BEYOND FRESH START

Addressing the Flaws of the Current Student Loan Collection System

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STUDENT BORROWER PROTECTION CENTER

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Protect Borrowers

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Foreword

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In the years prior to the start of the COVID-19 pandemic, more than 1 million people with federal student debt defaulted on a loan each year, despite rights under the law to affordable payments and debt cancellation intended to end the epidemic of student loan default. The framers of these rights and protections believed they would be an effective lifeline for people with student debt who struggle financially and—in the words of former Education Under Secretary Ted Mitchell—promised to bring about a "zero default rate."[1]

These borrowers are dealt consequences for what they are told is an individual failure, but it is clear that the failures are systemic and run counter to the stated goals of the loan program.

On April 6, 2022, the U.S. Department of Education (ED) announced that it is taking steps to give a "Fresh Start" to millions of struggling borrowers who are currently in default on their federal student loans by removing all federal student loan borrowers from default and placing their loans back into "good standing." For too long, defaulted borrowers have slipped through the cracks and been made to suffer at the hands of the Department of Education's punitive collection system. While the relief the White House announced in April is critically needed for people living in or close to poverty, it is not a long-term solution to a crisis decades in the making.

For decades, ED has levied severe consequences on student loan borrowers for falling behind on payments and having their loans go into default. Often, these consequences are financially disastrous for borrowers already experiencing strain or poverty; this runs counter to the intention of the loan program, which originally aimed to provide economic mobility through access to higher education. When federal student loan borrowers cannot

[1] Shahien Nasiripour, *Student Loan Defaults Drop, but the Numbers Are Rigged*, BLOOMBERG, Sept. 28, 2016, https://www.bloomberg.com/news/articles/2016-09-28/student-loan-defaults-fall-but-the-numbers-are-rigged.

afford their monthly student loan payment, their loans are placed into default after 270 days of missing payments. Then, ED—in conjunction with the Treasury Department—implements punitive measures including the garnishment of wages, tax credits, and other federal benefits designed to keep Americans out of poverty. The number of borrowers subject to this draconian system is also massive: before the federal student loan payment pause in 2020, roughly 20 percent of all 43 million student loan borrowers were in default.[2] A significant portion of those borrowers consequently had their wages garnished through Administrative Wage Garnishment (AWG) or their benefits seized through the Treasury Offset Program (TOP).

As the papers in *Beyond Fresh Start: Addressing the Flaws of the Current Student Loan Collection System* demonstrate, the current system not only fails to put borrowers on a path to repayment, but rather punishes those who are unable to afford payments. These borrowers are dealt consequences for what they are told is an individual failure, but it is clear that the failures are systemic and run counter to the stated goals of the loan program. This system normalized the forcible collection of resources that borrowers from low-income backgrounds rely on to make ends meet. The papers in *Beyond Fresh Start* shed light on how the current system of default and collection further entrenches racial inequality, propose ideas for reforming debt collection, identify the role states can play in addressing default and helping borrowers, and outline the existing legal authority for administrative solutions.

Student loan borrowers receive an incredible amount of conflicting and confusing information about their student loans, including through the federal regulatory process. These updates and negotiations are likely to impact many borrowers' plans for managing their loans (if they have the ability to plan at all).

For example, in May 2021, ED announced its intention to establish negotiated rulemaking committees to develop proposed regulations related to a number of higher education practices and issues. ED promised reforms on a wide range of topics from income-driven repayment (IDR), to the administrative cancellation programs (i.e., disability discharges, Public Service Loan Forgiveness, borrower defense), to school accountability measures. That fall, it convened a committee to address "Affordability and Student Loans." Notably missing throughout this

[2] Office of Federal Student Aid, "Default Rates," U.S. Department of Education, accessed July 27, 2022, https://studentaid.ed.gov/sa/about/data-center/student/default.

process was any serious effort to address the struggles of people with defaulted loans. Negotiators proposed adding the issue of default to the agenda, suggesting that ED should amend its regulations in order to:

- Create additional pathways out of default;
- End the practice of demanding borrowers repay their entire loan balance—typically tens of thousands of dollars—immediately upon default; and
- Limit the amount collected to the IDR amount when involuntary collection is used.[3]

Ultimately, ED did not add addressing default to the agenda, insisting that adding default was unnecessary because it had already put a debt collection rulemaking on its regulatory agenda. That rulemaking was scheduled for June 2022 and has yet to occur.[4]

While the details are still sparse, through "Fresh Start" ED has laid the groundwork for further action to address the default crisis.

In addition, the federal student loan payment pause initiated at the start of the COVID-19 pandemic has prevented more borrowers from entering default. In March 2020, Congress took action by passing the CARES Act, suspending student loan bills for everyone and pausing AWG and TOP for borrowers in default—protections that have been extended via executive action six more times, including most recently by President Biden in April 2022.[5] Looking ahead, these actions establish significant grounds for meaningful protections for low-income borrowers to be codified and implemented. The Biden Administration must now engage in long-term planning to ensure that borrowers are not driven back into default, and if they do, the result is not financially ruinous.

Beyond Fresh Start contains a number of suggested solutions for fixing the broken collections system and delivering on the promise of a "Fresh Start" for the most economically vulnerable people in the student loan system. The authors approach default and collections from diverse perspectives; many of the policies can work in

[3] *See* Appendix, U.S. Department of Education, "Final Default Proposal for Neg Reg Oct 4 2021," https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/findefpropmemo.pdf.

[4] Office of Information and Regulatory Affairs, "Debt Collection Practices Rule," U.S. Office of Management and Budget, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1894-AA12.

[5] Eugene Daniels & Michael Stratford, *White House to Extend Student Loan Moratorium Once Again*, POLITICO, Apr. 5, 2002, https://www.politico.com/news/2022/04/05/white-house-to-extend-the-student-loan-moratorium-once-again-00023072.

harmony. If implemented, low-income borrowers would not be forced to sacrifice basic necessities due to an unaffordable student loan payment. There is an overwhelmingly common thread throughout the papers that follow: student loan default is a crisis requiring urgent and significant action, and ED has the ability to make the necessary changes. Policymakers must prioritize borrowers, as substituting real systemic reform for small policy tweaks will not help the millions in distress.

CREATING AN INCOME-DRIVEN REPAYMENT STRUCTURE FOR DEFAULTED LOANS

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Introduction

Before the COVID-19 pandemic, there were approximately 7.7 million student loan borrowers in default on approximately $168 billion in federally-held student loans, including Federal Family Education Loans ("FFEL") and Direct loans.[1] Though borrowers have in theory been able to get out of default since March 2020 through rehabilitation or consolidation, these numbers have hardly budged.[2] In 2019, the last year before collections were paused due to the ongoing COVID-19 pandemic, total defaulted student loan receivables (principal and interest) serviced by the Department of Education's Default Resolution Group were approximately $185.1 billion.[3] Collections that same year were approximately $14.5 billion.[4]

Difficulties with student loan repayment are unevenly distributed. Student loan borrowers in default and subject to collections are disproportionately likely to be from low-income backgrounds and communities of color, older, single, and living in severe financial precarity.[5] Borrowers in default are disproportionately likely to be Black; one study has estimated that "nearly half of all Black students (49 percent) defaulted on at least one loan within 12 years—more than twice the rate of white students (20 percent) and more than four times the rate of Asian students (11 percent)."[6] Borrowers in default are also less likely to have graduated from college than the median

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[1] *Federally Managed Portfolio by Loan Status*, Federal Student Aid, https://studentaid.gov/data-center/student/portfolio (last accessed July 26, 2022).

[2] Ben Kaufman, *Millions of Borrowers Had a Special Chance to Exit Default During COVID*, Student Borrower Protection Center (Nov. 16 2021), https://protectborrowers.org/millions-of-student-loan-borrowers-had-a-special-chance-to-exit-default-during-covid-the-biden-administration-must-fix-the-system-failure-that-led-almost-no-borrowers-to-access-it/.

[3] U.S. Dep't of the Treasury, *Fiscal Year 2019 Report to the Congress*, https://fiscal.treasury.gov/files/dms/debt19.pdf at 8 (last accessed July 27, 2022). This includes loans being serviced by DRG that are in rehabilitation or consolidation.

[4] *Id.* at 10.

[5] *See e.g.*, Sarah Sattelmeyer, *Trapped by Default*, New America (July 27, 2022), https://www.newamerica.org/education-policy/briefs/trapped-by-default/ (estimating that almost half of current borrowers who have defaulted or are in default are Black, and almost half have incomes below $30,000); Ben Miller, *Who Are Student Loan Defaulters?*, Center for American Progress (Dec. 14, 2017), https://www.americanprogress.org/article/student-loan-defaulters/; Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers,* Center for American Progress (Oct 16, 2017), https://www.americanprogress.org/article/new-federal-data-show-student-loan-crisis-african-american-borrowers/.

[6] Robert Kelchen, *New Data on Long-Term Student Loan Default Rates,* Wordpress Blog (Oct. 17, 2017), https://robertkelchen.com/2017/10/06/new-data-on-long-term-student-loan-default-rates/; *see also Ben Miller, The Continued Student Loan Crisis for Black Borrowers, Center for American Progress (Dec. 2, 2019),*

borrower, and so are correspondingly less likely to have experienced the income benefits of having a college degree.[7] Student loan borrowers who attended for-profit institutions are also more likely to default than borrowers who attended private non-profit or public institutions.[8]

The U.S. Department of Education ("Department") collects billions of dollars from borrowers in default every year through wage garnishment, tax refund offsets, and federal benefits offsets.[9] These borrowers often rely on federal benefits, wages, and tax refunds to pay for basic necessities such as housing, food, transportation, clothing, childcare, and health care costs. Collections often push these borrowers over the financial brink. Indeed, most borrowers in default have incomes that make them eligible for a low or zero dollar per month income-driven repayment ("IDR") plan. [10] But many qualified borrowers never accessed IDR due to servicer misconduct or neglect.[11]

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https://www.americanprogress.org/article/continued-student-loan-crisis-black-borrowers/; Fed. Res. Bank of N.Y., *Just Released: Racial Disparities in Student Loan Outcomes*, Liberty Street Economics (Nov. 13, 2019), https://libertystreeteconomics.newyorkfed.or*g/2019/11/just-released-racial-disparities-in-student-loan-outcomes/;* Linders et al, *Mapping Student Debt*, Washington Center for Equitable Growth, 2018 https://mappingstudentdebt.org/#/map-2-race; Judith Scott-Clayton, *What accounts for gaps in student loan default, and what happens after*, Brookings (June 21, 2018), https://www.brookings.edu/research/what-accounts-for-gaps-in-student-loan-default-and-what-happens-after/.

[7] *Id*.

[8] Scott-Clayton *supra* note 6; Miller *supra* note 5; https://www.americanprogress.org/article/student-loan-defaulters; Kelly Field, *Government Vastly Undercounts Defaults*, Chronicle of Higher Educ. (July 11, 2010), https://www.chronicle.com/article/government-vastly-undercounts-defaults.

[9] *Supra* note 3.

[10] U.S. Government Accountability Office, GAO-15-663, *Federal Student Loans: Education could do more to help ensure borrowers are aware of repayment and forgiveness options* (Aug. 2015), at 13, http://www.gao.gov/products/GAO-15-663 (finding that 70 percent of borrowers in default had income that would entitle them to a reduced monthly payment under an IDR plan). Furthermore, borrowers who attend for-profit colleges or two-year colleges make up 70 percent of all borrowers in default—and many would qualify for $0 payments in IDR. The median debt burden and median wages of these borrowers suggest that the typical defaulted borrower likely would qualify for $0 IDR monthly student loan payment or substantially reduced payment, up to a 75 percent, under an IDR plan than under a standard repayment plan. *See* CFPB, *Annual report of the CFPB Student Loan Ombudsman* (October 2015), https://files.consumerfinance.gov/f/201510_cfpb_annual-report-of-the-cfpb-student-loan-ombudsman.pdf; *see also* Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions they Attend Contributed to Rising Loan Defaults*, BPEA Conference Draft, the Brookings Institution (Sept. 2015), https://www.brookings.edu/wp-content/uploads/2015/09/LooneyTextFall15BPEA.pdf.

[11] *Infra* note 13.

One of the many troublesome aspects of the debt collection system is the sheer amount that is collected from defaulted borrowers relative to their incomes. Perversely, the default system is designed such that many defaulted borrowers pay significantly higher sums through wage garnishment, benefit garnishment, and tax refund offsets than they would if they were on an IDR plan. Since 1992, the Department has regularly recognized through the creation of its IDR plans that student loan payments based on outstanding loan balance are simply unaffordable for a significant contingent of borrowers, and that time-limited repayment plans based on a borrower's income are more manageable, affordable, and thereby less likely to lead borrowers to default.[12] While IDR plans have been expanded such that they are theoretically available to all borrowers, policy design failures and student loan servicer misconduct have combined to keep borrowers from accessing IDR at all or remaining in these plans over the long-term.[13] Troublingly, Black borrowers in particular are more likely to fall into default

[12] *See e.g.*, 138 Cong. Rec. 17002 (1992) (statement of Sen. Durenberger) ("The most important principle in the legislation I introduced is that student loan payments should be tied to post-college income--easing cash-flow burdens on students and dramatically reducing current levels of student loan defaults."); 138 Cong. Rec. 18278 (1992) (statement of Rep. Gejdenson) https://www.govinfo.gov/content/pkg/GPO-CRECB-1992pt13/pdf/GPO-CRECB-1992-pt13-3.pdf, ("Since 35 percent of the schools involved in the pilot program will offer students an income-contingent repayment schedule, borrowers will find that their loan payments are more reasonable. This progressive system guarantees that borrowers at all income levels will not pay more per month than they can afford. It also means that college graduates taking lower paying jobs in teaching or social services can make smaller loan payments at lower interest rates for a longer time than someone who takes a high-paying job."); 138 Cong. Rec. 16972 (1992) (statement of Sen. Bradley), https://webarchive.loc.gov/congressionalrecord/20160304194432/http://thomas.loc.gov/cgi-bin/query/C?r102:./temp/~r102bxLlyR ("Universal access and income contingent repayment harness the value of a college education to get past the hurdle of paying for it"); 153 Cong. Rec. H10269 (daily ed. Sept. 7, 2007) (statement of Rep. Van Hollen), https://www.congress.gov/crec/2007/09/07/CREC-2007-09-07-pt1-PgH10259-3.pdf ("We're going to institute income-based loan repayment, so graduates don't have to choose between paying their rent and paying off their loans."). For a history of IDR plans, *see generally, Driving Down Distress,* the Student Borrower Prot. Ctr. https://protectborrowers.org/wp-content/uploads/2021/09/Driving-Down-Distress.pdf.

[13] For details on how shoddy and deceptive student loan servicing has consistently blocked borrowers from accessing and remaining IDR plans, *see 39 State Attorneys General Announce $1.85 Billion Settlement with Student Loan Servicer Navient,* Navient AG Settlement, https://navientagsettlement.com/Home/portalid/0?portalid=0?portalid=0?portalid=0 (last updated June 22, 2022) (settlement with Navient and dozens of Attorneys General resolving allegations that, in part, Navient steered borrowers towards forbearances and deferments rather than income-based plans);Consumer Fin. Prot. Bureau, S*tudent Loan Servicing: Analysis of Public Input and Recommendations for Reform* (Sep. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf (shoddy student loan servicing may have prevented as many as three-in-five borrowers who managed to enroll in IDR from staying on track year-over-year); *see generally Driving into a Dead End,* the Student Borrower Prot. Ctr. (2021), https://protectborrowers.org/wp-content/uploads/2021/10/SBPC_Driving_Into_A_Dead_End.pdf.

without ever accessing IDR.[14] In short, the same "struggling borrowers"[15] that IDR plans are meant to help but fail to assist are ultimately those who default and from whom the Department collects enormous sums of money.

Consider the experiences of Ms. Smith, an elderly, disabled, Black woman living on fixed Social Security retirement benefits of $1,800 per month. She suffers from severe back pain, fibromyalgia, and chronic depression. In 2019, Ms. Smith owed around $240,000 on a Federal Family Education Loan ("FFEL") Consolidated loan. Her loans were on a repayment plan with a $2,100 monthly payment, which she had never been able to afford. Between July 2010 and March 2015, she called her loan servicer five times and told it that she could not afford her monthly payments. Each time her loan servicer put her on forbearance. She finally defaulted in July 2015, and experienced tax refund offsets of money she needed to survive. She rehabilitated her loan out of default in February 2019. At this time, she sought legal aid's help. They immediately submitted an IDR request which was granted, with a $0 monthly payment.

The student loan system also failed Ned, a retired, partially disabled, Black veteran. Circa 1990, Ned's employer told him he had to attend a 6-week course at a truck driving school if he wanted to keep his job as a truck driver. He ended up having to take out around $3,000 in federal student loans, and did not learn anything from the course. Ned is now 68 and his loans have ballooned to almost $7,000. He does not have internet access or email. He was unable to keep up with the payments and defaulted in 2008. Ned has had over $7,600 garnished from his tax refund since then—it has all gone towards fees and interest with none applied to the principal balance. A retiree living primarily on Supplemental Security Income, Ned has qualified for a $0 IDR plan for years, which his servicer never told him about. He did not enter such a plan until late 2019 when a legal services organization contacted his servicer to get him out of default and onto an IDR plan, after over a decade of being in default. These experiences are commonplace.

We propose several solutions to correct for this policy failure, and in particular urge the Department to (1) amend its regulations to dispense with the acceleration of defaulted debts and (2) reform the amount that is collected

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[14] 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-showborrowers-of-color-and-low-income-borrowers-are-missing-out-on-key-protections-raising-significant-fair-lending-concerns/.

[15] 80 Fed. Reg. 39616, 39617 (July 9, 2015) (noting that the REPAYE plan is targeted to struggling borrowers).

through debt collection to reflect an income-driven structure in which borrowers only pay what they can afford.[16] While these reforms would not solve the broken default system, they would mitigate its impact on American families, and ensure that borrowers are never forced to pay more in default than they would under an IDR plan.

Legal Background

The Department's debt collection machinery is governed by several different statutes and regulations, including the Federal Claims Collection Standards ("FCCS"),[17] as amended by the Debt Collection Improvement Act ("DCIA"),[18] U.S. Department of Treasury ("Treasury") regulations,[19] and Education Department regulations.[20] However, the Department has a remarkable amount of flexibility in its debt collection mechanisms as these statutes and non-Department regulations primarily set the ceiling on debt collection but provide the Department with flexibility to set a more generous floor.

