STUDENT BORROWER PROTECTION CENTER

Berkeley Law | Center for Consumer Law & Economic Justice

MEMORANDUM

DATE: May 23, 2022

TO: Student Borrower Protection Center
FROM: Britta Kajimura and Doug Lewis
Center for Consumer Law & Economic Justice
University of California, Berkeley, School of Law

RE: College and University "Institutional Debt"

I. Introduction: California should protect student borrowers by extending debt-collection protections to higher education

The COVID-19 pandemic has shed light on an overlooked form of student debt increasingly prevalent at universities and colleges: institutional debt. Institutional debt refers to any debt that students or former students owe directly to schools rather than the government or private lenders. Occasionally, institutional debt arises from a school's own lending practices; it is not uncommon for schools in California, whether public, private, or nonprofit, to engage in institutional lending to various degrees, ranging from summer loans to short-term emergency loans to supplemental tuition loans.[1] Institutional debt can often also arise from obligations as small as library fees and parking fines.

However, institutional debt is most problematic when students relying on Title IV federal aid, such as Pell Grants, withdraw from an academic program before completion.[2] When a

[1] *See, e.g.,* Public: (Berkeley Loan, Berkeley Summer Session Loan, UCSD University Loan and Quon Family Loan, UCR Loans), Nonprofit: (Oxy Low Interest Loan, University of San Diego Campus Loan, The Private Whittier Student Loan), For-profit: San Joaquin Valley College, Carrington College Loan).
[2] See Eaton et. al., Creditor Colleges: Canceling Debts that Surges During COVID-19 for Low-Income Students, Student Borrower Protection Center, https://protectborrowers.org/wp-content/uploads/2022/03/Creditor-Colleges.pdf (March 2022).

student borrower withdraws early from school before completing a semester, a school must repay a portion of that student's Title IV funds to the federal government using a formula proportional to the amount of class time the student completed.[3] Most institutions – across all two-year, four-year, and for-profit schools – have policies that charge students for a percentage of the Title IV aid returned to the federal government as part of their refund policies.[4] Suddenly, students intending to pay off their education over time with loans and grants find themselves owing debts immediately due to their school.[5]

Postsecondary institutions across the country employ various tactics to collect on this debt, including withholding transcripts, preventing re-enrollment, and retaining grades and diplomas.[6] These tactics often damage students' ability to repay the institutional debts they owe, preventing students from earning a degree that might lead to a higher paying job or outright barring them from securing employment because they lack necessary credentials.[7] States and federal regulators are increasingly recognizing transcript withholding as a regressive and cruel debt collection practice.[8] In 2019, California became the first (and, as of this writing, the only) state to pass legislation banning all schools from using transcript withholding as a debt collection practice, without exception.[9] However, contrary to the California bill's label – the "Education

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[3] 34 C.F.R. § 668.22. When a student withdraws before attending one class, schools are required to pay back 100% of the Title IV Aid.

[4] Withholding Dreams, Student Borrower Protection Center, https://protectborrowers.org/wp-content/uploads/2021/01/Withholding_Dreams_SBPC.pdf (February 2021).

[5] Hereinafter, debts owed directly to a school that are incurred through direct institutional lending or early withdrawal will be referred to as "institutional debt."

[6] Karon et al., Solving Stranded Credits: Assessing the Scope and Effects of Transcript Withholding on Students, States, and Institutions, Ithaka S+R, https://sr.ithaka.org/wp-content/uploads/2020/10/SR-Report-Solving-Stranded-Credits-100520.pdf (October 5, 2020).

[7] *Id.*

[8] Filter et al., Transcript Withholding Holds Back Workers and Wages, Consumer Financial Protection Bureau, https://www.consumerfinance.gov/about-us/blog/transcript-withholding-holds-back-workers-and-wages/ (April 18, 2022).

[9] Education Debt Collection Practices Act, Assem. B. 1313 (Cal. 2019-2020 Reg. Sess.). Three other states, Washington, Maine, and Louisiana have passed narrower versions that ban transcript withholding in most cases.

