applies to government payments for the promotion of the general welfare, particular in the context of disaster like the COVID-19 pandemic. Furthermore, other parts of the tax law that apply to debt instruments raise substantial questions of whether student debt cancellation would be taxable anyway. In these circumstances, the IRS should, at a minimum, use its discretion to extend the safe harbor in Revenue Procedure 2020-11 and announce that it will not assert taxation for any cancellation of student debt.

ABOUT THE AUTHORS

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John Brooks is a Professor of Law at Georgetown University Law Center, where he has been on the faculty since 2011. His research and scholarship focus on federal tax law and federal student loan law, as well as public finance and social insurance more generally. He is one of the foremost legal academic experts on the income-driven repayment student loan programs, which he has been researching and writing on since 2013. He teaches courses on federal income tax law, corporate tax law, and tax policy.

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Eileen Connor joined the Project on Predatory Student Lending in 2016. Previously, she was a Senior Staff Attorney in the Special Litigation Unit of the New York Legal Assistance Group, where she was counsel on multiple consumer class-action lawsuits concerning student loan debt. Prior to joining NYLAG, she was a John J. Gibbons Fellow in Constitutional and Public Interest Law at Gibbons P.C. and a staff attorney at the Habeas Corpus Resource Center in San Francisco. Eileen has twice represented legal aid providers and their clients in the U.S. Department of Education's negotiated rulemaking sessions.

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Dalié Jiménez's scholarly work focuses on contracts, bankruptcy, consumer financial distress, the regulation of financial products, its intersection with consumer protection, and access to justice. Professor Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau where she worked on debt collection, debt relief, credit reporting, and student loan issues. Prior to her academic career, she clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit, and was a litigation associate at Ropes & Gray, L.L.P. in Boston.

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John S. Whitelaw rejoined CLASI as its first Advocacy Director in December 2017. John works with advocates to pursue creative strategies to address systemic problems faced by CLASI clients. He also provides supervision and mentorship to advocates in housing, government benefits, and SSA matters. John has more than thirty years of experience representing low income and other vulnerable clients in various legal aid programs. Previously John was Co-Director of the Aging and Disabilities unit at the North Philadelphia office of Community Legal Services, Inc. of Philadelphia.

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