The mechanism through which Treasury collects tax refunds, federal benefits, and federal salary on behalf of agencies is referred to as the Treasury Offset Program ("TOP"). Typically, agencies will send Treasury identifying information on individuals who owe debts to the agency, and Treasury will cross-reference this information to seize their tax refund, federal benefits, or federal salary for federal employees and remit these payments back to

[16] These changes were also suggested by negotiators for legal assistance organizations and individuals with disabilities at the 2021 negotiated rulemaking session on affordability and student loans. S*ee* Bethany Lilly, Joshua Rovenger, Persis Yu, and John Whitelaw, *Memorandum to the U.S. Dep't of Education re Additional Topics to add to Rulemaking* (Oct. 4, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/findefpropmemo.pdf. The latest proposed rules from the Department have not incorporated these suggestions.

[17] 31 U.S.C. §§ 3711–3719.

[18] 31 U.S.C. §§ 3701 to 3720E.

[19] 31 C.F.R.§§ 900–904; 31 C.F.R. §§ 285 *et seq.*

[20] 34 C.F.R. § 30 *et seq.*; 34 C.F.R. § 34 *et seq.;* 34 C.F.R. § 685 *et seq.* (FFEL loans)*;* 34 C.F.R. § 685 *et seq.* (Direct Loans).

the agency.[21] One study has estimated that in 2019 alone, the Department collected $4.9 billion from defaulted borrowers through TOP.[22]

Upon default, the Department claims the entire balance of a borrower's loan as due,[23] though this is not required by the DCIA, the Higher Education Act ("HEA"), or borrowers' Master Promissory Notes ("MPN"). This practice is particularly harmful for borrowers with respect to tax refund offsets. Treasury regulations reference acceleration, but do not necessarily require it: stating only that "agencies that agree to accept payments in regular installments *should* obtain a legally enforceable written agreement from the debtor that . . . contains a provision accelerating the debt in the event of default."[24] The Federal Register's Document Drafting Handbook defines "should" as "infer[ring] obligation, but not absolute necessity" and instructs agencies to use the word "must" to impose legal obligation, rather than "shall," "will," or "should."[25] Meaning that while Treasury recommends including a provision to accelerate the debt in the event of default within the loan agreement, i.e., the MPN, it does not require it. Moreover, the language of this regulation does not require the Department to necessarily enforce the acceleration provision.

Similarly, the HEA includes discretionary language regarding acceleration, stating that the MPN "shall include provision for acceleration of repayment of the whole, or any part, of such loan, *at the option of the borrower*."[26] Furthermore, the current iteration of the MPN provides that the Department "may" accelerate borrowers' loans under certain conditions, rather than the predictive "will" or required "must." By containing the most obviously discretionary rather than automatic language ("may"), this clause seems to reflect that the Department already both understands itself as having discretion over acceleration and has chosen to preserve this discretion against

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[21] *What is the Treasury Offset Program?*, Bureau of the Fiscal Service, https://fiscal.treasury.gov/top/how-top-works.html (last accessed July 27, 2022).

[22] Stacy Cowley, *7 Million Bad Student Loans With No Way Out, for Anyone*, New York Times (May 25, 2022), https://www.nytimes.com/2022/05/25/business/student-loans-default-forgiveness.html.

[23] The Department's regulations mandate that "if a borrower defaults on a Direct Loan, the entire unpaid balance and accrued interest are immediately due and payable." 34 C.F.R. § 685.211.

[24] 31 C.F.R. § 901.8 (emphasis added).

[25] Federal Register, *Drafting Legal Documents, Principles of Clear Writing*, https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html (last updated March 17, 2021).

[26] 20 U.S.C. § 1087dd(c)(1)(B) (emphasis added).

individual borrowers. In short, the DCIA and HEA do not call for acceleration of the full debt balance upon default, and the Department should not impose such an onerous and harmful practice on student loan borrowers.

Tax Refund Offsets

A primary mechanism the Department uses to collect money from defaulted borrowers is by using the TOP program to offset up to 100 percent of borrowers' annual tax refunds. Even the Earned-Income Tax Credit and the recent Child Tax Credit, critical antipoverty measures,[27] can be seized. In 2019, the last year collections were ongoing, the Department collected approximately $4 billion from defaulted borrowers' tax refunds.[28]

The DCIA authorizes the offset of tax refunds, allowing the Treasury to reduce tax refunds by the amount of a borrower's past-due debt as reported by a federal agency.[29] Treasury regulations further specify that the amount offset is the amount of debt due, as reported by the creditor federal agency.[30] One of the reasons that the amount that can be seized through the tax offset program is often thousands of dollars more than what a borrower would pay under an IDR plan is because of loan acceleration as earlier described.

For many defaulted borrowers, the government's seizure of their entire tax refund may not come close to paying off the entirety of their loan balance plus accrued interest and fees. Borrowers find themselves trapped in a cycle of having their tax refunds seized every year they are in default, and losing income that is critical to putting food on the table, caring for children, and paying for rent and medical expenses.

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[27] Policy Basics: The Earned Income Tax Credit, Center on Budget and Policy Priorities (Dec. 10, 2019), http://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit; Treasury Offset Program, Treasury.gov (last updated July 15, 2022), https://fiscaldata.treasury.gov/datasets/treasury-offset-program/federal-collections.

[28] Treasury Offset Program, Treasury.gov (last updated July 15, 2022), https://fiscaldata.treasury.gov/datasets/treasury-offset-program/federal-collections.

[29] 31 U.S.C. § 3720A(c) ("upon receiving notice from any Federal agency that a named person owes to such agency a past-due legally enforceable debt, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such person. If the Secretary of the Treasury finds that any such amount is payable, he shall reduce such refunds by an amount equal to the amount of such debt, pay the amount of such reduction to such agency, and notify such agency of the individual's home address.").

[30] 31 C.F.R. § 285.5(f)(2) "Offset amount (i) Except as otherwise provided in 31 CFR 285.4(e) and 285.7(g) (addressing centralized offset of certain Federal benefit payments and salary payments, respectively), the disbursing official shall offset the lesser of: (A) The amount of the payment as shown on the payment record; or (B) The amount of the debt, including any interest, penalties and administrative costs . . . ".

Wage Garnishment

Another collection strategy used by the Department is to instruct employers to garnish defaulted borrowers' wages. While the DCIA sets the ceiling on the amount an agency can collect from an individual through wage garnishment, the Department has the discretion to collect less than this amount. Specifically, the DCIA only mandates that the garnishment amount "may not *exceed* 15 percent of disposable pay,"[31] where disposable pay is the "part of the compensation of any individual from an employer remaining after the deduction of any amounts required by any other law to be withheld," such as Social Security taxes and withholding taxes.[32] Treasury regulations further specify that the garnishment amount should be the lesser of "*up to* 15 percent of the debtor's disposable pay" or "the amount by which a debtor's disposable pay exceeds an amount equivalent to thirty times the minimum wage."[33]

Department regulations go on to state that an employer must garnish "the smallest of—(1) The amount specified in the guaranty agency order; (2) . . . 15 percent of the borrower's disposable pay; or (3) . . . the amount by which the borrower's disposable pay exceeds 30 times the minimum wage."[34] Note that the Department collects 15 percent of a defaulted borrower's disposable income, going to the furthest amount permitted by the DCIA and Treasury regulations.

Federal Benefit Offsets

The Department also collects defaulted loans through the offset of federal benefits, including Social Security retirement and disability benefits.[35] In 2019, the Department collected approximately $228 million from borrowers' Social Security benefits.[36] The DCIA generally sets the parameters of what benefits can be offset and some of the

[31] 31 U.S.C.§ 3720D (emphasis added).

[32] 31 U.S.C.§ 3720D(g).

[33] 31 C.F.R. § 285.11 (emphasis added).

[34] 34 C.F.R. § 682.410(b)(9)(i)(K).

[35] Some benefits are exempt by the DCIA and other federal statutes, including Social Security Income (SSI). 31 U.S.C. § 3716(c)(3)(A).

[36] *Treasury Offset Program*, Treasury.gov (last updated July 15, 2022), https://fiscaldata.treasury.gov/datasets/treasury-offset-program/federal-collections.

mechanisms of offset, but does not fix the amount to be collected.[37] Treasury regulations set the offset amount as "the lesser of: (i) The amount of the debt, including any interest, penalties and administrative costs; (ii) An amount equal to 15 percent of the monthly covered benefit payment; or (iii) The amount, if any, by which the monthly covered benefit payment exceeds $750."[38] The Department's regulations do not specifically outline the amount to be garnished. Similar to wage garnishment and tax offsets, federal benefit offsets take subsistence wages from borrowers who cannot afford to pay their student loans, including from borrowers with disabilities. For instance, in 2016, the Government Accountability Office found that the offset of Social Security benefits due to defaulted student loans had pushed more than 70,000 seniors into or further into poverty from 2001 to 2015.[39]

Proposed Changes

Redefining the amount of debt due upon default

The Department should entirely strike the regulation requiring acceleration of the full amount of debt due upon default[40] and instead only require the past-due balance on an IDR plan to be due. As stated by negotiators during the most recent Department negotiated rulemaking session, "acceleration has the effect of making borrowers responsible for payment of the entire loan balance at a time when they can least afford it."[41] Such a change would recognize that requiring borrowers to pay more in default than on income-driven repayment is a perverse system in which low-income borrowers are in effect punished for poor policy design and servicer misconduct that has kept them from accessing or remaining in IDR, such as forbearance steering by servicers and onerous annual rectification requirements. The Department claims to want to help struggling borrowers through IDR, and yet, when these same borrowers default, the Department chooses to collect billions of dollars from them.[42]

[37] 31 U.S.C. § 3716.

[38] 31 C.F.R. § 285.4(b).

[39] *Social Security Offsets*, U.S. Gov't Accountability Office (Dec. 2016), https://www.gao.gov/assets/gao-17-45.pdf.

[40] 34 C.F.R. § 685.211(d)(3)(ii).

[41] *Supra* note 15 at 3.

[42] *Supra* note 3.

Requiring defaulted borrowers to pay the full amount due, particularly in the case of tax refund offsets, substantially increases both the amount borrowers must pay over the life of their loan and the time it will take them to pay it off. Student loan borrowers have enormous loan balances—the typical borrower owes approximately $37,000 in federal student loans,[43] though defaulted borrowers typically have lower balances.[44] Furthermore, payments on defaulted loans are applied first to collection costs, then late charges, interest, and finally principal.[45] Meaning, even when making payments, many borrowers rarely see their balances decline, and in fact often see them rise. As a result, acceleration of the full amount due upon default is devastating for American families—once collection fees and other amounts are added, many borrowers are not even able to touch the principal through tax refund offsets, benefits offset, or wage garnishment. In the case of tax refund offsets, demanding the entire amount due means borrowers will have the entirety of their refund seized each year they are in default, adding up to thousands of dollars for some borrowers, even though for many borrowers, they would have been paying $0 on IDR.

Acceleration of the full amount of debt due is not required by the DCIA or implementing regulations. In the case of collection through TOP (both tax refund and social security offsets)—the federal agency refers to the Department of Treasury only the amount of the debt due, meaning the referring agency (i.e., the Department) has flexibility to determine what amount is due.[46]

To remedy this harm to borrowers, the Department has the opportunity and the authority to enact regulations that establish that the "amount due" upon default is (1) what is past-due, that is, what the borrower has not paid in the 270 days that led to default, and (2) what the borrower would have paid on an income-driven repayment plan. The HEA firmly authorizes the Secretary to "require any borrower who has defaulted on a loan . . . to . . . repay the loan pursuant to an income contingent repayment plan."[47] Meanwhile, the DCIA and Treasury regulations regarding tax offset only reference the "amount due," but do not define what the amount due is.

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[43] *Federal Student Loan Portfolio*, Fed. Student Aid, https://studentaid.gov/data-center/student/portfolio (last visited May 5, 2022).

[44] *See supra* note 1.

[45] 34 C.F.R. § 682.404(f) (FFEL).

[46] *See* 31 U.S.C. §3720A.

[47] 20 U.S.C. § 1087(d)(5).

Furthermore, the DCIA and Treasury regulations only set the upper limit (up to 15 percent) of the amount that can be garnished but provide the agency with the flexibility to set a lower floor. The Department must acknowledge that acceleration is a devastating and punitive policy choice that drives borrowers living on the edge of or in poverty further towards the financial brink. A more humane debt collection system designed with an IDR structure in mind is well within reach through regulation or sub-regulatory policy guidance.

Redefining "disposable pay" to reflect an IDR repayment structure for borrowers in default

The Department could also amend the definition of disposable pay in its debt collection regulations to ensure that the amount collected through wage garnishments and federal benefits offsets would not exceed what a borrower would pay under IDR. Currently, Department regulations require payment of 15 percent of disposable pay or of the monthly benefit payment through wage garnishment or benefits offset, respectively. This is not required by the DCIA, HEA, or Treasury regulations, which, if they set any amount, only set an amount *not exceeding* 15 percent of disposable income. Instead, the Department should amend its regulations to define disposable pay in the same way as it defines discretionary income in the IDR context, and to only require 10 percent of this amount, as in the most recent version of the IDR plan.[48] The Department has recognized through its IDR regulations that 10 percent of discretionary income is a reasonable and affordable amount to demand from borrowers and, notably, the Department has proposed a new IDR plan that would protect even more of a borrower's income.[49]

Conclusion

A system that extracts more from borrowers who cannot afford to pay their loans and have thus defaulted is punitive, perverse, and unnecessary. The Department has remarkable flexibility in how it decides to carry out its debt collection mechanism. Rather than seeking to punish borrowers who cannot afford to repay their loans, the

[48] 34 C.F.R. § 685.209(c).

[49] Proposed Regulatory Text for Issue Paper #10: Income-driven Repayment Plans Session Three, Dep't of Education (Dec. 6, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/10idrsess3.pdf.

Department should allow for borrowers to repay their defaulted loans through an IDR payment structure. The Department has the authority and moral imperative to do so.

AUTOMATIC & SYSTEMATIC: OVERHAULING GOVERNMENT STUDENT LOAN REPAYMENT AND COLLECTION

Deanne Loonin
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Introduction[1]

I wrote five years ago that "There is no amount of incremental reform that can fix the broken government student loan system. The time for tweaking is long past."[2] At that time, the Bipartisan Policy Center listed the following failings of student debt: "Too many students rely excessively on loans to finance their degrees, too few borrowers can afford to repay their loans once they leave school, and hundreds of billions of dollars are sitting on federal balance sheets."[3] The situation is even worse now.

We reached this point because we collectively allowed higher education to become a huge for-profit business. Proponents of financializing higher education created a faux "free market" fueled by government funds. They then hired private contractors to run the system with little or no accountability. The result, as Student Borrower Protection Center executive director Mike Pierce recently stated in Congressional testimony, is that the U.S. Department of Education ("the Department" or "ED") has come to act more like Wells Fargo than a branch of the government.[4] Ultimately, as Tressie McMillan Cottom has observed, this type of market-based response to collective social conditions does not make us more secure. Rather, "[i]t only makes our collective insecurity profitable."[5]

[1] Attorney and advocate for student loan borrowers, including as an attorney at the Project on Predatory Student Lending, and as the former Director of the National Consumer Law Center's Student Loan Borrower Assistance Project. The author is solely responsible for the content of this Article. Special thanks to the Student Borrower Protection Center for soliciting and compiling these articles.

[2] Deanne Loonin, Overhauling Federal Student Loan Repayment: Part One, MEDIUM (June 12, 2017), https://medium.com/@db.loonin/overhauling-federal-student-loan-repayment-part-one-a2856a1bae89.

[3] Bipartisan Policy Center, *America's Student Debt Explosion: Understanding the Federal Government's Role*, (2017) at 3, https://cdn.bipartisanpolicy.org/wp-content/uploads/2017/03/BPC-Higher-Education-Americas-Student-Debt-Explosion.pdf.

[4] Mike Pierce, Executive Director, Student Borrower Protection Center, Testimony Before the U.S. Senate Committee on Banking, Housing and Urban Affairs (May 5, 2022), https://protectborrowers.org/testimony-of-mike-pierce-before-the-senate-banking-housing-and-urban-affairs-committee/.

[5] University of North Carolina at Chapel Hill professor Tressie McMillan Cottom, Lower Ed: The Troubling Rise of For-Profit Colleges in the New Economy 181 (2017).

Similar to the Federal Housing Administration loan program featured in Keeanga-Yamahtta Taylor's book *Race for Profit*, it was not government involvement per se that caused the student loan program failure. Rather, it was government negligence and failed public policy. As Taylor writes, "When public policies are guided by the objectives of private enterprise…they are clinched in a dance of conflict."[6] She concludes that under these circumstances, the objective of profit making will always be paramount.[7]

To move beyond the current broken system, we first need to discharge existing student loan debt. Going forward, the government should still be involved in promoting equal access to higher education and delivering student aid, but only under a new structure that eliminates education debt and prioritizes student interests.

To reach these broad goals, we must give up thinking that clever new schemes can fix a structurally failed system. It is far too late for that. The policymakers and advocates promoting these ideas contributed to the current crisis by advocating solutions without properly considering implementation and oversight. Moving beyond regulatory tweaks, interagency coordination, and rebuilding a government that works will not be easy. It is, as Ezra Klein describes, "…difficult, coalition-splitting work."[8] But we must do it.

Despite the need to eliminate the reliance on debt to finance higher education over time, it seems that the government will remain in the student loan business at least for the foreseeable future. Given this reality, there is an urgent need for a new, simplified repayment system. This section is followed by recommendations the Department can implement immediately without Congressional action.

[6] Keeanga-Yamahtta Taylor, Race for Profit 253-254 (2019). For a general discussion of the inherent conflicts of interest built into the federal student loan system, *see* Deanne Loonin & Julie Margetta Morgan, *Aiming Higher: Looking Beyond Completion to Restore the Promise of Higher Education*, 48 J. L. & Educ. 423 (2019).

[7] *Id.*

[8] Ezra Klein, What America Needs is a Liberalism That Builds, N.Y. TIMES (May 29, 2022).

A Simplified Government Student Loan Repayment System[9]

This proposed system ties student loan repayment to tax filing.[10] It will eliminate private student loan servicers and debt collectors and eliminate student loan defaults. This system is not the same as automatic payroll withholding; there will be no automatic debits from payroll or other sources. I present the general concept below knowing that there will be many details to determine later.

This is not a new idea within the student loan context. For example, the initial vision for the Direct Loan program in the 1990's included Internal Revenue Service (I.R.S.) collection. The private profiteers fought back aggressively, as did many bureaucrats, protective of their institutional fiefdoms. Corruption, revolving doors, and intensive lobbying helped kill this idea at the time.[11] We now know the catastrophe that followed. These powerful interests remain strong, but we cannot afford to allow them to continue to win.

There are also similarities to student loan systems in other countries, such as Australia, but this proposal includes some unique features such as borrower rights to raise certain school-related defenses, that other countries (and other proposals for the U.S.) generally do not have.[12] This is particularly necessary because of the massive predatory sector in U.S. higher education.[13]

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[9] It is also important to rein in the often-predatory private student loan market, but this topic is beyond the scope of this article.