Debt Collection Practices Act" – California's regulatory framework has not firmly established schools as debt collectors under the relevant state consumer protection statutes: the Rosenthal Fair Debt Collection Practices Act,[10] the California Consumer Financial Protection Law (CCFPL),[11] and the Debt Collection Licensing Act (DCLA).[12]

This memo argues that California's existing regulations concerning debt collectors and debt collection practices should apply to postsecondary institutions' debt collection practices. First, the memo provides a brief overview of institutional debt in California and the harmful consequences of schools' collections practices. Second, we draw from California's legislative history and existing statutory framework to argue that today's colleges and universities should be considered debt collectors under California's Rosenthal Act, CCFPL, and DCLA, and therefore are properly regulated by California's Department of Financial Protection & Innovation (DFPI). These frameworks are directly applicable to all for-profit, nonprofit, and public postsecondary institutions. Finally, we propose that DFPI take actions to prevent regressive and harmful institutional debt collection practices and protect the most vulnerable student borrowers. Apart from an Education Code provision specifically related to private post-secondary institutions,[13] these recommendations are applicable to all public and private institutions.

II. Overview: Institutional Debt

Institutional debt does not arise simply because students cannot cover bills they initially expected to pay. Instead, students accrue serious institutional debts because of a fundamental misalignment between Title IV federal financial aid and college and university enrollment rules. When a student using Title IV financial aid withdraws from a school before completing 60% of

[10] Cal. Civ. Code §1788 et seq.
[11] Cal. Fin. Code §90001 et seq.
[12] Cal. Fin. Code §10000 et seq.
[13] *See* discussion *infra* part C.III.2.

the enrollment period (as many students were forced to do during the COVID-19 pandemic, for example),[14] the school must return a prorated portion of the student's Title IV funds to the federal government under a policy known as "Return to Title IV."[15] If a student withdraws after completing 60% of the academic program, the school must return 100% of all Title IV aid linked to the withdrawn student.[16] Schools will typically then bill a student directly for a percentage of the Title IV aid they repay to the government.[17] Consequently, a student who planned to pay tuition over time using federal loans instead immediately owes a significant portion of tuition directly to the school. Though pandemic relief legislation has suspended the Return to Title IV requirement for schools in the event of a student withdrawing because of a qualifying COVID-19 related emergency, schools continue to repay the Education Department and charge students for the repaid funds.[18]

This debt often harms the most vulnerable student borrowers, who are more likely to withdraw from college due to financial insecurity, family care obligations, and fulfillment of unmet basic needs.[19] Schools' debt collection practices further exacerbate the issue, contributing to the regressive effects of institutional debt. Many schools attempt to collect these debts by obstructing a student's education or career, employing practices such as withholding a student's

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[14] 34 C.F.R. § 668.22.
[15] *Id.*
[16] *Id.*
[17] The amount owed by a student for an early withdrawal is dependent on a school's rules and billing practices. *See, e.g.*, *UC Santa Cruz Financial Aid Withdrawal Estimator*. The Federal Student Aid Handbook notes that because the "Right to Return" Title IV policies do not impact institutional refund policies, a school "must provide a student with information on both the school's refund policy and the R2T4 requirements, and explain the interaction between the two."
[18] Guidance for Interruptions of Study related to Coronavirus (COVID-19), Federal Student Aid, U.S. Department of Education, https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2020-03-05/guidance-interruptions-study-related-coronavirus-covid-19-updated-june-16-2020 (June 16, 2020) (Schools are required to determine whether a student's withdrawal was due to COVID-19 related issues). *See* Eaton et. al., Creditor Colleges: Canceling Debts that Surges During COVID-19 for Low-Income Students.
[19] Matt Krupnick, More Students Are Dropping out of College During Covid – and It Could Get Worse, *The Hechinger Report*, (Feb. 10, 2022), https://hechingerreport.org/more-students-are-dropping-out-of-college-during-covid-and-it-could-get-worse/.

official transcript, grades, or diploma; preventing the student's re-enrollment; disallowing the transfer of their credits to another institution; or threatening to withhold course materials.[20] In these cases, students are unable to benefit from their already-earned credits, and their federal aid is rendered null.

Nationally, an estimated 6.6 million students owe as much as $15 billion in institutional debt.[21] Institutional debt is concentrated in low-income and underserved communities that are most likely to rely on Title IV to finance their education.[22] A recent study of California schools shed light on how the University of California (UC), California State Universities (CSU), and community college systems incurred institutional debt during the first two years of the COVID-19 pandemic when more students withdrew from school – even though the CARES Act waived the Return to Title IV policy for COVID-19 related withdrawals.[23] From 2020 to 2022, nearly 750,000 California students accrued institutional debt, estimated to total approximately $395 million.[24] Data also reveals that the largest single source of institutional debt for the UC and CSU systems (and, to a lesser degree, California community colleges) is charges for students to repay Title IV Pell Grants, which are exclusively awarded to students based on financial need.[25] Assuming schools return to pre-pandemic collection practices, researchers predict schools will place almost 150,000 students or former students in collections. This imminent financial calamity requires a response.

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[20] A 2017 survey of representative U.S. undergraduate institutions found 95% of schools use transcript holds, and 99% use registration holds. Just 2% of schools noted they would release an official transcript needed to transfer for another institution. *See e.g.,* Jon Marcus, Colleges are withholding transcripts and degrees from millions over unpaid bills, *The Hechinger Report*, March 22, 2021, https://hechingerreport.org/colleges-are-withholding-transcripts-and-degrees-from-millions-over-unpaid-bills/; https://www.aacrao.org/docs/default-source/research-docs/stop-do-not-pass-go-part-2-a-national-survey-final-11172021.pdf; *CFPB v. ITT Educational Services, Inc.*, 219 F. Supp. 3d. 878, 886 (S.D. Ind. 2015).

[21] Solving Stranded Credits, Ithaka S+R.

[22] *Id.*

[23] Eaton et. al., Creditor Colleges: Canceling Debts that Surges During COVID-19 for Low-Income Students.

[24] *Id.*

[25] *Id.*

III. Colleges and Universities as Debt Collectors

When colleges and universities try to collect institutional debts, they are first-party debt collectors under applicable California debt collection laws.

A. Rosenthal Fair Debt Collection Practices Act

The California legislature has described the purpose of the Rosenthal Fair Debt Collection Practices Act as to prevent debt collectors "from engaging in unfair or deceptive acts or practices in the collection of consumer debts."[26] Under the Rosenthal Act, the definition of "debt collector" is "any person who, in the ordinary course of business, regularly, on behalf of that person or others, engages in debt collection."[27] Thus, unlike the Federal Debt Collection Procedures Act, the Rosenthal Act covers first-party debt collectors in addition to third-party collectors. The term "person" as used in that definition is further specified as any "natural person, partnership, corporation, limited liability company, trust, estate, cooperative, association, or other similar entity."[28] Given this broad statutory language, colleges and universities may be classified as debt collectors, given that they regularly engage in the collection of institutional debt, either from their own lending programs or Title IV refund policies.[29]

Institutional debt may be properly characterized under a plain reading of the Rosenthal Act as the type of "consumer debt" the Act is meant to regulate. "Consumer debt" is defined as "money, property, or their equivalent, due or owing . . . from a natural person by reason of a consumer credit transaction," which is a transaction between two "person[s] in which property,

[26] Cal. Civ. Code § 1788.1(b) (West 2020).
[27] *Id.* § 1788.2(c).
[28] *Id.* § 1788.2(g).
[29] That colleges and universities regularly engage in debt collection is evident from UC's opposition to a 2019 bill, the Education Debt Collection Practices Act. Assem. B. 1313, *supra* note 9. UC formally opposed the bill, which regulated the methods used by California colleges and universities to collect on "delinquent [student] accounts." S. Judiciary Comm., Rep. on Assem. B. No. 1313, at 4-5 (2019-2020 Reg. Sess.).

services, or money is acquired on credit by [one person] from the other person primarily for personal, family, or household purposes."[30] Given that institutional debts arise from services provided by the college or university in a transaction for personal purposes, these types of debts fall within the scope of the Rosenthal Act.