[10] For an earlier version of this proposal, *see* Deanne Loonin, *Overhauling Federal Student Loan Repayment: Part Two*, MEDIUM (June 15, 2017), https://medium.com/@db.loonin/overhauling-federal-student-loan-repayment-part-two-ee0359d11718.

[11] For a comprehensive history of the original Clinton area proposal and the end result that became the current Direct Loan program, see Steven Waldman, The Bill (1996).

[12] There are many articles and reports comparing systems in different countries and proposing new systems for the United States. For a summary, *see* Matthew Chingos and Susan Dynarski, *An International Final Four: Which Country Handles Student Debt Best*, N.Y. TIMES (Apr. 2, 2018).

[13] The PPSL web site includes a summary of the for-profit higher education predatory industry at https://predatorystudentlending.org/about-the-project/#predatory-industry.

Step One: I.R.S. Sends Annual Student Loan Statements

The I.R.S. will send an annual statement to individual federal student loan borrowers. The statements will show the amount due, if any, for that year and the total balance. The amount due will be based on individual income information that the I.R.S. already has or can easily obtain. The annual amount owed will be calculated using a fair income-driven formula that will apply to all borrowers. There will also be non-taxable forgiveness of remaining balances after a certain number of years (to be determined) of repayment.

This is essentially universal income-driven repayment. Universality is necessary to keep the program as simple as possible. To make a universal program work, policymakers and advocates have to give up trying to develop programs that will serve only those they deem deserving of relief. Means-tested programs' requirements take simple universal programs and make them complicated and inaccessible.[14]

Step Two: Individuals Respond to I.R.S. Notices

While all borrowers will receive the annual notices, only those required to file and pay federal taxes will be required to respond, ideally in a short section on the annual tax return form. The form should be very easy to use.

Borrowers not required to file will not incur student loan debt for that year. Since most individuals in this "non-filing" category are older or low-income, or both, most will not owe anything on their student loans.

Borrowers will check one of the following boxes when responding to the I.R.S. notice:

1. "**I agree with the amount listed on the statement and will do one of the following**:

    i. Pay the amount listed in the statement in a lump sum or monthly installments; or

    ii. My payment is $0 for the year."

The borrower will send payments to a designated government unit and could set up automatic debit, or possibly payroll withholding if that is desirable. Borrowers will always have the right to pay more or prepay without

[14] *See* David Sirota and Andrew Perez, *On Student Debt Forgiveness, Joe Biden is Pushing Stringent Means-Testing Yet Again*, Jacobin (May 2, 2022), https://jacobin.com/2022/05/student-loan-forgiveness-biden-means-testing-inequality.

penalty.

Or

2. "**The amount listed in the statement is incorrect**."

This would trigger a designated unit, presumably at I.R.S., to set up a phone hearing in order for the borrower an opportunity to provide an explanation. There would be no payment owed while pending a decision.

Or

3. "**I have a defense to repayment based on school wrongdoing or a right to immediate discharge**."

There should be a streamlined list of defenses and discharges, including for school-related claims and discharges for disability and death, including for parent PLUS loan borrowers in cases of disability or death of their children.

Retaining these protections will ensure that the neediest borrowers have access to timely relief. Everyone else, regardless of profession, will be in the same situation, repaying as described above through the tax filing system. This is more borrower-friendly than it may seem at first glance because even though the current system includes an array of discharges, few borrowers receive the promised relief. The government and its contractors too often create barriers to relief by failing to inform borrowers about these programs and about how to access them. [15]

Those checking the third box, if applicable, would automatically get information explaining how to raise defenses or discharge rights, followed by a phone or in-person hearing with a neutral hearing officer. Borrowers will not owe payments pending a decision.

Similar to the current system that allows borrowers nine to twelve months to resolve delinquencies, borrowers will have a year to pay their annual student loan repayment obligations. Borrowers will face collection if they

[15] The Department may even build in low utilization rates in estimating program costs. For example, in a 2015 article, Department officials estimated the cost of loan discharges at the predatory school chain Corinthian based on a low six percent discharge program usage rate. Michael Stratford, *Corinthian Closes for Good*, Inside Higher Ed (Apr. 27, 2015), https://www.insidehighered.com/news/2015/04/27/corinthian-ends-operations-remaining-campuses-affecting-16000-students; *See also* Deanne Loonin & Julie Morgan, *Federal Student Aid: Can We Solve a Problem We Do Not Understand*?, 2018 Utah L. Rev. 897, 904-5 (2018).

have not paid the annual amount due (if any) at the end of that period. If necessary, the government will have specified tools to collect from borrowers, but only the amount due that year. Unlike current policy, the government will not call the entire balance due (through loan acceleration) if a borrower fails to pay the annual amount.

This program requires a functioning and well-funded I.R.S., admittedly a difficult goal. But why is this any less possible than expecting the Department, with its decades long bureaucratic history of failure and neglect, to fix and properly administer the current system? Further, repaying through the tax system has the advantage that people know about paying taxes and are used to annual tax filings. Despite common wisdom, we have traditionally been a country of reliable individual taxpayers, and most people in the United States view paying taxes as an important civic duty.[16]

Recommendations to Implement Now

The system described above requires legislation, but we do not need to wait until Congress acts to start improving the student loan system. Below are a number of recommendations that the Department can implement immediately, without legislation. The list is non-exhaustive, highlighting suggested priorities. It focuses on servicing and collection, but the Department must also use regulatory powers and existing authority to put some teeth into its gatekeeping role and keep predatory school operators and other profiteers out of the system.

The Department proposed some of these recommendations during the 2021-2022 negotiated rulemaking sessions, but at the time of this article, there are no final regulations.

[16] Vanessa Williamson, *Americans are Proud to Pay Taxes-Except When They Think Others are Cheating*, The Wash. Post (April 18, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/18/americans-are-proud-to-pay-taxes-except-when-they-think-others-are-cheating/; Mark Trumbull and Bailey Bischoff, *The Tax That Binds? For Many, Tax Day Symbolizes Civic Duty*, The Christian Science Monitor (Apr. 17, 2018), https://www.csmonitor.com/Business/2018/0417/The-tax-that-binds-For-many-Tax-Day-symbolizes-civic-duty.

Simplify Income-Driven Repayment ("IDR")

There are many proposals to simplify IDR, some more likely to be effective than others. The most important priority is to automate IDR as much as possible. A primary way to reach this goal is to ensure that the I.R.S. matching system is working, eliminating the need for borrowers to self-report income. In 2020, Congress passed the FUTURE Act which directs the IRS to share information with the Department for the purposes of IDR income verification.[17] However, the law requires borrowers to agree to having their data shared. As the Department implements the FUTURE Act, it must also reach out to those who borrowed before the government solicited data sharing consent to include them in the data sharing program.

Streamline Access to Discharges and other Relief

Automatic Discharges

The Department has created an automatic application and approval system for some discharges, including matching programs with Social Security and V.A. for disability discharges.[18] The Department must continue to expand these disability discharge programs and create other automatic discharges systems as well. Further, as the Department has committed to do, borrowers subject to revocation periods should no longer have to provide income information to retain disability discharges. The Department is also seeking to restore the automatic closed school discharge and should implement this program early.

The Department does not have to wait for final regulations from the recent rulemakings to expand group borrower defense and other school fraud related discharges. For example, the Department can and should extend automatic relief to borrowers from schools with extensive findings of wrongdoing, as they did for former

[17] Fostering Undergraduate Talent by Unlocking Resources for Education (FUTURE) Act 2019.

[18] U.S. Department of Education, "Over 323,000 Federal Student Loan Borrowers to Receive $5.8 Billion in Automatic Total and Permanent Disability Discharges", (Aug. 19, 2021), https://www.ed.gov/news/press-releases/over-323000-federal-student-loan-borrowers-receive-58-billion-automatic-total-and-permanent-disability-discharges; Deanne Loonin, Abby Shafroth, & Persis Yu, Student Loan Law § 10.8.5.3, 10.8.5.4 (Nat'l Consumer Law Ctr 6th ed. 2019).

Corinthian College students, and grant full relief for borrowers included in group discharges submitted by state Attorneys General.[19]

The Department also has authority to grant group discharges for borrowers eligible for other statutory discharges such as false certification. These are discharges for cohorts of borrowers at particular schools that the Department grants without requiring applications from borrowers.[20] In the past, the Department had a specific office designated to handle group discharges. It is not clear if such an office still exists.[21] If not, the Department should act quickly to create a single point of contact for submission and review of group discharge applications. There are other important changes, particularly to the false certification system, that the Department can and should implement without requiring new legislation or regulations.[22]

Limit Bankruptcy Prosecution

Congress must change the punitive student loan bankruptcy provisions that require most student loan borrowers to prove undue hardship to discharge their loans. In the meantime, a number of academics and advocates have proposed helpful road maps for the Department to follow to limit prosecution of these cases.[23]

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[19] Press Release, U.S. Department of Education, Over 323,000 Federal Student Loan Borrowers to Receive $5.8 Billion in Automatic Total and Permanent Disability Discharges (Aug. 19, 2021), https://www.ed.gov/news/press-releases/over-323000-federal-student-loan-borrowers-receive-58-billion-automatic-total-and-permanent-disability-discharges; Deanne Loonin, Abby Shafroth, & Persis Yu, Student Loan Law § 10.8.5.3, 10.8.5.4 (6th ed. 2019) [hereinafter Loonin, Student Loan Law].

[20] For example, in the false certification context, the Department has authority to grant discharges without borrower applications if the Secretary determines, based on information in the Secretary's possession, that the borrower qualifies for a discharge. 34 C.F.R. § 685.215(c)(8).

[21] The Department has not yet responded to a January 2022 Project on Predatory Student Lending ("PPSL") FOIA request seeking information about group false certification discharges. See FOIA Request # 22-01634-F (on file with author).

[22] *See, e.g.*, Memorandum from Robyn Smith, Of Counsel, National Consumer Law Center to President-Elect Joe Biden Transition Team, Recommended Revisions to False Certification (Ability-to-Benefit) Discharge Policies and Regulations (Dec. 9, 2020), https://www.nclc.org/images/pdf/student_loans/Letter_Biden_Revisions_False_Cert.pdf.

[23] *See* Comments of the National Consumer Law Center to the Department of Education, Regarding the Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings (May 18, 2018), https://www.nclc.org/images/pdf/bankruptcy/comments-undue-hardship-bankruptcy.pdf; Matthew Bruckner, Brook Gotberg, Dalie Jimenez, and Chyrstin Ondersma, A No-Contest Discharge for Uncollectible Student Loans, 91 U. COLO. L. REV. 183 (Winter, 2020).

Prevent Default and Eliminate Draconian Collection

Our current federal student loan system is extraordinarily punitive, more so than other federal and private debt collection programs.[24] The recommendations below help prevent borrowers from defaulting and facing these extreme collection powers and alleviates the pain for those who fall into default despite preventative measures.

Make IDR Accessible to Borrowers in Default and Create Presumptive IDR for Borrowers in Delinquency

As the Department has proposed, but has yet to implement, borrowers in default should have full access to IDR, including counting time towards cancellation. Further, to avoid default, the Department should presumptively place borrowers in delinquency into IDR plans.

Eliminate Acceleration Clauses and Limit Involuntary Collection to IDR Amounts

Negotiators at the most recent negotiated rulemaking session provided a detailed memo explaining that the Department has discretion to eliminate acceleration clauses in student loan promissory notes.[25] The Department should use this discretion to end its policy of accelerating entire loan balances when borrowers default. As the negotiators explained, this policy has the effect of making borrowers responsible for payment of their entire loan balances at a time when they can least afford it.[26] The negotiators argued that the Department should then use its authority to require defaulted borrowers to repay under an IDR plan, thus limiting any amounts certified for involuntary collection to be capped at the amount not paid under an IDR plan.[27]

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[24] *See* generally Deanne Loonin, Illusory Due Process: The Broken Student Loan Hearing System, 11 U.C. IRVINE L.R.173, 175 (Nov. 2020) [hereinafter Loonin, Illusory Due Process].

[25] A number of negotiators during the 2021-2022 negotiated rulemaking recommended these changes. Memo from Persis Yu, Joshua Rovenger, Bethany Lilly and John Whitelaw, Negotiators, to U.S. Department of Education, Negotiated Rulemaking Committee, Re: Additional Topics to add to Rulemaking: Protections for Defaulted Borrowers (Oct. 4, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/findefpropmemo.pdf.

[26] *Id.* It is important in developing this guidance to ensure that borrowers in default can still consolidate their loans if they choose.

[27] *Id.* at fn. 9 (citing 20 U.S.C. §1087e(d)(5)) ("Repayment after default. The Secretary may require any borrower who has defaulted on a loan made under this part to….(B) repay the loan pursuant to an income contingent repayment plan.").

Enforce the Debt Certification Requirements

Before submitting debts to the Department of Treasury ("Treasury") for tax or benefits offset, the Department of Education must certify that the debts are legally enforceable.[28] "Legally enforceable" means there has been a final agency determination that the debt, in the amount stated, is due, and there are no legal bars to collection by offset.[29] It is unclear if the Department complies with this certification requirement beyond possibly a rote certification that all debts are enforceable. This practice is unacceptable. The Department must create a rigorous process to ensure that they certify only enforceable debts to Treasury and transparently explain that process. This can be done efficiently by not certifying all debts from schools where the Department has gathered significant findings of wrongdoing and/or broad discharges and declaring these debts presumptively unenforceable.

Automatically Return Earned Income Tax Credit (EITC) and Social Security benefits (SSA) Offsets

The Department has discretion to return seized tax refunds, but has chosen to restrict such returns to cases of "extreme hardship." The Department generally defines this standard to include only cases where an individual is facing eviction or foreclosure.[30] The Department should instead use its discretion to return all seized EITC returns. The EITC is one of the major anti-poverty programs in the U.S. and by definition it is a hardship to seize these funds.[31]

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[28] 31 U.S.C § 3720A(b); 31 C.F.R §285.2(d)(1)(i); 31 C.F.R. § 285.5(b), (d)(5), (d)(6) (requiring written certification).

[29] 31 C.F.R. § 285.5(b).

[30] *Loan Servicing and Collection - Frequently Asked Questions*, FED. STUDENT AID TOP-Q1, https://fsapartners.ed.gov/knowledge-center/faqs/loan-servicing-and-collection-frequently-asked-questions (last visited July 3, 2022).

[31] *See*, e.g., Persis Yu, National Consumer Law Center, "Voices of Despair: How Seizing the EITC is Leaving Student Loan Borrowers Homeless and Hopeless During a Pandemic" (July 2020), https://www.nclc.org/images/pdf/student_loans/voices-of-despair-seizing-eitc-in-pandemic.pdf.

The Department has also chosen to restrictively apply its discretion to return Social Security offsets.[32] The Department should instead return all Social Security offsets or at a minimum return funds to those with specified low incomes. Congress set the current exemption floor of $750/month ($12,000 annually) in 1996 and has not raised it since. Allowing borrowers to retain such a low amount of income, below the 2022 poverty line even for a family of one, is cruel and unacceptable.

Provide Automatic Hardship Suspensions for Collection

The garnishment regulations specifically include a right to raise hardship to reduce or suspend collection.[33] In contrast, a review based on financial hardship is not explicitly granted in the offset regulations. However, the Department and guaranty agencies have discretion to consider hardship claims for borrowers facing offset.[34] The Department should automatically grant hardship suspensions for all who request them. The request process should be as streamlined as possible, including an online option. The suspensions should last for at least three years, providing time for the Department to help borrowers get out of default.

Provide Relief for Incarcerated Borrowers

Nearly all student loan borrowers struggle to understand and navigate the complex student aid system. These problems are exponentially worse for incarcerated borrowers. The Department continues to require these borrowers to affirmatively apply for relief even though incarcerated borrowers in most cases lack access to basic communication, such as email and cell phones, that prevent them from managing their student loans or accessing relief for which they are eligible.

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[32] The Department has posted a Social Security offset package for borrowers. FED. STUDENT AID, U.S. DEP'T OF EDUC., REQUEST TO STOP OR REDUCE OFFSET OF SOCIAL SECURITY BENEFITS, https://ifap.ed.gov/sites/default/files/attachments/2019-09/ReqStopReduceOffsetSocSecBenefits.pdf (last visited July 3, 2022).

[33] 34 C.F.R. § 34.24-25.

[34] *Loan Servicing and Collection - Frequently Asked Questions*, FED. STUDENT AID TOP-Q1, https://fsapartners.ed.gov/knowledge-center/faqs/loan-servicing-and-collection-frequently-asked-questions (last visited July 3, 2022).

The Department should no longer neglect this population and at a minimum suspend collection from incarcerated borrowers and place them automatically in IDR.[35]

Develop Truly Fair Collection Hearings

If the Department implements the reforms above, there should not be many borrowers still facing default and collection. However, those that do must have access to fair hearings.[36]

Create Additional Pathways Out of Default

As legal aid negotiators highlighted in a memo during the recent negotiated rulemaking, the Higher Education Act does not limit the pathways out of default. These advocates and others have presented numerous creative and important ideas to create additional pathways beyond rehabilitation and consolidation.[37] This will be especially critical once the Fresh Start program is implemented and the payment pause on federal loans is over.

Eliminate the Commercial FFEL Portfolio

As of 2020, there were approximately eight million borrowers who owed commercially held guaranteed loans (also known as "FFEL" loans) or Perkins loans.[38] There have been no new originations from either of these programs for some time. Yet the old portfolios still exist, continuing to line the pockets of private actors, draining taxpayer funds, and adding unnecessary complexity to government student loan programs.

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[35] Deanne Loonin, Amber Saddler, Robyn Smith, Abby Shafroth, *Collection at All Costs: Examining the Intersection of Mass Incarceration and the Student Debt Crisis*, Student Borrower Protection Center and the National Consumer Law Center (Jul. 2022).

[36] For a detailed discussion of this topic, see Loonin, *Illusory Due Process*, *supra* note 21.

[37] For a discussion of pathways out of default, see Loonin, Student Loan Law, *supra* note 15, at ch. 7.

[38] Tariq Habash, *The CARES Act Leaves Behind Millions of Student Loan Borrowers*, Student Borrower Protection Center (Mar. 27, 2020), https://protectborrowers.org/the-cares-act-leaves-behind-millions-of-student-loan-borrowers/.

The Department should aggressively use its mandatory assignment authority to require guaranty agencies and other holders to assign all FFEL loans in default to the Department.[39]

For those borrowers eligible for statutory discharges, including defense to repayment, whether in default or not, the Department should use statutory authority to require guaranty agencies to discharge those loans. The Department should also create and enforce deadlines for commercial FFEL loan holders to process relief applications.

To further reduce the FFEL portfolio, the Department should cancel uncollectible old loans, including all loans from schools that closed prior to 1994.[40] Unless the borrower later consolidated, all of these loans are FFEL loans, because they were originated before the Direct Loan program began.