The legislative history of the Rosenthal Act adds further support to the argument that colleges and universities, in collecting institutional debt, are subject to the Act's provisions. Though lawmakers did not expressly contemplate colleges and universities in passing the Act,[31] the legislature was clear that the main innovation of the Act was to subject "in-house" debt collectors to regulation. At the time, these first-party debt collectors performed 90% of all debt collection activities in the state but were left untouched by existing debt collection laws, which at the time applied only to entities that were licensed by the Bureau of Collection and Investigative Services, leaving a wide gap in the protection of consumers.[32] The Chaptered Bill mentions such "in-house collectors" as "bankers, credit unions, savings and loans, personal property brokers,

[30] Cal. Civ. Code § 1788.2(d)-(e). Courts appear not to have not explicitly addressed whether the Rosenthal Act applies to this particular type of transaction, which arises after a college or university has to pay back the amount loaned or granted to a student by the federal government. Courts have found, however, that "there is a consumer credit transaction when the consumer acquires something without paying for it," analogous to how students here acquire the school's services before deciding to withdraw, and then are pursued by the school to repay on those services previously funded by federal loans or grants. *See Gouskos v. Aptos Village Garage*, 94 Cal. App. 4th 754, 759-60 (Cal. Ct. App. 2001) (finding that there was no consumer credit transaction under the Rosenthal Act with a car repair transaction when the car's owner never picked up the car and the repair shop was forced to sell it to recoup its costs, because the car's owner never acquired the repair shop's services); *but see Justice v. CNA National Warranty Corporation*, 346 F. Supp. 3d 873, 878-79 n.4 (S.D.W. Va. 2018) (distinguishing between the West Virginia statute and the Rosenthal Act in holding that a point of sale transaction did not make the seller a "debt collector" under the West Virginia statute in part because the statute does not have the restriction that the debt is "acquired on credit," while the Rosenthal Act does).

Further, to find that students' dealings with colleges and universities do not constitute credit transactions under the Rosenthal Act would leave students with this type of debt with no consumer protections at all. This result clearly runs contrary to the legislative intent of the Rosenthal Act to regulate "all debt collectors," even those not required at the time to be licensed by the state. Letter from Senator Alan Robbins, Author of S. B. 237 (1977-78 Reg. Sess.), to Governor Edmund Brown, Jr. (Sept. 20, 1977) (on file with the University of California, Berkeley School of Law Library).

[31] Legislative history documents from the enactment of the Rosenthal Act contain no mention of colleges and universities as debt collectors.

[32] Joann McNabb, Department of Consumer Affairs, Enrolled B. Rep., S. B. 237 1 (1977).

industrial loan companies, and retailers."[33] The bill's language, however, extended beyond any enumerated list of debt collectors, and explicitly governed "the debt collection practices of all persons who in the ordinary course of business on behalf of themselves or others engage in the collection of consumer debts."[34]

Applicable case law and recent amendments to the Rosenthal Act support a broad reading of the legislation's provisions. The California Court of Appeal analyzed the Rosenthal Act in 2018 to decide whether mortgage lenders were entities covered by the statute as "debt collectors," even though the Act was silent on this point, as it is with respect to institutional debt owed to colleges and universities.[35] Given that previous cases established that the Rosenthal Act "should be interpreted broadly," the court determined that mortgage servicers properly fell under the statute's provisions.[36] To remove all doubt, the California Legislature then relied on this decision to amend the law to include mortgage debt specifically, agreeing with the Court of Appeal that the broad "purpose" of the legislation was to "prohibit entities who are attempting to collect on a debt from 'engaging in unfair or deceptive acts or practices in the collection of [those] debts.'"[37] In clarifying that the Act covered this type of debt, the author of the bill emphasized that the "purpose" of the Rosenthal Act was to "ensure *all consumers* are protected from harassment and abusive debt collection."[38]

The Rosenthal Act's applicability to colleges and universities means that these entities are also subject to other consumer protection laws in California that adopt the Act's definitions.

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[33] *Id*.
[34] *Id*.
[35] *See Davidson v. Seterus, Inc.*, 21 Cal. App. 5th 283, 297 (2018).
[36] *Id.* at 296 (citation omitted), 304.
[37] S. Judiciary Comm., Rep. on S. B. No. 187, at 5 (2019-2020 Reg. Sess.)
[38] *Id.* at 6 (emphasis added).

These additional state consumer protection laws provide the DFPI with broad authority to oversee institutional debt and to regulate the tactics used to collect institutional debts.

B. California Consumer Financial Protection Law

The California Consumer Financial Protection Law (CCFPL), enacted in 2020 to enhance the authority and underscore the consumer protection mission of the renamed Department of Financial Protection and Innovation, prohibits "unfair, deceptive, or abusive debt collection practices" by any "covered persons."[39] A "covered person" is an entity that offers or provides consumers a "financial product or services" in California. Under the CCFPL, a "financial product or service" includes a financial service "delivered, offered, or provided for use by consumers primarily for personal, family, or household purposes."[40] The CCFPL allows DFPI broad discretion to define "financial product[s] or service[s]," including those entered into by "subterfuge or with a purpose to evade any consumer financial law."[41] DFPI regulates any "covered person's" activities in "collecting debt related to any consumer financial product or service" under the CCFPL."[42] Further, the CCFPL prohibits a "covered person" from "providing a service not in conformity with consumer financial law" or "in violation of a consumer financial law."[43] The CCFPL also provides broad authority to DFPI to regulate persons engaging in debt collection. Under the CCFPL, DFPI can prescribe rules identifying UDAAP practices, so long as it considers the "relative harm to the consumer," "frequency of the act in a question," and whether such act is unintentional or stems from a clerical error.[44] Further, DFPI may prescribe

[39] Cal. Fin. Code § 90003(a) (West 2021).
[40] *Id.* § 90005(f).
[41] *Id.* § 90005(e)(1).
[42] *Id.* § 90005(k)(10).
[43] *Id.* § 90005(a)
[44] *Id.* § 90009(c).

rules intended to "prevent" unfair, deceptive, or abusive acts and practices under its "UDAAP" authority.[45]

C. Debt Collection Licensing Act

While the Rosenthal Act imposes requirements and restrictions on California "debt collectors" as broadly defined under the statute, it does not impose a licensing obligation. In September 2020, however, California enacted the Debt Collection Licensing Act (DCLA), adding a licensure requirement for all first-party and third-party debt collectors. As DFPI has noted, the question of whether colleges and universities are required to be licensed under the DCLA concerns the DCLA's statutory definitions, not agency rulemaking.[46] The DCLA uses the same "debt," "debt collection," "creditor," "consumer credit," and "debt collector" definitions enumerated in the Rosenthal Act.[47] Therefore, so long as post-secondary schools' debt collection practices meet the Rosenthal Act's statutory definitions as "debt collection," schools must be licensed as "debt collectors" under the DCLA.[48] Requiring colleges and universities to register as debt collectors under the DCLA is consistent with the act's purpose to "ensure that debt collectors…comply with existing law."[49]

DFPI administers the DCLA and has broad authority to revoke or suspend debt collectors' licenses for violating the Rosenthal Act. DFPI can "specify the factors" considered

[45] *Id.* Given the broad discretion granted to DFPI under this statute, the Department may regulate the debt collection practices of colleges and universities under the CCFPL independent of the Rosenthal Act.
[46] Debt Collection Regulations: License Application and Requirements, Final Statement of Reason: Department of Financial Protection & Innovation, page 51, https://dfpi.ca.gov/wpcontent/uploads/sites/337/2021/12/DC-PRO02.20-Final-Statement-of-Reasons-12.22.21.pdf (December 22, 2021).
[47] Cal. Fin. Code § 100002 (West 2022).
[48] The act exempts most depository institutions (banks), California Financing Law licensees (consumer and commercial loan brokers), California Residential Mortgage Lending Act or Real Estate law licensees. The act also does not apply to student loan servicers' debt collection activities regulated under California's Student Loan Servicer Act.
[49] S. Rules Comm., S. Floor Analysis No. S.B. 908, at 6 (2019-2020 Reg. Sess).