To accelerate removal to the Department of any remaining FFEL loans, the Department should strictly monitor FFEL loan holders for compliance with due diligence and related provisions. The Department can punish violators with sanctions including re-assigning loans to the Department.[41] The Department may also have authority to move groups of FFEL loans after terminating a guaranty agency or potentially even after other sanctions, similar to transfers the Department has done when a guaranty agency closes.

Conclusion

The student loan system and its enablers keep failing students and borrowers. There were some unforeseeable circumstances, such as the COVID-19 pandemic, that exacerbated pre-existing problems. On the other hand,

[39] 20 U.S.C. § 1078(c)(8) ("If the Secretary determines that the protection of the Federal fiscal interest so requires, a guaranty agency shall assign to the Secretary any loan of which it is the holder and for which the Secretary has made a payment pursuant to paragraph (1) of this subsection."); 34 C.F.R. § 682.409(a)(1).

[40] PPSL, along with the Legal Aid Foundation of Los Angeles and New York Legal Aid submitted a group closed school discharge application dated March 24, 2022 requesting automatic discharges for all borrowers who attended closed for-profit schools before 1994. The Department has not yet responded.

[41] 34 C.F.R. § 682.413 lists penalties the Department can impose on FFEL loan holders for violating Higher Education Act ("HEA") regulations generally and for violating specific HEA regulations. The latter category includes violations of due diligence collection and servicing requirements, including in § 682.413 (b)(2) that the Department "may require a guaranty agency to repay reinsurance payments received on a loan *or to assign FFEL loans to the Department* [of Education] if the guaranty agency fails to meet the requirements of § 682.410" (emphasis added).

some circumstances were entirely foreseeable including the Department's decades long failure to properly rein in predatory schools, private contractors, and others taking advantage of the lack of accountability in the federal aid program.

There is an opportunity coming out of the payment pause to wipe the slate clean and start again. The time to act is now.

UNTAPPED TOOLS: THE POWER OF STATE DEBT COLLECTION LAWS TO PROTECT STUDENT LOAN BORROWERS

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Introduction

Many borrowers with federal student loans also carry balances on loans owed to private companies.[1] Students take out private loans to cover the cost of education, to pay for living expenses while in school, and in response to aggressive marketing by for-profit schools and private lenders.[2] Unlike federal student loans which are eligible for loan forgiveness based on disability, public service, and other discharges like the borrower defense to repayment, private student loans haunt borrowers for decades and there is little recourse for consumers. Private student loans have high interest rates, sometimes in the double digits, which means that by the time a borrower has defaulted, she may owe more than she originally borrowed.[3] This will certainly be true if a borrower has trouble finding a job that pays enough to make monthly payments on the private student loan before and in the lead up to default, as is often the case for graduates of for-profit schools.[4]

Private student loans are not equally distributed across those who have attended post-secondary schools. Private student lenders have historically targeted low-income and non-white students, including those attending

[1] In California alone, it is estimated that 650,000 borrowers owe over $10 billion in private student loans in addition to, or in lieu of, federal student loans. Ben Kaufman, *California Has the Opportunity to Protect Private Student Loan Borrowers in Every Corner of the State*, Student Borrower Prot. Ctr. (July 6, 2021), https://protectborrowers.org/california-has-the-opportunity-to-protectprivate-student-loan-borrowers-in-every-corner-of-the-state/.

[2] *See*, *e.g.*, *Kilgore v. KeyBank, N.A.*, 718 F. 3d 1052 (9th Cir. 2013) In an action against lender KeyBank for originating private student loans in collusion with a for-profit helicopter flight training school, KeyBank was referred to as a "preferred lender" for the over $50,000 cost of attendance. (The Ninth Circuit sent the case to arbitration, overturning the district court's holding on the merits of the putative class claims.)

[3] Consumer Fin. Prot. Bureau, Private Student Loans: Report to the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Health, Education, Labor, and Pensions, the House of Representatives Committee on Financial Services, and the House of Representatives Committee on Education and the Workforce (Aug. 29, 2012), http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf [hereinafter "CFPB PSL Report"].

[4] Stephanie Riegg Cellini & Nicholas Turner*, Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data*, (2016), https://www.nber.org/papers/w22287.

States can provide protections for low-income borrowers and rein in student loan creditors that seek to profit off students who could not afford to repay loans in the first place through legislation that protects student loan borrowers during the debt collection stages of student loan collection.

for-profit colleges and trade schools, which makes addressing the outstanding balances carried by borrowers of private student loans both an economic and racial justice issue across the United States.[5]

States can provide protections for low-income borrowers and rein in student loan creditors that seek to profit off students who could not afford to repay loans in the first place through legislation that protects student loan borrowers during the debt collection stages of student loan collection. Although some state attempts to pass new laws targeting abuses in origination and servicing of private student loans may be preempted by federal banking regulations, an underutilized tool of states in protecting consumers is the authority to regulate debt collectors that use state courts to obtain and enforce civil judgments.[6]

This policy paper utilizes an empirical analysis of the filing and outcome of private student debt collection cases in California as an example of how state courts function as a tool of debt collection for private student loan lenders, servicers, and investors.[7] The study period encompasses twelve years and analyzes the case outcomes and post-judgment collection activity for almost 15,000 student loan borrowers who were sued to collect old

[5] While 1-in-20 college students overall enroll in for-profit and trade schools, 1-in-10 Black and Latino students are enrolled in these institutions. Tressie McMillan Cottom, Lower Ed: The Troubling Rise of For-Profit Colleges in the New Economy 32 (2017).

[6] The use of state unfair and deceptive act consumer protection statutes to seek relief for defrauded borrowers is outside the scope of this paper but it is important to note that following the implementation of the Dodd-Frank Act, a state consumer law statute is preempted only if it "prevents or significantly interferes with" the exercise of federally authorized banking powers. 12 U.S.C. §25b(b). In January of 2022, 39 state attorneys general settled with Navient over state law claims alleging unfair and deceptive acts and practices in the servicing of private student loans. *Commonwealth of Pennsylvania v. Navient Corporation and Navient Solutions L.L.C.*, Case. No. 3:17-cv-1814, Consent Order and Judgment, https://www.attorneygeneral.gov/wp-content/uploads/2022/01/2022-01-13-Navient-PA-Consent-Judgment.pdf Private student loans are regulated under federal banking laws.

[7] This paper draws on research by author Claire Johnson Raba first reported in Co-Opting California Courts: How Private Creditors Have Turned the Judiciary into a Predatory Student Debt Collection Machine, (August 2021), https://protectborrowers.org/wp-content/uploads/2021/08/Co-Opting-CA-Courts.pdf. Methodology and data sources are described at pp. 15-16.

debts. Unlike many other kinds of consumer debt, the data shows that student loan creditors do not tend to sell defaulted debt to third-party debt collectors, but instead retain title to the debts and reduce them to judgment.

California court record data highlights the problem

Although the Consumer Financial Protection Bureau has found widespread abuses in the prosecution of thousands of private student loan debt collection cases nationwide, in almost all of the cases filed in California, borrowers do not have access to an attorney to represent them in court.[8] This lack of legal representation leads borrowers to forgo the opportunity to raise meritorious affirmative defenses and leaves consumers vulnerable to the default process. The debt collection judgments that arise out of this vacuum of legal representation remain collectible for ten years and are indefinitely renewable unless a borrower affirmatively acts to challenge renewal of judgment or moves to set aside the default judgment.[9]

In almost all of the cases filed in California, borrowers do not have access to an attorney to represent them in court.

In an overwhelmingly high number of these cases, the plaintiff is one of many National Collegiate Student Loan Trust (NCSLT) entities.[10] Like the home loans marketed during the predatory lending subprime mortgage crisis that preceded the Great Recession of 2008, many private student loans of the same era were risky, high-cost credit products packaged into security instruments almost immediately following origination.[11] While a borrower might have made payments to a servicer that ran a customer service and billing department, the actual owner of many of these loans is a security vehicle in which the delinquent status of many borrowers remains buried in the tranches of loans included in the trust. Meanwhile, student loan servicers offer borrowers months and years of

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[8] Fig. 5, *infra*.

[9] Judgments are enforceable for 10 years and can be renewed, effectively making a judgment enforceable indefinitely unless a satisfaction of judgment is filed with the court. Cal. Civ. Proc. Code §§ 685.010, 683.120.

[10] Fig. 2, *infra.*

[11] Between 2001 and 2007, these lenders made more than 50,000 loans to California borrowers totaling nearly $800,000,000 that were ultimately bought by the Trusts. SBPC analysis of NCSLT filings, available at https://public.tableau.com/app/profile/ben.kaufman4147/viz/TableauNCSLTmap/Sheet1.

deferrals and forbearances, while interest continues to accrue on the loan and the statute of limitations is extended, one negatively amortizing payment at a time.[12]

When a private student loan borrower finally defaults, the trust or other legal owner of the loan files a lawsuit in state court and proceeds to judgment based on a claim for breach of contract. Upon entry of judgment in favor of the trust or student loan creditor, borrowers find themselves subjected to debt collection sanctioned by the court, including wage garnishment and bank levies. California has taken steps in the last two years to protect low-income debtors by protecting the first $1,700 in a bank account from levy, but this legislative action does not replace any of the funds taken over the years by student loan creditors.[13] However, California still allows the wages of low-income consumers to be garnished and places a heavy procedural burden on a debtor to ask the court for relief in the form of a claim of exemption.[14]

Recently passed and pending legislation in California

In 2021, California passed Assembly Bill 424, which created new protections for student loan borrowers who are sued to collect delinquent private student loans.[15] Despite this progress, work still remains to be done to protect borrowers who already have judgments entered against them. This paper utilizes data analysis of existing

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[12] The author's experience as a legal aid attorney assisting private student loan borrowers from 2010-2019 affirmed this was a common practice for private student loan servicers. See also Consumer Fin. Prot. Bureau, Annual Report of the CFPB Student Loan Ombudsman (2012), https://files.consumerfinance.gov/f/documents/201709_cfpb_transworld-systems_consentorder.pdf.

[13] California Senate Bill 616 (2019) amends California Code of Civil Procedure § 704.220 to create an automatic exemption, requiring the debtor to file no claim of exemption, for funds in a debtor's deposit account "equal to or less than the minimum basic standard of adequate care for a family of four" as annually adjusted by the California State Department of Social Services. In 2022, that amount is $1,788.

[14] California Code of Civil Procedure §§ 706.124 and 703.530 set out the guidelines for the form of this request and the information that a debtor must provide, including a list of all earnings, assets, and outstanding obligations for the debtor and the debtor's spouse. If a creditor objects to this claim of exemption, the debtor must appear in court to petition a judge to grant the claim.

[15] California Assembly Bill 424 (2021), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB424. Claire Johnson Raba, *Court Record Data Shows Enduring Harm from Private Student Loan Default Judgments*, (Dec. 31, 2021), https://unicourt.com/blog/enduring-harm-from-private-student-loan-default-judgments/.

student loan judgments in California to propose additional protections that state legislatures can put in place to protect low-income borrowers who have outstanding judgments. Two steps that states can take are to ensure that student loan judgments expire after a period of time, without the opportunity for renewal, and to reduce the interest rate for consumer debt judgments. California's Senate Bill 1200, introduced during the 2022 legislative session, attempts to do just that but has a carveout that may exclude many student loan borrowers from its protections.[16] SB 1200 proposes to amend the current structure of judgment renewal in California to preclude renewal of judgments for consumer debts under $50,000 and medical debts under $200,000 and to reduce from 10 percent to 5 percent the post-judgment interest rate on these debts.

As drafted, SB 1200 may not apply to many private student loan debts. Private student loans have higher interest rates than federal student loans, and over time often accrue extremely high amounts of interest due to servicers' placing borrowers into deferred-interest payment plans in which the interest capitalizes and adds to the balance of the loan. By the time a borrower defaults on private student loans, in many cases, the original balance may have doubled. SB 1200 does not take into consideration the high balances of private student loan debt. Moreover, although it is difficult to retroactively reduce interest rates for judgments, some states are trying. At the end of 2021, New York passed S.5724A/A.6474A, the Consumer Judgment Interest Act, which caps the interest on consumer debt, including student loan debt, at 2 percent, down from 9 percent.[17] The new law covers all outstanding judgments that are not yet fully paid, but implementation of the new rules have been challenged in a putative class action filed by three credit unions.[18]

California's SB 1200 does not apply retroactively and is therefore not vulnerable to the same legal challenge brought in New York. However, exclusion of debts over $50,000 from the proposed amendments will leave many

[16] California Senate Bill 1200 (2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1200.

[17] Kevin Thomas, *Governor Hochul Signs Consumer Judgement [sic] Interest Act into Law* The New York State Senate, Dec. 31, 2021, https://www.nysenate.gov/newsroom/press-releases/kevin-thomas/governor-hochul-signs-consumer-judgement-interest-act-law.

[18] *Greater Chautauqua Fed. Credit Union v. Marks*, Case No. 1:22-cv-2753(MKV) (E.D.N.Y) filed Apr. 4, 2022, On April 28, 2022, the District Court granted the credit unions' motion for a preliminary injunction staying implementation of the retroactive reduction in interest for existing judgments. The court's order was based on a determination that the plaintiffs are likely to prevail on their Fifth Amendment Takings Clause claim and held that the amendment constitutes a regulatory taking.

student loan debtors vulnerable.[19] SB 1200 would benefit from an amendment to explicitly include private student loan debt within the language in the proposed amendment to California Code of Civil Procedure section 683.110(c)(1) and section 685.010(a)(2)(A)(i) which prohibits renewal of judgment for medical debt up to $200,000 and halves the interest rate on judgments entered after the bill's effective date to 5 percent. This would provide significant relief for student loan borrowers in the future, as the California data shows that student loan debt remains a burden for consumers for many years and that judgments are rarely satisfied in full.

California's legislature is also considering amending the state's wage garnishment statute in the 2022 legislative session for a temporary period of six months.[20] To protect student borrowers with existing outstanding judgments, the same statutory section could be amended to preclude student loan judgment creditors from using the courts to garnish wages. In recognition of the findings that show student loan borrowers are rarely able to satisfy a judgment, the state could exclude from wage garnishment any loans that originated as a student loan.[21] This would acknowledge the harm done by predatory lenders and for-profit schools, long recognized in California as problematic and targeted at the most vulnerable students. Under the current and proposed laws, a judgment debtor subjected to wage garnishment must file a claim of exemption and appear before a judge to prove her inability to pay. By shifting the procedural burden to prove indigence away from the low-income debtor, and acknowledging the predatory nature of private student loans, an amendment entirely halting wage garnishment to collect private student loan debt would protect the wages of borrowers in a high-cost-of-living state and acknowledge the demonstrated predatory origination practices and problematic servicing behind a vast number of these loans.[22] Creditors could retain the right to record lien against a judgment debtor's home and be paid if the home is voluntarily sold during the time that the judgment remains enforceable with a valid lien recorded. This compromise would not unduly burden the debtor because California recently revoked the right of judgment creditors to foreclose on a home for a consumer debt reduced to judgment, with an explicit clause

[19] SB 1200, *supra,* note 16.

[20] California Senate Bill 1477 (2022), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1477.

[21] Fig. 7 and 8, *infra.*

[22] *See Commonwealth of Pennsylvania v. Navient Corporation and Navient Solutions L.L.C.*, Case. No. 3:17-cv-1814, Consent Order and Judgment, *supra* note 6.

including all student loan debt judgments, irrespective of the amount of the judgment.[23] Taken together, these proposed legislative changes within the authority of state legislatures to regulate post-judgment debt collection would present relief for student loan borrowers with outstanding judgments. A set of bills that would reduce the interest rate on newly entered judgments, allow a judgment to expire in a reasonable amount of time without the option for renewal, and eliminate wage garnishment and bank levies would provide a true fresh start for private student loan borrowers.

Connecting the dots between predatory, for-profit schools and private student loans

The marriage of private, for-profit schools and private student loans has created a crisis of borrowers being unable to repay their debts.[24] For-profit schools preyed on borrowers, misleading them with deceptive advertising about educational attainment and job placement outcomes and taking advantage of a set of borrowers who were much more likely than students at public and private non-profit colleges and universities to have relied on private student loans to meet the costs of education.[25] Moreover, in many cases, student borrowers at for-profit schools were affirmatively driven toward private student loans, as were students who had a need for additional cash to cover expenses not met by federal loans. [26]

[23] California Assembly Bill 2463 (2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2463 prohibits the forced sale of a California homestead pursuant to a judgment lien to enforce a money judgment in a civil action. Cal. Code Civ. Proc. § 699.730(b)(7)(A) exempts debts over $75,000 unless they are student loan debts.

[24] Student Borrower Protection Center *Private Student Lending*, Apr. 2020, at p. 3, 9 "for-profit attendees are disproportionately more likely to borrower private student loans and to face difficulties repaying them." available at https://protectborrowers.org/wp-content/uploads/2020/04/PSL-Report_042020.pdf.

[25] *Id. See also* the Department of Education's decisions to grant relief to federal student loan borrowers who attended the Corinthian Colleges, DeVry, ITT Technical, Marinello School of Beauty, Court Reporting Institute, Westwood College and others due to these schools misleading students about education outcomes and job placement. Fed. Student Aid, Dep't of Educ., ED Announces Approval of Borrower Defense Claims for more than 1,800 Court Reporting Institute, Marinello Schools of Beauty, and Westwood College Students (July 9, 2021), https://studentaid.gov/announcements-events/borrower-defense-update.

[26] Robyn C. Smith & Emily Green Caplan, Nat'l Consumer L. Ctr. & Student Loan Borrower Assistance, Going to School on Robo-signing: How to Help Borrowers and Stop the Abuses in Private Student Loan Collection Cases 14 (2014) ("It is likely that many

Student loan borrowers who attended private, for-profit schools were also often encouraged to obtain co-signers for these debts. Because of the 90/10 rule, a federal rule that requires institutions receiving federal aid to obtain at least ten percent of funding from another source, for-profit schools have traditionally tended to steer students into private student loans, including those offered by the school itself. Major student loan lenders and servicers also originated loans for schools such as ITT Technical College, the Corinthian Colleges, the Art Institutes, and the California Culinary Academy.[27] The students who graduated from these colleges proved less likely to obtain a job in a field that would allow them to pay off the loan.[28]

Many of the worst practices that for-profit colleges once used to bury students under risky private student loans are now more difficult for companies to execute. Private student loans are still available, but since 2008, schools have been prohibited from entering into co-branding and revenue-sharing arrangements with private student lenders, and they are bound by restrictions on marketing private student loans along with their federal student

of the borrowers who are defendants in PSL collection lawsuits attended for-profit schools") *see also* Mary Nguyen, Degreeless in Debt: What Happens to Borrowers Who Drop Out, Education Sector at 1 (Feb. 2012).