for revoking and suspending a licensee, including "harm to the consumer, frequency of a violation, and disciplinary actions against the licensee," and order licensees to pay ancillary relief for Rosenthal Act violations.[50] Licensees must file annual reports stating the total number and dollar amount of debtor accounts collected.[51] Further, the DCLA allows DFPI's commissioner to engage in "periodic examination" of licensees and submit an annual report disclosing relevant information concerning debt collection operations, including the total debt collected each year, the number of California debtor accounts, and the total dollar amount of California's debtor accounts in the licensee's portfolio.[52]

IV. Proposals for DFPI

DFPI can and should use its broad plenary authority to regulate colleges and universities as debt collectors under the Rosenthal Act, CCFPL, and DCLA to protect vulnerable student borrowers from any illegal or unfair, deceptive, or abusive acts or practices (UDAAP) deployed by these entities.

A. Oversight

Under the DCLA, DFPI should require licensed postsecondary institutions to regularly disclose institutional debt data. The impact and scale of institutional debt owed by California's students are currently challenging to quantify, and California's colleges and universities' debt collection practices are difficult to oversee. A California State Senate legislative analysis in 2019 noted that California's community colleges, the California State University system, and the

[50] Cal. Fin. Code § 100003.3(b)(3) (West 2022).
[51] *Id.* § 100021(a).
[52] *Id.* § 100021(a)(1)-(7).

University of California "do not uniformly track student information system-wide."[53] Further, private post-secondary schools, although required to be licensed by California's Bureau for Private Post-Secondary Education (BPPE), are not required as a condition of licensure to report institutional debts for students or former students.[54] DFPI's authority to institute regular examinations and annual disclosures can improve reporting requirements and enable much-needed oversight, especially as schools expand their own institutional lending practices.

Basic information about a college or university's institutional debt portfolio will allow DFPI to quantify the sheer scale of institutional debt collected by colleges and universities and ensure that debt collection practices comply with existing laws. Helpful reporting requirements would include data on the sources of institutional debt, as well as whether such debts originate from Pell grants, Title IV loans, or institutional fees. Further, demographic information on the students affected would help to illustrate the scope and effects of institutional debt.

B. *Enforcement*

In recognition of the harmful practices that colleges and universities employ to collect institutional debts, the California legislature enacted the Education Debt Collection Practices Act (EDCPA) in 2019.[55] The EDPCA prohibits any "school," defined broadly as any public or private postsecondary school or entity responsible for issuing transcripts,[56] from refusing to provide a transcript to any current or former students because they owe a debt, conditioning the transcript's release on payment of a debt, charging a higher fee for the transcript because the

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[53] S. Rules Comm., S. Floor Analysis Assemb. B. 1313, Floor Analysis of Assemb. B. 1313, at 5 (2019-2020 Reg. Sess).
[54] Annual Report Instructions, Bureau for Private Postsecondary Education, https://www.bppe.ca.gov/annual_report/instructions.pdf (accessed April 3, 2022).
[55] Cal. Civ. Code § 1788.90 (West 2020).
[56] *Id.* § 1788.92(a).

student owes a debt, or generally from using transcript issuance "as a tool for debt collection."[57] Moreover, the EDCPA amended the Education Code to require the governing boards of California postsecondary public schools to "adopt regulations providing for the withholding of institutional services from students or former students" in default on a loan under the Federal Family Education Loan Program.[58] The services withheld may include "the provision" of grades or diplomas,[59] but explicitly do not include "the withholding of registration privileges or transcripts."[60] Thus, existing law protects students facing these types of debts by barring one of the worst practices colleges and universities use against students.

The statute, however, does not specify what state regulatory body is responsible for enforcing the law. Based on DFPI's authority to regulate debt collection activities and consumer financial laws under the CCFPL, which was enacted after the EDCPA, it is logical that DFPI can now exercise authority to enforce the prohibition in the EDCPA.[61] A school attempting to collect a debt by withholding a transcript is engaging in an act that falls expressly within DFPI's authority to regulate debt collection.[62] Under DFPI's enforcement authority, the agency may take civil or administrative action against schools that violate the EDCPA, in addition to demanding monetary penalties and restitution. For instance, under the CCFPL the DFPI may fine a college a

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[57] *Id.* § 1788.93. This bill was opposed by the UC and the Association of Independent California Colleges and Universities. S. Judiciary Comm. Rep., *supra* note 26, at 4-5. The UC claimed that transcript withholding was the "primary leverage" it used to get students "into a productive conversation" about paying back debts to the school. *Id*. Without it, the UC claimed it would have to send debts to collections. *Id.* Though third-party collections are a possible consequence of tightening regulations for the practices used by these entities to collect institutional debt, regulations put in place by DFPI will still affect third-party debt collection. Thus, the regulations proposed in this memo will also protect students from unfair or abusive practices that colleges and universities are currently able to leverage for repayment of this type of debt.

[58] Cal. Educ. Code § 66022(a) (West 2020). Though these practices are currently allowed under this statute, this loophole should also be closed by DFPI since grades and the conferral of a degree are also essential tools to transferring to another institution or securing employment, and thus have the same harmful effect on student debtors as transcript withholding.

[59] *Id.* § 66022(b)(1)(A)-(B).

[60] *Id.* § 66022(b)(2).

[61] Cal. Fin. Code §§ 90005, 90015 (West 2021).

[62] *Id.* § 90005(k)(10).

maximum of $2,500 ($10,000 if the violation is considered reckless) each time the school withholds a transcript in violation of the EDCPA.[63]

Though students could in theory bring complaints to the Attorney General's office or file their own lawsuits to enforce debt collection laws, the limited resources of the Attorney General's office and the constraints of pursuing (or even knowing of the possibility of pursuing) a private action justify substantial administrative oversight. As the DCLA's Senate Floor Analysis noted, California's Attorney General cannot "engage on every complaint filed."[64] Further, it is "unreasonable to expect individual consumers to bring their own actions for violations against the Rosenthal Act," because many borrowers do not know of the consumer laws that protect them.[65]

C. *Rulemaking*

1. Barring Other Unfair Practices Used to Collect Institutional Debt

DFPI can use its rulemaking authority to prohibit other unfair practices employed by colleges and universities to collect institutional debt. As the California legislature found with respect to withholding transcripts, practices like barring re-enrollment because of institutional debt are counterproductive to enabling students to pay back these debts. Without the ability to earn a degree, students will face more difficulty finding a job that pays enough money to cover their institutional debts.[66] These practices are especially insidious because they disproportionately impact the lowest-income students who most rely on Title IV aid like Pell Grants.

[63] *Id.* § 90012(c)(A)(i-iii).
[64] S. Rules Comm., S. Floor Analysis No. S.B. 908, at 5-6 (2019-2020 Reg. Sess).
[65] *Id.*
[66] Cal. Civ. Code § 1788.91 (West 2020).

Thus, DFPI can use its authority under the CCFPL to declare practices like enrollment restrictions to be unfair, deceptive, or abusive.[67] DFPI has engaged in similar proposed rulemaking concerning financial services offered to small business recipients, nonprofits, and family farms.[68] In the proposed rules issued by DFPI in this context, the agency defined unfair practices broadly, as when:

> (A) The act or practice violates another law.
>
> (B) On balance, the harm from the conduct outweighs the utility of the conduct.
>
> (C) The act or practice offends an established public policy, or the act or practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to a person. [or]
>
> (D) (1) The injury is substantial, (2) the injury is not outweighed by countervailing benefits, and (3) the injury could not reasonably have been avoided.[69]

Given these broad definitions of unfair practices, a tactic like barring re-enrollment of a student who cannot pay off an institutional debt would clearly be covered. As the legislature observed, these practices undermine a student's ability to pay back institutional debt.