[27] On September 6, 2016, ITT Tech filed for Chapter 7 bankruptcy after failing to comply with accreditation standards. *History of Oversight and Compliance Actions Against ITT Educational Services, Inc.*, Fed. Student Aid, https://studentaid.gov/announcements-events/itt#history-of-oversight-and-compliance-actions-against-itt-educational-services-inc; On April 27, 2015 Corinthian closed Its locations after the California Attorney General and U.S. Department of Education found the school defrauded students from 2010 to 2014. *Information on Pending Litigation for Students at Corinthian Colleges (Everest, Heald, and WyoTech) Under Borrower Defense to Repayment Rule*, Fed. Student Aid, https://studentaid.gov/announcements-events/corinthian#debt-relief and https://oag.ca.gov/corinthian. The parent company of the Art Institutes, Education Management Corp. was the subject of a U.S. Department of Justice investigation that found EDMC engaged In Illegal compensation practices for Its admissions recruiters. Most of the Art Institute campuses closed in 2015. U.S. Dep't of Justice, *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.

[28] *See generally Fact Sheet: What to Know About the Gainful Employment Rule*, The Institute for College Access & Success (Aug. 2019), https://higherednotdebt.org/blog/fact-sheet-what-to-know-about-the-gainful-employment-rule. The Gainful Employment Rule, an Obama-era Department of Education rule requiring that career programs receiving federal student aid "prepare students for gainful employment." This rule was rescinded by the Trump Administration on July 1, 2019.

aid.[29] State and federal governments have also taken some steps to rein in private for-profit schools.[30] Despite these efforts, for borrowers with outstanding private student loan balances, the struggle to keep their loans from falling into default puts them deeper into debt. Placing private student loans in forbearance or deferment doesn't stop the accrual of interest, causing loan balances to grow. On private student loans with high interest rates, some servicers, such as Navient, offer "reduced-rate interest plans" in which a borrower makes interest-only payments for a period of time.[31] At the end of the plan period, however, the deferred interest is capitalized, and the balance of the loan grows by the amount of the deferred interest. Through "negatively amortizing" repayment plans such as this one, one borrower described in a court filing how a private student loan that started at $45,000 ballooned to $87,000 over ten years. [32]

Moreover, despite changes in federal law intended to protect borrowers from the private student loan trap, there are two decades' worth of private student loan borrowers who are still repaying on outstanding legacy debts.[33] For these borrowers as well as new ones, the problems associated with predatory private education credit are far from a relic of history.

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[29] *See* Higher Education Opportunity Act, Pub. L. 110-315 (Aug. 14, 2018). Note that a growing body of evidence suggests that these restrictions have not been enforced by the U.S. Department of Education, and an emerging class of "fintech" private student lenders appear to be partnering with public and private not-for-profit colleges in open violation of these restrictions. *See* Student Borrower Prot. Ctr., Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Toward Risky Private Debt and Credit (June 2021), https://protectborrowers.org/wp-content/uploads/2021/06/SBPC_OPM.pdf.

[30] The Department of Education issued findings against the Corinthian Colleges in June of 2015, stripping them of their accreditation, leading to the shuttering of the Everest, Heald, and WyoTech for-profit colleges. The California Attorney General's Office investigated and filed suit against Corinthian and contributed to the findings. Cal. Off. of the Att'y Gen., Rob Bonta, *Information for Former Corinthian Colleges Students* (Feb. 11, 2021), https://oag.ca.gov/corinthian.

[31] Brandon Duley v. Navient Corporation 2:17-ap-01513 (C.D. Cal. 2017) (adversary proceeding seeking to discharge private student loan and asserting that the balance of the loan grew due to the negatively amortizing "reduced interest-rate plan" under the Ninth Circuits In Re Neff factors for the Brunner bankruptcy discharge evaluation.

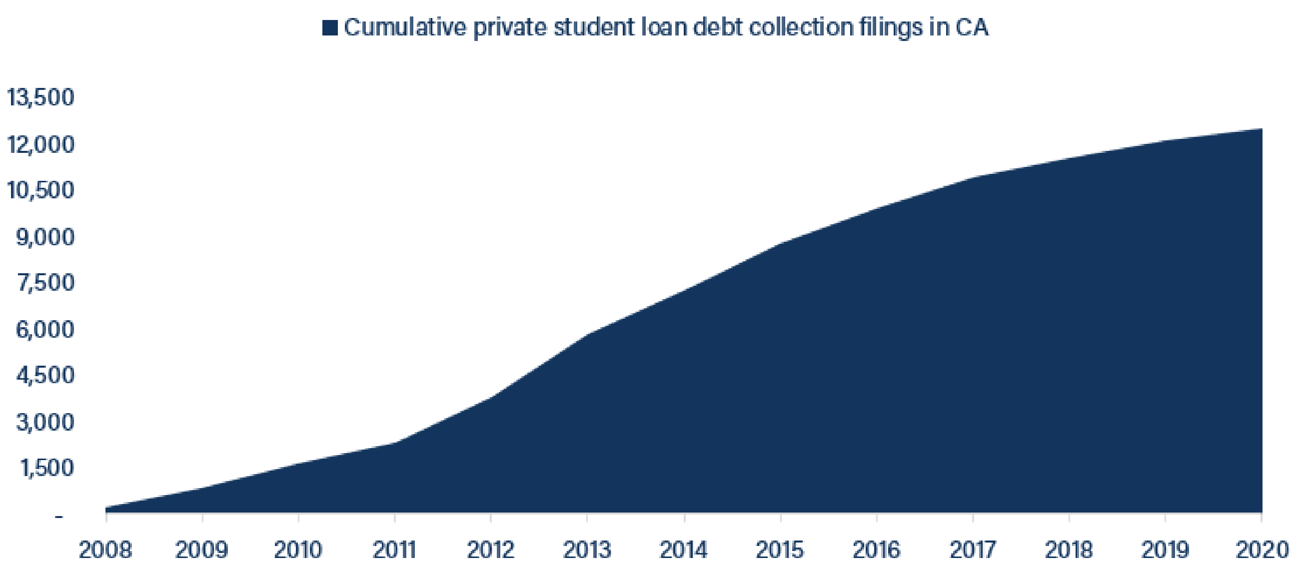
[32] *Id.*

[33] Student Borrower Protection Center *Private Student Lending*, Apr. 2020, at p. 9 "looking beyond top-line statistics on the private student loan market reveals that vulnerable borrowers frequently find themselves falling behind." available at https://protectborrowers.org/wp-content/uploads/2020/04/PSL-Report_042020.pdf.

Findings from student loan judgments in California

Californians carry a high burden of student loan debt, with an estimated 650,000 borrowers owing over $10 billion in private student loans in addition to, or in lieu of, federal student loans.[34] Unlike federal student loans, private student loans are not eligible for federal alternative repayment and debt relief options. Even many student borrowers who attended predatory, for-profit colleges or trade schools that later lost their accreditation remain liable to private student lenders that continue to collect on outstanding balances.[35]

Figure 1: In only slightly more than a decade, creditors have filed tens of thousands of debt collection lawsuits against California private student loan borrowers



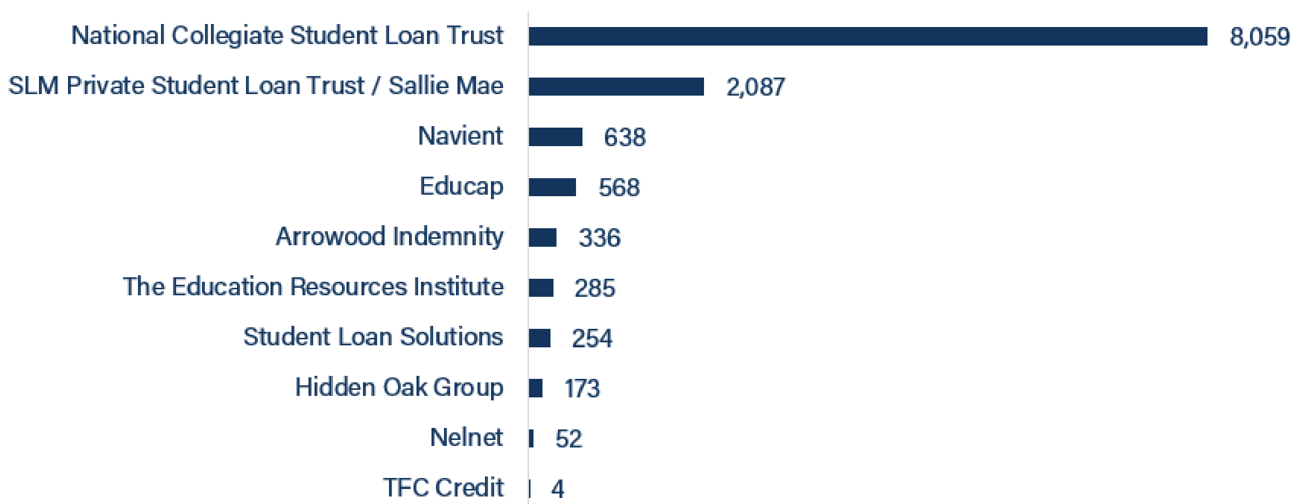
[34] Kaufman, Student Borrower Protection Center, *supra,* note 1.

[35] 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). *See also* NCLC's summary of the implementation of the rule *available at* Kyra Taylor, Nat'l Consumer L. Ctr., *New July Student Loan Rule Amendments: What Changes and What Does Not* (Aug. 27, 2020), https://library.nclc.org/new-july-student-loan-rule-amendments-what-changes-and-what-does-not.

The following analysis supports a series of findings that, when taken together, demonstrate the scale of the injustice imposed on California student loan borrowers who fall behind on private student loans. Over the last twelve years, at least 12,499 student loan debt collection cases were filed in California by creditors seeking to recover defaulted private student loans from former students and their families.

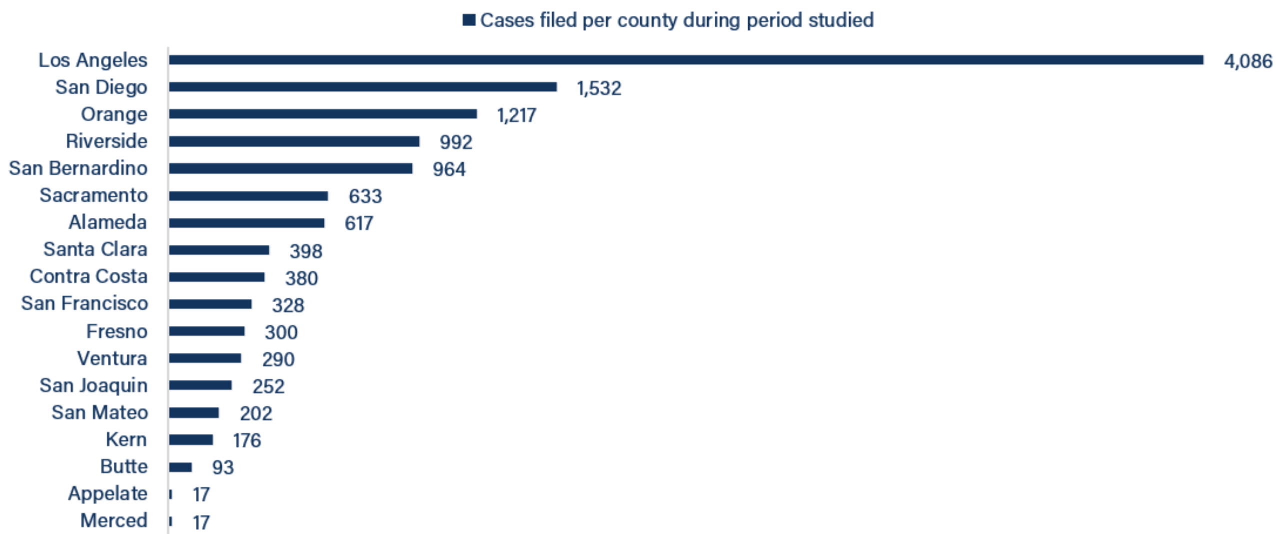
The majority of these cases were brought by one of the National Collegiate Student Loan Trust entities, which, as discussed above, are private student loan-backed securities trusts holding the notes to millions of dollars of value in private student loans. Following close behind are private student loan originators and servicers Sallie Mae and Navient.

Figure 2: Most private student loan collection lawsuits were brought by large, out-of-state creditors, including NCSLT



Collections cases filed over the past 12 years were spread throughout California, and while roughly a third were filed in Los Angeles County, thousands of people have also been sued in smaller, more rural counties such as San Joaquin, Fresno, Kern, and Butte Counties.

Figure 3: Thousands of private student loan debt collection cases have been filed in courtrooms spanning California

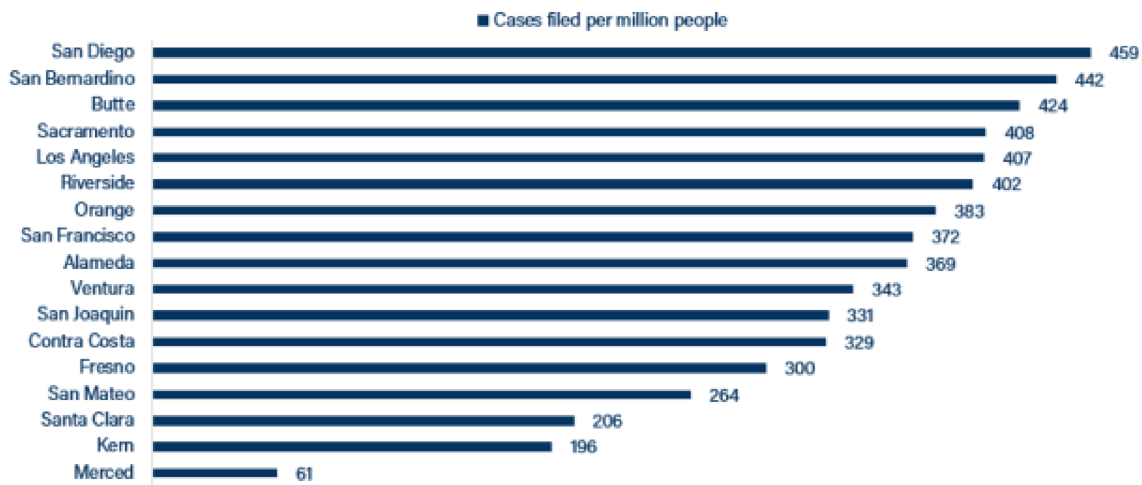


Indeed, analysis indicates that the nominally outsized prevalence of Los Angeles County in the data may mask deep private student loan borrower distress across more lightly populated areas of California. In particular, it appears that the distribution of private student loan debt collection cases in California is much more equal across urban and rural areas when the number of those cases is considered on a per-capita basis.

In California, student loan debtors very rarely have an attorney to help them in court. Findings in the California data set indicate that borrowers of private student loans are unable to afford an attorney or do not know where to find help from legal aid. Borrowers may also feel overwhelmed when served with a debt collection lawsuit and not know where to look for help.[36] Over the 12 years of cases examined, only *ten percent* of the total number of borrowers sued in California Superior Court had an attorney. In 2012, the year that student loan debt collection cases skyrocketed, the rate of attorney-represented borrowers was only five percent. In contrast, all creditors in superior court who brought cases against California consumers had a lawyer for the entirety of the study period.

[36] *See generally* Emily Taylor Poppe, Why Consumer Defendants Lump It, 14 NW. J. L. & Soc. Pol'y 149 (2019), describing the psychological reasons why consumer defendants are less likely to assert their rights in the court system than consumer plaintiffs and the barriers to self-represented litigants prevailing in civil litigation.

Figure 4: Private student loan debt collection cases per capita show the broad reach of predatory student lending



This means that the court process in these cases moved forward without the defendant's participation, not as an adversary proceeding in which consumer debtors were able to raise meritorious defenses, but as a rubber stamp for the student loan debt collection industry.

The rate at which judgment is entered in favor of the student loan creditor plaintiff is astronomically high, with 8,237 of 12,499 cases (66 percent of cases) resulting in a judgment against the consumer defendant. Of these cases, the majority of judgments entered were default judgments, which means that the consumer never responded to the lawsuit and the student loan debt collector automatically won the case, giving collectors the right to seek a wage garnishment or order to levy funds from a borrower's bank account. In these instances, as mentioned above, the court process functions as a rubber stamp for the student loan debt collection industry instead of as an adversary proceeding. Of the remaining 34 percent of cases, 29 percent were dismissed. Cases may be dismissed for a variety of reasons, including an inability to serve the defendant, or, more often in debt collection cases, because the creditor and debtor entered into a settlement agreement in which the consumer agrees to repay the debt over time.