2. Legally-Voided Institutional Debt from Private Institutions

While the discussion above focused on California public institutions, institutional debts can arise at private, nonprofit, and for-profit higher education entities, too. DFPI should clarify that private post-secondary institutions' attempts to collect legally-voided institutional debt issued while unaccredited under the California Education Code are abusive practices.

DFPI can use its broadened authority under the CCFPL to promulgate regulations that protect student borrowers from unlicensed private higher education institutions. Under section

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[67] Cal. Fin. Code § 90009(c) (West 2021).
[68] Department of Financial Protection & Innovation, California Consumer Financial Law: Draft Text – Small Business Protections, https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/08/PRO-02-21-Text-Small-Business-Protections.pdf (February 2, 2021).
[69] *Id.*

94917 of the Education Code, any "indebtedness relating to payment for an education program" at a private institution is void if, at the time the student accrues institutional debt, the institution did not have approval to operate according to BPPE.[70] While CCFPL exempts persons who sell "non-financial goods and services to a consumer," the exemption does not apply to institutions or persons, like private post-secondary schools, that regularly extend credit as defined under the federal Truth in Lending Act (TILA).[71] Therefore, DFPI should treat private post-secondary schools' efforts to collect legally-void institutional debt created while unaccredited as an abusive practice under CCFPL and should declare those debts "uncollectible." These are clear violations of consumer protection laws and unlawful conduct that DFPI oversees under the CCFPL.[72]

DFPI can use its broad plenary authority under the CCFPL to ensure schools are not collecting on voided loans from unaccredited institutions. Under the CCFPL, DFPI can require "reports and conduct examinations" of covered persons to "assess compliance" with consumer financial laws such as section 94917 of the Education Code. When an unlicensed school has attempted to collect on a voided loan (or has sent it to a third-party collector), DFPI can demand relief in the form of restitution, monetary compensation, and operating restrictions.[73] Further, under the DCLA, DFPI can periodically audit and examine licensed debt collectors under oath on matters related to the licensee's debt collection practices, as often as the Commissioner deems "necessary and appropriate."[74]

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[70] Cal. Educ. Code § 94917 (West 2010). While the CCFPL does not apply to a licensee acting under the authority of the other state agency's license, it does not disqualify the DFPI from enforcing consumer financial law against private colleges required to be licensed under the BPPE, since the BPPE does not authorize or regulate s school's debt collection activities. BPPE does not enforce any provision regulating schools' collection of institutional debt. https://dfpi.ca.gov/wp-content/uploads/sites/337/2021/03/3-8-21-Legal-Aid-Foundation-DFPI-Comments-LAFLA-BayLegal-HERA-CLC.pdf.
[71] Cal. Fin. Code § 90006(e) (West 2021). The TILA considers a person to regularly extend consumer credit if they extend credit "more than 25 times" per calendar year. *See* 12 C.F.R. § 1026.2(a)(17)(iv) (2019).
[72] *Id.* § 90003(a)(2).
[73] *Id.* § 90012(b)(1-8).
[74] Cal. Fin. Code § 100023(a) (West 2022).

Finally, beyond these examination procedures, DFPI has broad latitude under the DCLA to hold schools and their third-party debt collectors accountable for violating section 94917. The Commissioner may adopt regulations that specify when DFPI will consider revoking or suspending a license.[75] Where a school or third-party debt collector has repeatedly violated section 94917, therefore, the Commissioner could initiate proceedings for revoking its license.

V. Conclusion

The debt collection practices described in this memorandum prevent schools and students from reaching their shared objective: providing students with an education and a degree to unlock better, higher-paying jobs and achieving the benefit of a more highly educated workforce for the state. California's laws grant DFPI the authority to regulate the harmful practices employed by schools to collect on institutional debts. Regulation should take the form of increased oversight through reporting requirements, enforcement of the EDCPA, and rulemaking to bar other unfair and abusive practices employed by public and private institutions to collect from students. Without these reforms, millions of students will be left vulnerable to the far-reaching harms of institutional indebtedness, exacerbated by the COVID-19 pandemic. By taking action, DFPI can avert these harms and help to restore the promise of higher education in California.

[75] *Id.* § 100003.3(b)(1-6).