Figure 5: Of the student loan borrowers sued over the last twelve years in California, only ten percent were represented by a lawyer

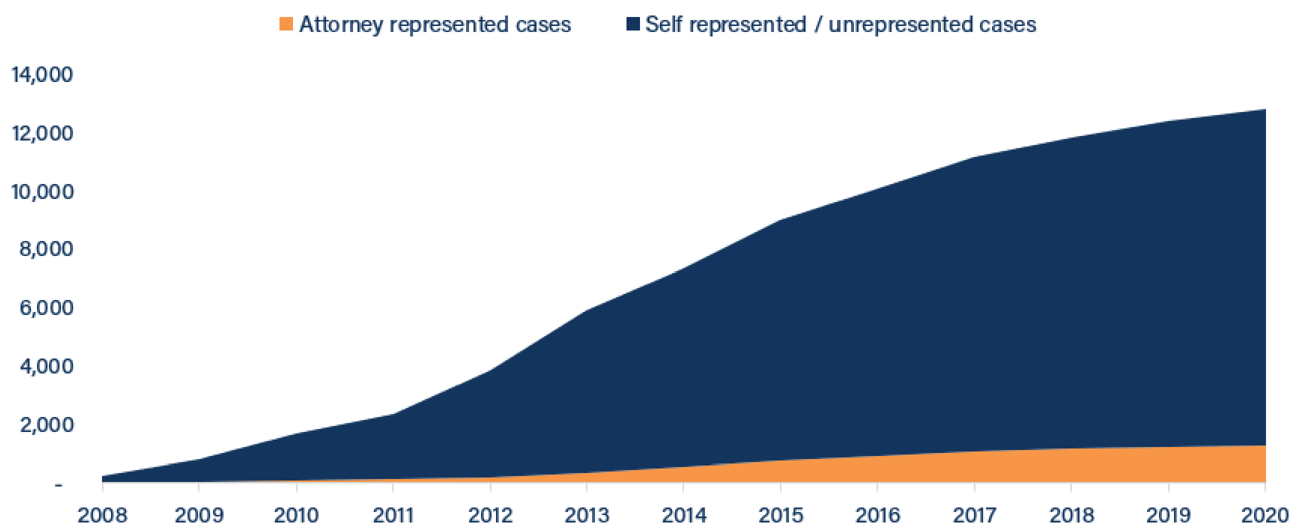
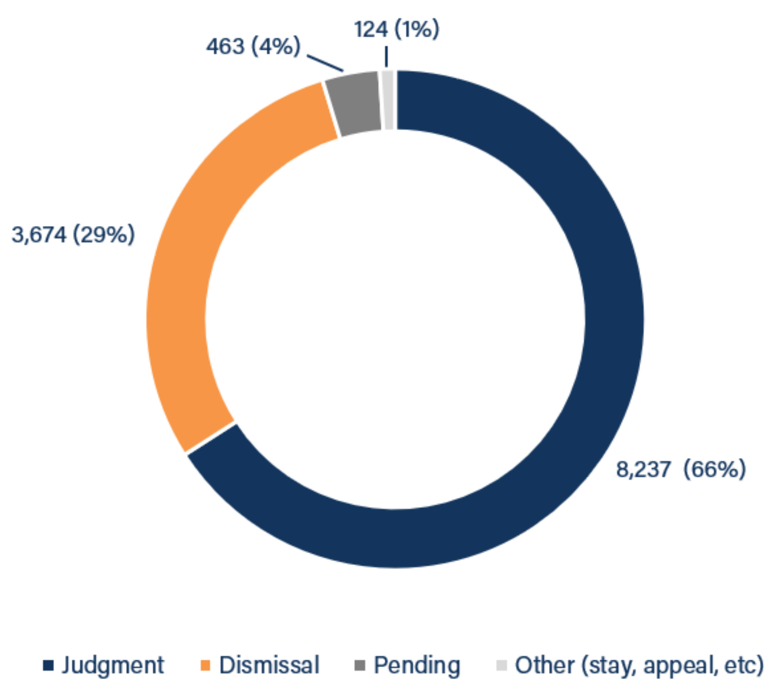
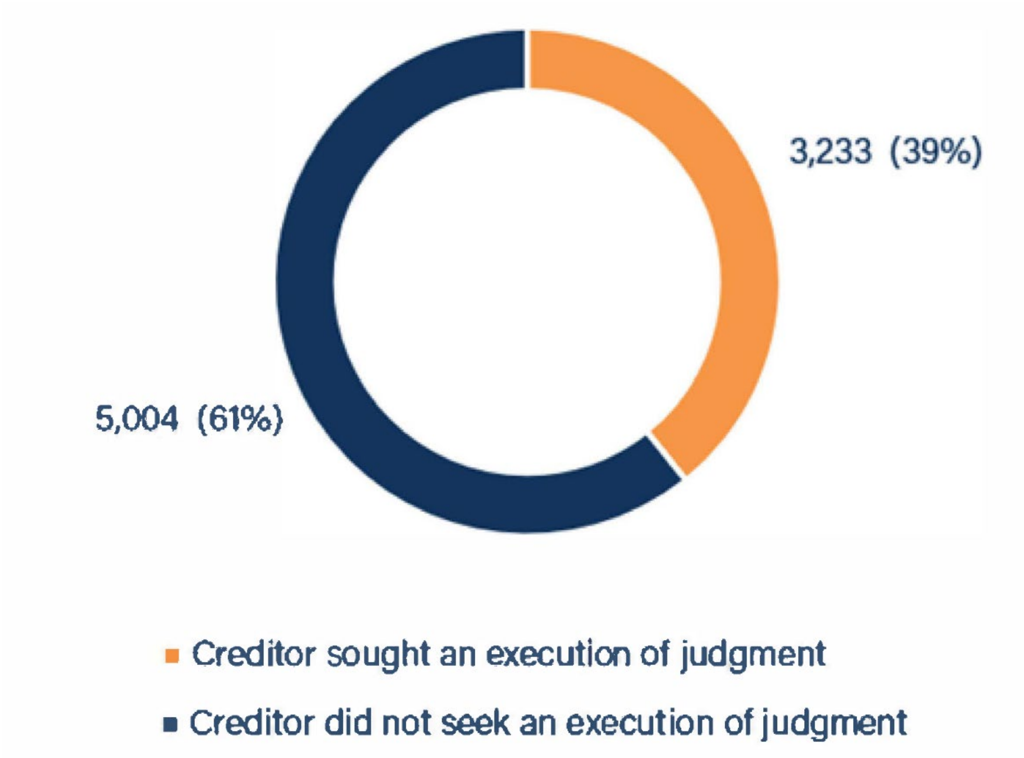


Figure 6: Borrowers lose student loan debt collection lawsuits the vast majority of the time



Because settlement agreements are not publicly filed, the disposition data does not show the consumers who entered into settlement agreements with the creditors, but anecdotal data from legal aid attorneys supports the theory that student loan creditors, like other debt collectors, call up consumers after filing a lawsuit and seek to enter into a settlement agreement. Empirical analysis of debt collection lawsuit settlements generally shows that such settlements are often not to the consumer's benefit.[37]

Figure 7: Borrowers face wage garnishment and forced collections in thousands of cases



Once a creditor obtains a judgment against a consumer, that creditor can then file an execution of judgment and engage in post-judgment collection activity. Analysis of the California data set shows that creditors sought an execution of judgment in 39 percent of the cases in which a judgment was entered. After a writ of execution is

[37] Ing-Haw Cheng, Felipe Severino, & Richard R. Townsend, How Do Consumers Fare When Dealing with Debt Collectors? Evidence from Out-of-Court Settlements, 34 Rev. Fin. Stud. 1617 (2021).

issued, a creditor can garnish the consumer's wages or levy her bank account, and through these actions, will be paid.

Once the judgment is paid in full, the creditor must legally file a satisfaction of judgment. Of the cases analyzed for this report, an incredibly low number of cases resulted in a satisfaction of judgment, meaning that the creditor was likely not able to recover the amount of the debt through wage garnishments, bank levies, and voluntary repayment.

In the other 61 percent of judgments, the creditor chose not to execute on the judgment, allowing the judgment to sit and accrue Interest. The data does not show why, but creditors may "sit on" a judgment for a number of reasons, such as allowing the judgment to grow before being sold or assigned on the secondary debt collection market, or because a review of the consumer's credit report shows no assets. A creditor may also engage In non-judicial post-judgment collection activity, calling the consumer to persuade them to enter a payment plan to avoid wage garnishment.

The docket data shows that only 624 of these borrowers were able to satisfy (pay off) these judgments in full. This means that 7,613 of these judgments remain due and owing. In addition, many thousands of other borrowers are likely making payments on unaffordable settlement agreements. These settlement agreements are drafted by the creditor's attorney, and many of them include a provision for stipulated entry of judgment against the consumer if they stop making payments.[38]

It is also noteworthy that in only 224 cases was a claim of exemption filed by the consumer. The claim of exemption process is how a consumer tells the court that they are unable to afford a wage garnishment, or that the money in a bank account is exempt from levy, but many consumers do not know how to file this claim.

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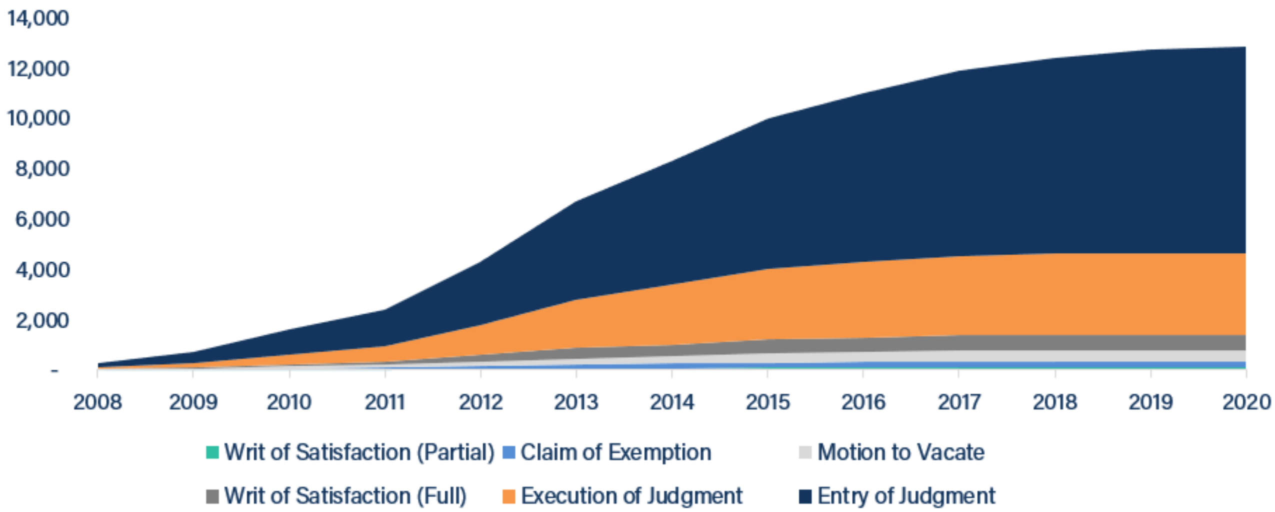
[38] Creditor attorneys often draft settlement agreements in which a consumer defendant agrees to have a judgment entered against them for the full amount of a debt if they breach the settlement agreement by missing even one payment. Unrepresented consumers do not know that they should negotiate to avoid such “gotcha” terms in a settlement agreement. Source: legal aid practice.

Figure 8: The vast majority of private student loan debt collection judgments in California are not paid off, leaving thousands of borrowers owing on judgments.



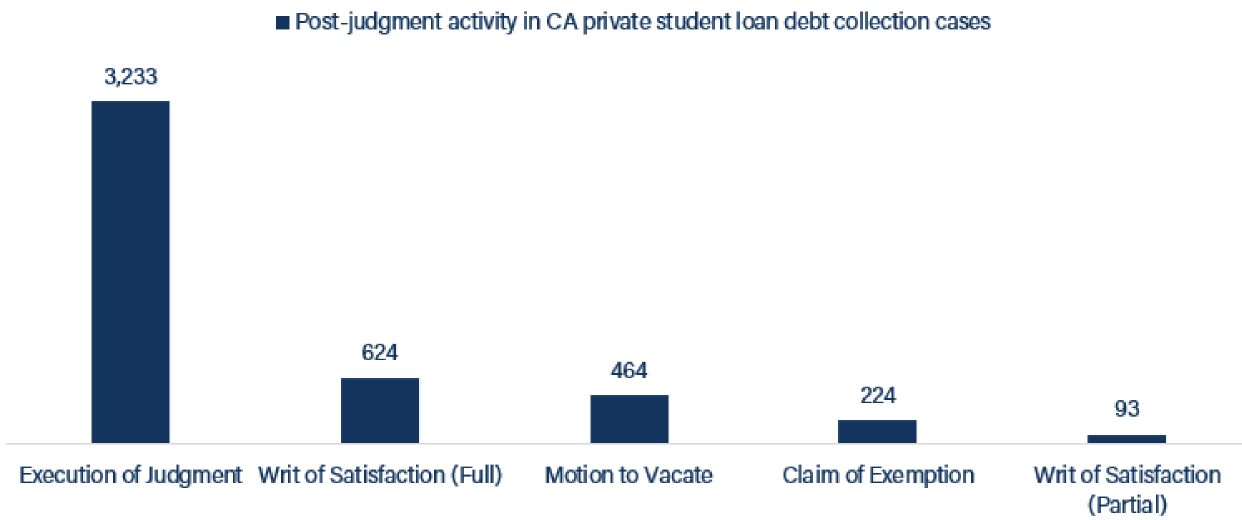
As described above, the data analyzed from the court cases in this study shows that of the entries of judgment in California cases, thousands of judgments remain unpaid and subject to post-judgment collection activity, including wage garnishment, bank levy, and recording of a lien on real property. Although processes exist in California to set aside a judgment or seek an exemption to an execution of judgment, very few borrowers are able to successfully use these procedural tools of these. Of the 8,237 judgments entered, only 464 borrowers, fewer than 6 percent, sought to have a default judgment set aside. This is likely because of the high rate of unrepresented litigants, a lack of knowledge that it is possible to set aside a judgment, or instances of when the consumer is unaware that they have been sued and where the judgment has not been enforced yet.[39]

Of the thousands of student loan borrowers with judgments in place, in at least 2,600 cases a writ of execution and levy or earnings withholding order returned no funds—in effect, borrowers facing forced collections following

[39] California law permits the set aside of a judgment for "inadvertence, mistake, or excusable neglect" for 180 days after the entry of judgment, and for two years in cases of non-service. Cal. Code Civ. Proc. §§ 473(b), (d). California's Fair Debt Buying Practices Act extended this time to six years the time period to move to set aside a default judgment where the defendant was not properly served and did not have knowledge of the entry of judgment for judgments in favor of third-party debt buyers. Assembly Bill 424 extended this section to apply to judgments for student loan creditors. Cal. Civ. Code § 1788.61(a)(2)(A).

a judgment repaid no money at all. This would occur if a debtor had no assets to levy or sufficient wages to garnish.[40]

Figure 9: The vast majority of borrowers simply do not have the money needed to pay off their debts



As noted above, a judgment was entered in 66 percent of the cases filed by student loan debt collectors in the data set analyzed. Of the 8,237 entries of judgment, lenders sought to execute on these judgments less than half of the time, in 3,233 cases. This means that in the rest of the cases, the judgments are sitting on the books, accruing interest, and subject to renewal every ten years.[41]

[40] Cal. Code Civ. Proc. § 706.050 exempts low-income employees from wage garnishment by setting a "floor" below which wages are exempt without the filing of a claim of exemption.

[41] Anecdotal evidence from legal aid offices supports the presumption that debt collectors may let a judgment sit and collect interest before moving to execute on a judgment in order to maximize the value of the judgment. The secondary market for judgments may also place greater value on a judgment which has had additional interest added through the filing of a memorandum of post-judgment costs and interest.

How states can help

Borrowers unable to make full payments but not yet in default are continually pressured by student loan servicers to enter repayment plans and forbearances in attempts to manage the growing balances of these private student loans, and they are sued when they cannot keep up on payments. Even private student loan borrowers with good defenses are at risk of entry of judgment and court-assisted collection practices when they face student loan creditor plaintiffs in the court system—and the data shows this rarely ends well for the consumer.

State lawmakers can change this. California's AB 424 was a great first step, providing protection for a borrower facing a lawsuit. AB 424 heightened evidentiary requirements for private student loan debt collection lawsuits, extending the protections of the Fair Debt Buying Practices Act to student loan creditors. This ensures that a student loan note holder, including the National Collegiate Student Loan Trusts, must show proof that it owns the debt that is the subject of the state lawsuit. AB 424 also extends the time to bring a motion to set aside default judgment from two years to six, allowing borrowers to have their day in court and assert meritorious defenses. Other states should follow suit by ensuring that consumer protections are strengthened for private student loan defendants when they face collectors in court.

This legislative change will provide relief for some debtors, particularly those facing newly filed lawsuits, but for many thousands of consumers with old outstanding debt collection judgments in California and other states, the cost of a few years of education continues to grow. State legislatures should consider stopping this accrual of harm by reducing the interest rate for new judgments to a nominal amount like two percent annually and exempting private student loan judgments from renewal. Along with halting the indefinite renewal of judgments, in recognition of the predatory nature of both the origination and servicing of private student loans, states should halt wage garnishment and bank levies for private student loan debts, eliminating the burdensome procedural process on the consumer to claim an exemption and prove her inability to pay. These actions would allow a student loan judgment to expire after a reasonable amount of time and would go a long way to remediate the harm of old, outstanding consumer debt judgments and provide delinquent private student loan borrowers with a fresh start.

Conclusion

Under current state debt collection laws, the burden is placed on unrepresented consumer borrowers to understand and assert their rights, both during the lawsuit and the post-judgment collection process. This means that the court-aided collection process is a one-way conversation for private student loan debt collectors with borrowers who took out the loans, almost all of whom are unrepresented by an attorney. The collection process through the state courts is not the end of the line for borrowers who simply cannot keep up with the payments on private student loans—it is the beginning of a new nightmare. Court judgments, accruing interest annually and renewable indefinitely, are waiting in the wings whenever a borrower tries to save money or gets a better paying job. After years of abuse at the hands of lenders, servicers, for-profit colleges, debt collectors, and more, private student loan borrowers deserve better protections.

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ENSURING DEBT RELIEF FOR OLDER BORROWERS

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Introduction

The Total and Permanent Disability (TPD) student loan discharge program has undergone dramatic improvements over the past year. The TPD program allows people with substantially work-limiting disabilities to discharge their student loan debt. Recent changes the Biden Administration has made to this program have made it more effective and easier to use, and have resulted in a total of $8.5 billion in loan discharges for over 400,000 people with disabilities. Additional discharges are expected as the Department of Education (ED) finalizes the rules negotiated in late 2021 that would make significant additional changes.

But even with all of these necessary reforms, one population of disabled borrowers—older adults—still cannot access the TPD program easily, despite carrying a growing amount of student loan debt. This situation is likely leading many seniors to face financial precarity in retirement, particularly borrowers in default who are subject to the federal government's harsh debt collection measures. Accordingly, this paper suggests various administrative and legislative changes that could help older borrowers access the student loan relief they are entitled to under the law through the TPD program and other remedies that would protect low-income older borrowers.

Older borrowers face a growing student debt burden—and seniors systematically struggle to access existing relief programs

Older adults might not be the first population that comes to mind as having student loan debt, but such debt is a growing threat to retirement security.[1] While fewer older adults hold student loan debt than those who are younger, those over 65 are the fastest growing group of student debtors. In 2015, there were 870,000 debtors aged 65 and older, a 385 percent increase since 2005. The most recent data available (from December 2021)

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[1] *See generally Retirement Security: Debt Increased for Older Americans Over Time, But the Implications Very by Debt Type*, U.S. GOV'T ACCOUNTABILITY OFFICE (Apr. 2021), https://www.gao.gov/assets/gao-21-170.pdf [hereinafter GAO, *Retirement Security*].

indicate that there are now close to 2 million borrowers in this age group.[2] The increase in the amount of federal student loan debt among this group was also large—it grew from more than $2 billion in 2005 to almost $22 billion in 2015, about a ten-fold increase. Today, it's closer to $100 billion.[3]

Those over 65 are the fastest growing group of student debtors.

The Government Accountability Office (GAO) examined the debt burden on older adults in 2021 and found that not only was the share of older adult households (defined as those with a head of household age 50+) with debt higher in 2016 than in 1989, "the median student loan debt amount for households with student loan debt was about three times as high in 2016 ($16,800) as it was in 1989 ($6,700)."[4] Most concerningly, "older individuals' share of student loan debt delinquency was higher in 2019 than in 2003 in almost all states and the District of Columbia."[5] Older adults generally live on fixed incomes, without the prospect of having increased earnings in the future.

GAO's analysis of the trends in student debt further highlights that some groups are particularly vulnerable to the risks that recent increases in student loan debt and default among older adults pose to their financial security. From 2003 to 2019, individuals aged 75 to 79 often had higher shares of student loan debt that was delinquent than those who were aged 50 to 74. And older individuals with credit scores below 720 had median student loan debt amounts that were more than twice as much in 2019 as in 2003.[6] Not only do older adults owe a growing amount of student loan debt and are more likely to experience delinquency, but they also are increasingly in default on that debt. A growing number of older adults are missing payments or making payments late and, eventually, going into default. The default rate was actually higher for older borrowers over 65 than for younger borrowers: 37% for borrowers over 65 compared to 29% for those 50-64, and 17% for those under 50.

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[2] *Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief*, U.S. GOV'T ACCOUNTABILITY OFFICE (Dec. 2016), https://www.gao.gov/assets/gao-17-45.pdf [hereinafter GAO, *Social Security Offsets*]; *Federal Student Loan Portfolio*, FEDERAL STUDENT AID, U.S. DEP'T OF EDUC., https://studentaid.gov/data-center/student/portfolio (last visited July 25, 2022) [hereinafter FEDERAL STUDENT AID, *Student Loan Portfolio*].

[3] GAO, *Social Security Offsets*, *supra* note 2; FEDERAL STUDENT AID, *Student Loan Portfolio*, *supra* note 2.

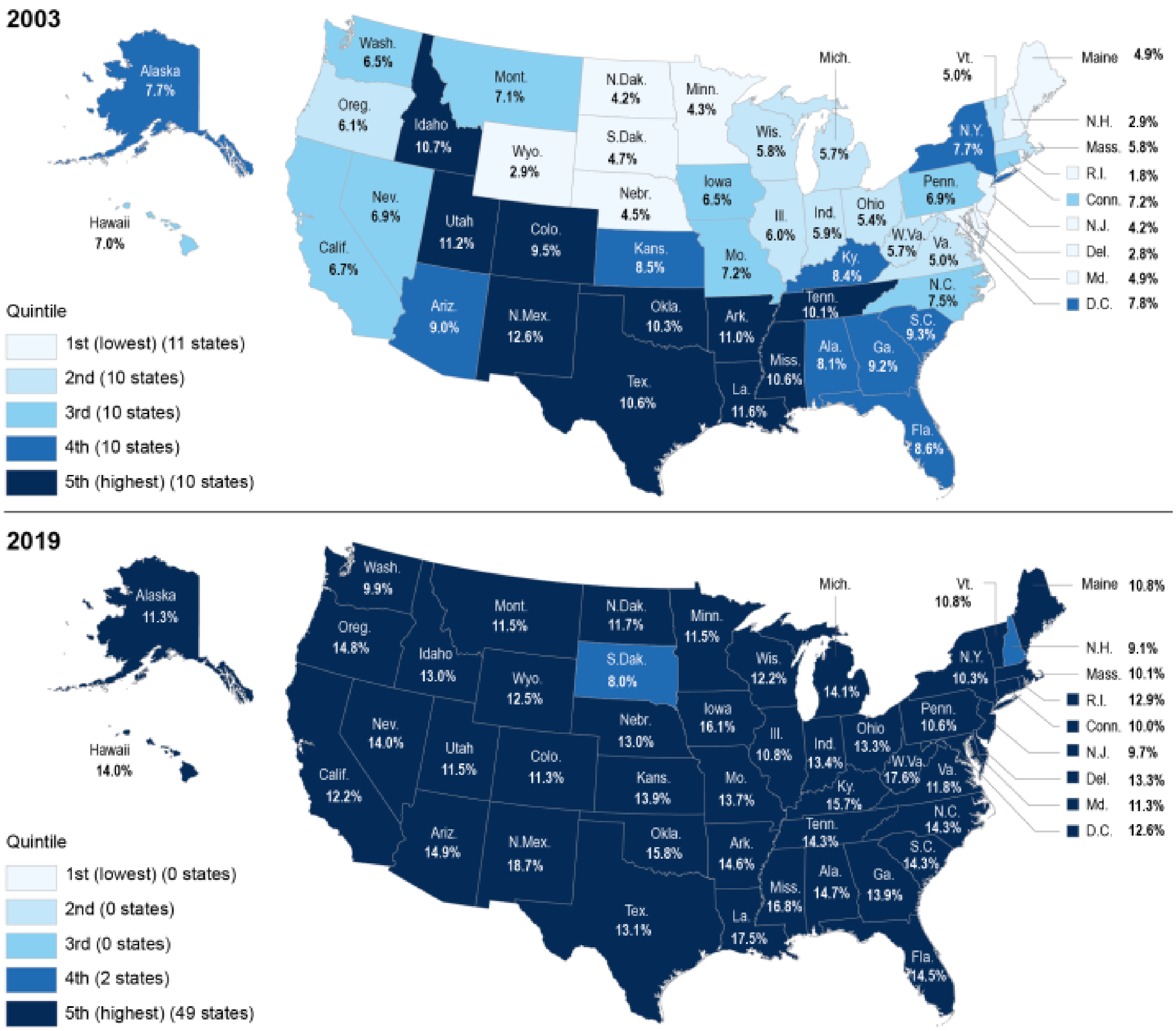
[4] GAO, *Retirement Security*, *supra* note 1, at 15.

[5] *Id.* at 27.

[6] *Id.* at 29.

Figure 1: Older borrowers across America face increasing student debt distress[7]

Figure 11: Percent of Outstanding Student Loan Balance Delinquent by 90 Days or More, for Individuals Age 50-79, By U.S. State, December 2003 to December 2019



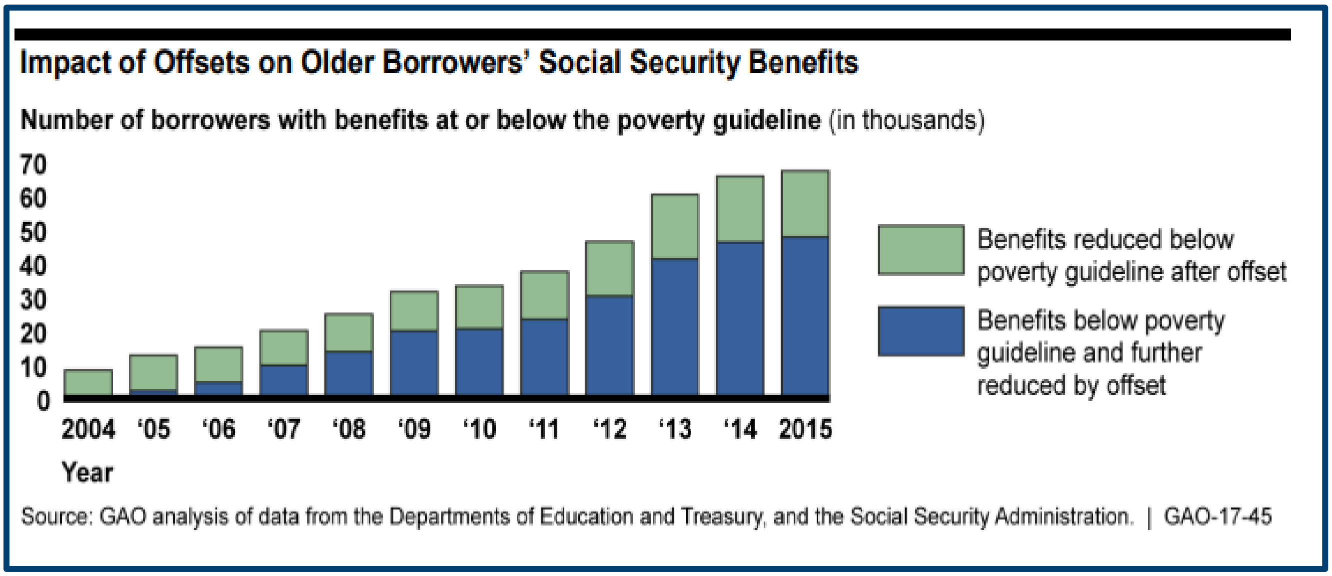
Source: GAO analysis of Federal Reserve Bank of New York Consumer Credit Panel / Equifax Data. | GAO-21-170

Note: For 2003, we broke the 50 states and the District of Columbia into five even groups—quintiles—based on the percent of outstanding student loan balance delinquent by 90 days or more for older individuals living there. Then for 2019, we compared states' percent of outstanding student

[7] *Id.* at 28.

In addition, older adults have not only taken on debt to pay for their own educations, but also have taken on debt to help children pay for their higher education. AARP reports that "[a]bout 25 percent of borrowers aged 50 or older make loan payments on private student loans because the student failed to do so."[8] Similarly, in 2020, an estimated 3.6 million parents have taken out $96 billion in federal PLUS loans offered to parents to help pay for their children's schooling, although these loans are subject to very different repayment options.[9]

Figure 2: The government's own data show that benefit offsets push seniors into or further into poverty[10]



This increase in student loan debt and default is particularly concerning because Social Security benefits, the income on which many low-income and older adults of color rely for basic living expenses, can be attached or garnished by the federal government to pay delinquent loans through the Department of the Treasury Offset

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[8] John Waggoner, *Student Loan Debt Is an Unheralded Burden for Older Borrowers*, AARP (Oct. 30, 2021), https://www.aarp.org/money/credit-loans-debt/info-2021/student-debt-crisis-for-older-americans.html.

[9] Carla Fletcher, Jess Webster and Wenhua Di, *PLUS Borrowing in Texas: Repayment Expectations, Experience, and Hindsight by Minority-Serving Institution Status*, TRELLIS COMPANY (Jan. 2020), https://www.trelliscompany.org/wp-content/uploads/2020/01/parent-plus-borrowing-study.pdf.

[10] GAO, *Social Security Offsets*, *supra* note 2.

Program (TOP).[11] This garnishment of Social Security benefits has been a growing problem as the student loan debt burden on older adults has grown. In 2015, the GAO found that almost 40 percent of borrowers over the age of 65 were in default, compared to 29 percent of those aged 50 to 64 and 17 percent of those under age 50.[12] Indeed the Consumer Financial Protection Bureau found in 2017 that "[t]he number of borrowers age 65 and older who had their Social Security benefits offset to repay a federal student loan increased almost five fold from about 8,700 to 40,000 borrowers from 2005 to 2015."[13]

These garnishments can leave older adults with only $750 dollars a month to live on, an amount that has not been adjusted since 1996. That amount is substantially lower now than even the poverty cash benefit, the Supplemental Security Income (SSI) program, that the Social Security Administration (SSA) pays out to seniors and people with disabilities who have low or no other income and few assets. SSI has a maximum federal benefit rate of $841 a month in 2022, and is exempted from collection for federal student loan debt by statute. The current garnishment system is forcing older adults with student loan debt who rely on Social Security benefits to meet their basic needs into poverty, at 66 percent of the federal poverty line, a level that itself leaves people in deep poverty. Perhaps unsurprisingly, the GAO found in 2016 that the offset of Social Security benefits due to defaulted student loans had pushed more than 70,000 seniors into or further into poverty from 2001 to 2015.

In 2015, GAO found that almost 40 percent of borrowers over the age of 65 were in default, compared to 29 percent of those age 50 to 64 and 17 percent of those under age 50.

While data is not available on the number of current Social Security beneficiaries having their benefits garnished, the increase in defaulted loans held by older individuals suggests that the number has continued to increase.

[11] *Student Loan Debt Can Sink Your Retirement Plan*, AARP (Sept. 18, 2018), https://www.aarp.org/money/credit-loans-debt/info-2018/student-loans-garnish-ss.html.

[12] GAO, *Social Security Offsets*, *supra* note 2, at 10.

[13] *Snapshot of Older Consumers and Student Loan Debt*, CONSUMER FINANCIAL PROTECTION BUREAU 12-13 (Jan. 2017), https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf.

While the collection of these debts has been suspended during the pandemic,[14] as collection of these debts restarts, student loan debt will once again steal away the limited financial security that many older adults have.

Recommendations

The current problems with the TPD, Income-Driven Repayment (IDR), and Public Service Loan Forgiveness (PSLF) plans, thoroughly discussed during the recent round of negotiated rulemaking on these issues, mean that many of these borrowers may be eligible for forgiveness, but have been unable to complete burdensome paperwork requirements, been steered into default, or otherwise been unable to navigate forgiveness or discharge options to which they are eligible. Yet the present impoverishment of vulnerable older borrowers does not have to persist. Many of these borrowers have work limitations and disabilities—the exact reason for the TPD program—and may be eligible for TPD discharge like younger adults with disabilities. But the current structure of the TPD program and even the changes that ED has proposed in rulemaking will not help many of these borrowers.

As such, we have several recommendations to Congress and the Administration to improve the situation of older adult borrowers through revisions to TPD, particularly those in default who may be having their Social Security and other federal government benefits garnished.

Recommendations for Congress

One of the fastest ways to address this crisis is for Congress to pass the Protection of Social Security Benefits Restoration Act (S. 3177/H.R.5866). The legislation is led by Chairman Wyden of the Senate Finance Committee and Rep. Grijalva, with the support of Chairman Larson of the House Ways and Means Social Security Subcommittee, and would eliminate TOP for Social Security benefits.[15] This legislation would allow older adults to keep all of their earned Social Security benefits, even if they had defaulted student loans. This change would

[14] Bulletin, Justice Management Division, U.S. Dep't of Justice, COVID-19 Bulletin Update (May 5, 2022), https://www.justice.gov/jmd/page/file/1288251/download.

[15] Protection of Social Security Benefits Restoration Act, S. 3177, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/senate-bill/3177. The legislation also addresses offsets to Railroad Retirement benefits, a similar program to Social Security.

ensure that older adults have their full benefits to live on and are not consigned to having benefits reduced to as little as $750 per month and being thrown into poverty, as can happen under current law.

This change is particularly important because Social Security benefits provide "the majority of income to most older adults."[16] Research from SSA and studies of Census Bureau data make it clear that low-income older adults often rely almost exclusively on Social Security benefits to pay all of their bills.[17] These benefits include retirement benefits based on their own history of low-wage work, spousal benefits based on the work history of a current or former spouse, and survivor benefits based on the work history of a deceased spouse. Allowing these crucial benefits to be garnished reduces the financial security of older adults trying to live on a fixed income, and defeats the stated purpose of our largest safety net programs for older adults.

Congress could also develop legislation allowing older adults with student loan debt to discharge that debt. The legislation could mirror the TPD program, focused on older adult borrowers who rely on Social Security benefits. We urge members of Congress to take the lessons learned from current discharge programs and automate this potential process to the greatest extent possible.[18] As explained below, if the process is not automated, experience has shown that many of those who are eligible for a discharge don't get the relief they are entitled to. Tying relief to existing programs that support low-income individuals, such as the Supplemental Nutrition Assistance Program, Medicaid, and Medicare Part D Low Income Subsidy (LIS) program would allow for automation via data matching while providing relief to those most in need.

There is also legislation under consideration that would expand the circumstance in which borrowers could discharge their debt in bankruptcy that could be enacted.[19] Navigating the bankruptcy system for some

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[16] *Policy Basics: Top Ten Facts About Social Security*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 4, 2022), https://www.cbpp.org/research/social-security/top-ten-facts-about-social-security [hereinafter CBPP, *Policy Basics*].

[17] *Id.*

[18] Bethany Lilly and Persis Yu, *Targeted Loan Relief Doesn't Work*, INSIDE HIGHER ED (June 9, 2022), https://www.insidehighered.com/views/2022/06/09/targeted-loan-relief-programs-dont-work-opinion.

[19] FRESH START Through Bankruptcy Act, S. 2598, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2598/text (expanding bankruptcy for public borrowers); Private Student Loan Bankruptcy Fairness Act of 2019, H.R. 4907, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/house-bill/4907 (expanding bankruptcy for private borrowers).

borrowers would be challenging, but an expansion here would provide another pathway for older adults struggling with student loan debt to discharge that debt.

Congress should also specifically address the challenges facing older adults who borrowed on behalf of children or grandchildren and pass legislation that allows for Parent PLUS loan borrowers access to the same repayment plans and relief options, such as PSLF, as non-Parent PLUS loan borrowers.

Recommendations for Congress

ED and other federal agencies can immediately take other steps to provide relief to these borrowers.

It is important that any executive actions are informed by lessons learned from the existing student loan discharge programs over the past several years. Unfortunately, as our experience with TPD shows, programs that rely on individuals applying for relief to either consolidate and place their loans in specific IDR plans, or to apply for discharge options, often fail to fulfill their promise for millions of eligible borrowers, particularly those who are lowest income and the disproportionate number of people of color who are low-income. Automatic relief, relying on existing governmental administrative data, is the most effective and easiest way to reach these populations, including low-income older adults who rely almost exclusively on Social Security benefits. Income-targeted relief that is not automatic, but that requires an application or regular income verification will exclude the people who need relief the most.[20]

With that lesson in mind, recommendations for administrative relief for older borrowers include the following:

Automatically placing defaulted borrowers into IDR plans

ED should automatically place all individuals with student loans in default into IDR plans based on available data from the U.S. Treasury Department (Treasury) . This change would ensure that the lowest income borrowers, those who are living near or below the poverty level, would have $0 monthly payments and would no longer be subject to garnishment. The data sharing authorities authorized in the FUTURE Act would be relevant here, given

[20] Lilly, *supra* note 18.

that they were specifically focused on improving the administration of IDR Plans.[21] These individuals should also be automatically re-enrolled unless there is evidence that their income has changed.

Addressing the harms of TOP

One major challenge facing borrowers is that Treasury currently has no publicly available policy on how the agency determines who should not be garnished. 31 U.S. Code § 3711(3) specifically grants the heads of agencies the authority to "suspend or end collection action on a claim . . . when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount on the claim . . . ." Treasury should develop clear, publicly available guidance about how they make these determinations and should solicit public input about the data available to them and how it could automatically limit the application of the TOP program to low-income older adults.

There are several specific populations that Treasury should consider. As mentioned above, low-income older adults rely on Social Security benefits for the overwhelming majority of their incomes.[22] At a minimum, Treasury should work with ED and SSA to exclude any individual who should be eligible for a $0 payment under the current Income-Driven Repayment Plans from the application of TOP. If they were not in default, these individuals would not be required to pay on their loans—it has been determined that they in fact cannot—and the actions of Treasury and the other agencies should reflect that. Such a change would also recognize that the reduction of Social Security benefits could gravely harm the ability of low-income beneficiaries to afford necessities such as rent and groceries.

This exclusion could also be provided to subpopulations that demonstrated other eligibility or financial need, such as those older adults eligible for the Medicare Part D Low Income Subsidy (LIS) program (data that is already available to SSA) or other Medicare programs for low-income beneficiaries. SSA could also provide data on individuals who were receiving Social Security disability benefits before they transitioned to retirement benefits. Those individuals have met the Social Security disability standard required by the TPD statute, and given that SSA does not conduct continuing disability reviews of certain older adults, there is a clear statutory

[21] *Fact Sheet: Data Sharing for a Better Customer Experience*, FEDERAL STUDENT AID (Sept. 22, 2020), https://studentaid.gov/sites/default/files/future-act-fact-sheet.pdf.

[22] CBPP, *Policy Basics*, *supra* note 16.

argument that these individuals would also meet the statutory time requirement of five years for TPD discharges. These borrowers should be entitled to relief under TPD and thus Treasury should not be offsetting their benefits.

One challenge with this approach is that PLUS loans are not eligible for IDR plans without prior consolidation. This leaves some of those borrowers without relief. ED should attempt to address the needs of these borrowers, likely a disproportionate number of whom are older adults.

Outreach to beneficiaries about student loan relief options

ED, SSA, and Treasury should also be conducting outreach to all Social Security beneficiaries, particularly those individuals with student loan debt in default. It is likely that many of these individuals are not aware that they might be eligible for some form of discharge program or able to enroll in IDR plans. Notices that explain, in plain language, what the TPD program is, eligibility for the program, and instructions for applying are absolutely crucial. This outreach should be proactive and embedded in all existing contacts that each agency has with beneficiaries with student loan debt.

For example, the required TOP notices to individuals should clearly explain that there are discharge options and how beneficiaries might get out of default and into an IDR plan. SSA and the Veterans Administration should work with ED to identify all beneficiaries with student loan debt and actively reach out to them, beginning with the population currently in default on their loans who are at most risk of garnishment.

It is important to note that this population may be more difficult to reach. They may have frequent changes in address due to housing instability and English may not be their first language. Resources in other languages, accessibility, and plain language will be essential if this outreach is to be successful. As mentioned above, these difficulties are why automation of the system is so important. Another method of reaching older populations might be a specialized group of ED student loan ombuds who can conduct outreach to this and other at-risk populations—ED, SSA, other agencies, and Treasury could jointly request sufficient appropriations for this program.

Conclusion

Older adults face increasing student loan debt and rates of default. Congress and the Biden Administration can help particularly at-risk older adult student loan borrowers in a variety of ways and should act immediately. With the student loan payment pause about to expire and Treasury garnishment set to resume at any moment, Congress and the Administration must take action now to protect low-income older adults.

ILLOGICAL COLLECTIONS: HOW THE DEPARTMENT OF EDUCATION'S INVOLUNTARY COLLECTION EFFORTS UNDERMINE THE HIGHER EDUCATION ACT

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Introduction

On November 8, 1965, President Lyndon B. Johnson signed the Higher Education Act (HEA) in front of a crowd of students and dignitaries at Southwest Texas State College. Boasting about the legislation, he proclaimed: it "will swing open a door for the young people of America . . . the most important door that will ever open—the door to education."[1] He continued, "It means that a high school senior anywhere . . . can apply to any college or university . . . and not be turned away because his family is poor."[2] And, he applauded Congress for doing "more to uplift education, more to attack disease in this country and around the world, and more to conquer poverty than any other session in all American history."[3]

The government is now actively undermining the HEA's purpose by keeping students in poverty and amplifying racial disparities.

President Johnson and the framers of the HEA would not recognize today's student loan system. Their goal was to provide a pathway to the middle class and create a more equitable education system. Instead, after decades of modifying the federal student loan program, the government is now actively undermining the HEA's purpose by keeping students in poverty and amplifying racial disparities. This perverse result is most pronounced when the Department of Education (ED) engages in involuntary collections to collect on defaulted student loan debt.[4]

To see how ED's involuntary collection efforts undermine the HEA, consider a hypothetical student loan borrower: Sally. She is Black, a single mother, and a first-generation student whose family lives just above the federal poverty line. Growing up, the government repeatedly told her that higher education was her path to the middle class. With this message in mind, and after seeing ads guaranteeing her a high-paying job, Sally enrolled

[1] Lyndon B. Johnson, *Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965* (Nov. 8, 1965) available at: https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965.

[2] *Id.*

[3] *Id.*

[4] A borrower defaults on their loan when they fail to make payment on the loan for 270 consecutive days. As detailed below, ED has extensive authority to collect on borrowers in default. This includes garnishing a borrower's wages and social security benefits. It also includes offsetting a borrower's tax refunds, including those provided by the EITC and Child Tax Credit (CTC).

at a for-profit school. She borrowed $50,000 in federal student loans to attend and reasonably believed that this was a sound investment.[5] The federal government, she reasoned, would not offer loans for a subpar education.

Unlike many of her classmates, Sally finished the program and got her degree. But she could not get a job in her field of study and eventually removed the school's name from her resume based on potential employers' feedback. From there, Sally started a minimum wage job, and it was impossible for her to pay hundreds of dollars each month towards student loans. Seeking some help, she went to her loan servicer (the face of the federal student loan program to borrowers) and learned that she could place her loans in forbearance. Although this offered temporary relief, her servicer never informed her that interest would accrue, or that she was eligible for a $0 monthly payment through an income-driven repayment program.[6]

The years passed and Sally's servicer suddenly refused to apply forbearances to her account. Her debt had ballooned to more than $75,000. But Sally had more urgent living expenses that ate up her income and so she could not make payments. After 270 days, her loans went into default. She then went to file her taxes and desperately needed the Earned Income Tax Credit (EITC) to secure a new place to live and get back on her feet. She learned that the government had other plans; it unexpectedly seized this EITC lifeline to pay a small portion of her outstanding student loan debt.

Sally's story is similar to those of millions of students. After failing to provide appropriate oversight of schools, contracting with loan servicers that provide inadequate and incomplete information, and touting federal student loans as the gateway out of poverty, the government punishes students who are doing everything "right" through garnishment of their wages or benefits. These borrowers are simply following the government's directions in pursuit of a better financial future.

Said differently, ED is actively keeping many student loan borrowers in poverty by depriving them of their wages and antipoverty supports (such as the EITC and Social Security benefits) solely to pay back loans that were supposed to help those same individuals advance to the middle class. This illogical conduct—which has cascading implications that drive borrowers further into cycles of poverty—is most significant for older

[5] Sally also received a Pell grant, but this was far from sufficient to cover her cost of tuition.

[6] Nor did the servicer tell her that her time spent in an IDR plan—but not in forbearance—could eventually lead to loan forgiveness. Though, even if it had informed Sally of this option, ED has—until recently—largely failed to forgive borrowers' loans through the IDR program.

borrowers, borrowers of color, and those who attended for-profit schools.[7] In this way, and as explored in detail below, ED's current collection system is undermining the HEA's antipoverty goal and widening the already vast racial wealth gap.

The HEA was designed to offer students a pathway out of poverty

The Great Society

The HEA can be understood only in the context of President Johnson's broader legislative agenda. In 1964 and 1965, Johnson embarked in creating a "Great Society" that had two overlapping goals: "to create racial justice and eliminate poverty."[8] He explained his conception of justice as follows: "freedom is not enough. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."[9] This vision anchored his work and drove reform on issues including voting rights, employment, health care, housing, and education.

One of the most important pieces of legislation in the Great Society program, and a key foundation for the others, was the Civil Rights Act of 1964. That law ended *de jure* segregation and barred discrimination by private enterprises in various settings, including in accommodations and employment.[10] Notably, Title VI of that law applies in the context of public education, stating: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[11]

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[7] *Infra* pp. 76-78.

[8] Joseph A. Califano Jr., *What was Really Great About the Great Society*, WASHINGTON MONTHLY (Oct. 1, 1999), https://washingtonmonthly.com/1999/10/01/what-was-really-great-about-the-great-society.

[9] *Id.*

[10] *See generally* 78 Stat. 241 (July 2, 1964).

[11] *See generally* 42 U.S.C. § 2000d *et seq.*

Building on this non-discrimination requirement, and trying to create a more equitable education system, President Johnson focused first on primary and secondary schools. He designed a "far-reaching bill" to help "local school districts meet the special educational needs of educationally deprived children," which included "children who are unable to take full advantage of the educational system because of . . . poverty."[12] Among other things, the law increased funding for schools with high proportions of low-income students.[13]

The Higher Education Act

The President then turned to higher education. Here, too, he focused on providing a pathway out of poverty. In 1964, President Johnson "created a task force . . . to study the role of the federal government in student aid."[14] That task force "believed that the ability to pay for higher education should not be the controlling factor for educational attainment."[15] It ultimately adopted various recommendations that would form the structure of the HEA, including "grants . . . expansion of work-study programs . . . [and] more extensive use of loans and loan guarantees . . . ."[16]

Based on these recommendations, Congress went to work. The bill was tethered to the President's broader civil rights agenda and the law made its way "through Congress with the help of civil-rights activists whose cause he saw as intertwined with education reform."[17] Proponents of the bill also underscored the antipoverty purpose of the law. Senator Prouty from Vermont made clear that "[t]oday, higher education is becoming essential in helping individuals and societies realize even their most fundamental aspirations."[18] Similarly, Representative Stafford of Vermont, on the eve of passage, said: "Now we are on the doorstep to final approval of a measure

[12] Winston J. Prouty, *Report to Vermont* (April 26, 1965).

[13] *See* TG Research and Analytical Services, *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later* (Nov. 2005) at p.13.

[14] *Id.* at p.17.

[15] *Id.* at pp. 17-18.

[16] *Id.* at pp. 17-18.

[17] Julian E. Zelizer, *How Education Policy Went Astray,* THE ATLANTIC (Apr. 10, 2015), https://www.theatlantic.com/education/archive/2015/04/how-education-policy-went-astray/390210/.

[18] William J. Prouty, *Statement on the Higher Education Act of 1965* (Mar. 16, 1965).

providing aid to higher education . . . As passed by the House, the Higher Education legislation will establish the first program of direct scholarship to college students and it will greatly increase and liberalize the loans which are available for such students."[19]

President Johnson signed the bill into law on November 8, 1965. As noted above, he also explicitly noted the antipoverty purpose of the law, saying the bill showed how Congress was doing "more to uplift education, more to attack disease in this country and around the world, and more to conquer poverty than any other session in all American history."[20]

The Student Loan Program within the HEA

The HEA included the country's first broadly accessible student loan program; a component that was essential to the law's antipoverty mission.[21] As part of the plan, private lenders would loan money and the federal government would protect the lender in the event of a borrower default. While the law provided some scholarships to low-income students, the guaranteed loan program was the main initiative to ensure all students had access to education regardless of their wealth. Over the years, the government itself issued loans and now holds the bulk of federal student loan debt.[22]

* * *

The framers of the HEA sought to provide low-income individuals with an opportunity to access higher education; they believed the student loan program was a critical piece of that vision. They also believed that access to higher education would facilitate upward socioeconomic mobility. And, building on the work of the Civil

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[19] Robert Stafford, *September Radio Script* (Sept. 16, 1965).

[20] *Supra* note 3.

[21] *Supra* note 11. The path to student loans was not inevitable. President Johnson initially wanted to prioritize scholarships. Eventually, though, the government made the intentional choice that "students [were] obligated to pay a substantial share of the cost of their education, rather than having government cover it entirely." *See* Josh Mitchell, *The Debt Trap: How Student Loans Became a National Catastrophe* at pp. 20-28.

[22] *Id.* Congress has consistently reauthorized the student loan provisions in Title IV of the HEA. The short version of this history: Congress has expanded the loan program and shifted away from a guaranteed program into one in which the government holds the loans themselves. As of June 30, 2010, all new federal student loans are directly held by the government.

Rights Act of 1964, they believed that this increased access would create a more equitable society.

The Current Collections System is Actively Undermining the HEA

ED has lost sight of the original goals for the HEA. As Dr. Tressie McMillan Cottom explains: "federal aid assistance for students indeed, had a clear goal: to give the poor an equal shot at college."[23] Over the years, that has shifted and "the program's antipoverty focus has been replaced with a fuzzy affordability mission. More middle-class families are using programs designed as an antipoverty solution, and poorer students are getting short shrift."[24] This failure is particularly acute in the context of ED's involuntary collection system for defaulted borrowers.

By stripping people of their wages, tax refunds, and antipoverty supports (including the Earned Income Tax Credit, Child Tax Credit, and Social Security benefits), the government is keeping the intended beneficiaries of the HEA in poverty.

In this context, ED's actions undermine the goals of the HEA.[25] By stripping people of their wages, tax refunds, and antipoverty supports (including the EITC, Child Tax Credit (CTC), and Social Security benefits), the government is keeping the intended beneficiaries of the HEA in poverty. To see why, it is critical to understand borrowers who default on their loans. Low-income borrowers are most likely to default because they are unable to afford monthly loan payments in addition to basic necessities. Black borrowers, because of underlying systemic problems, are more likely to default than white student loan borrowers and are more likely to have been preyed upon by a predatory for-profit school. The

[23] *See* Tressie McMillan Cottom, *A Middle-Cass Anti-Poverty Solution*, Slate (Nov. 20, 2013), https://slate.com/human-interest/2013/11/fafsa-federal-student-aid-benefits-go-to-the-middle-class-not-the-poor.html.

[24] *Id.*

[25] ED is not the only one to blame. Since the initial passage of the Higher Education Act, Congress has also curtailed many protections for borrowers in default. For example, in 1991, Congress eliminated the statute of limitations on the collection of federal student loans, thus allowing ED to pursue this debt indefinitely. *See* Public Law 102-26 (Apr. 9, 1991). Similarly, the Debt Collection Improvement Act has provided the government with significant flexibility and authority to collect on federal debt. *See generally* Public Law 104-134 (Apr. 26, 1996).

populations who experience ED's punitive debt collection system are those who need the critical resources the most.

Who is in Default?

There are currently 7.5 million people—or nearly a quarter of all student loan borrowers—in default.[26] The number of defaults has been increasing in recent years; it rose nearly 50 percent between 2016 and 2020.[27] These borrowers are precisely the ones whom the HEA was supposed to benefit. They share several characteristics.[28]

First, the bulk of defaulted borrowers were low-income when they entered school and low-income at the time of default. They face various financial challenges, such as a "drop in income, health issues, or other further debt," and are often "living paycheck to paycheck."[29] Notably, "borrowers who default within 12 years of starting college entered school with incomes below 200 percent of the federal poverty level for their family size,"[30] and approximately 65 percent of defaulted borrowers earn income below the federal poverty line.[31] Research has also revealed that it is "common" for them to be "receiving some form of public assistance."[32]

[26] *See* FSA, *Federal Student Aid Posts Quarterly Portfolio Reports to FSA Data Center* (July 13, 2022), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-07-13/federal-student-aid-posts-quarterly-portfolio-reports-fsa-data-center. ED has announced a "fresh start" for these borrowers and so this number will refresh after ED effectuates that policy.

[27] *See* Peter G. Peterson Foundation, *10 Key Facts About Student Debt in the United States,* (May 5, 2021), https://www.pgpf.org/blog/2021/05/10-key-facts-about-student-debt-in-the-united-states.

[28] Perhaps counter intuitively, some research suggests that the amount a student borrows is not necessarily correlated with their risk of default. *See* The Institute for College Access & Success, *Casualties of College Debt, What Data Show and Experts Say About Who Defaults and Why* (June 2019).

[29] *Supra* note 22, 23.

[30] *Supra* note 23*.*

[31] *Supra* note 22 & 23.

[32] *Id.*

Second, due to systemic racism, including the racial wage gap and generational poverty, defaulted borrowers are predominantly black and Hispanic or Latino borrowers.[33] Approximately 29 to 33 percent of Black borrowers have defaulted on their student loan debt.[34] In contrast, only 12 percent of white borrowers have defaulted.[35] Some research has also indicated that "as many as 70 percent of Black borrowers may eventually default" on their debt.[36]

Third, defaulted borrowers disproportionately attended for-profit schools. For example, 34 percent of students who started at a for-profit school in the 2011-2012 school year had defaulted on their debt as of 2021.[37] Those students are also, on average, likely to have about $15,000 more in debt to begin with compared to students who attended public or private non-profit schools.[38] Notably for-profit schools intentionally target individuals from low-income backgrounds, Black and brown communities, veterans, and women.[39]

Fourth, defaulted borrowers are less likely to have completed their programs (and thus lack a credential to help them advance in the workforce and earn a higher income). Nearly 49 percent of "defaulted borrowers never complete their program."[40] Those who are least likely to complete, in turn, are those "fac[ing] the most barriers to success" on the front end; "43 percent of low-income students receiving a Pell Grant earn a certificate or degree within five years, compared to 57 percent of their higher-income peers."[41]

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[33] *See* Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, Center for American Progress (Dec. 2, 2019), https://www.americanprogress.org/article/continued-student-loan-crisis-black-borrowers/.

[34] *Id.; supra* note 22 & 23.

[35] *Supra* note 22 & 23.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See, e.g.,* Genevieve Bonadies, Joshua Rovenger, Eileen Connor, Brenda Shum, & Toby Merrill, *For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather than Educate,* Harvard Law Review Blog (July 30, 2018), https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/.

[40] *Supra* note 23.

[41] *Id.*

Finally, an increasing number of defaulted borrowers are aged 60 and older. "Nearly 40 percent of federal student loan borrowers aged 65 and older are in default and are vulnerable to the government's extraordinary collection power."[42] These older borrowers are typically low-income, and many of these borrowers rely on Social Security for more than 90 percent of their earnings.[43] This is disproportionately true for Latino, Black, and Asian American borrowers.[44]

In sum, although the HEA was intended to help low-income borrowers, and though the HEA was a key piece of President Johnson's broader civil rights agenda, it is low-income, borrowers of color who are, because of overlapping systems of oppression, most likely to default on their loans and become subject to the government's involuntary collection authority.

The government's involuntary collection powers

For non-student loan debt, such as credit card debt, a lender generally must go to court before they can coercively collect from a borrower who defaults. The borrower has an opportunity to defend themself, to try to reach a settlement with the creditor, or to financially prepare themself for a judgment. Particularly low-income consumers may also be "judgment proof" and have their assets protected from any collection effort following a judgment.[45]

No such safeguards exist in the context of defaulted federal student loans. Instead, the federal government wields extensive powers to collect on defaulted borrowers without first taking the matter to court or providing the borrower with a meaningful opportunity to challenge the collection.[46]

[42] Persis Yu, *Pushed into Poverty How Student Loan Collections Threaten the Financial Security of Older Americans* (May 2017).

[43] *Id.*

[44] *Id.*

[45] A borrower in this situation may also be able to seek recourse through bankruptcy. In contrast, it is exceptionally difficult to discharge student loans through bankruptcy and so student loan borrowers are denied this other avenue of relief.

[46] *See generally* Deanne Loonin, *Illusory Due Process: The Broken Student Loan Hearing System* 11 U.C. Irvine L. Rev. 173 (2020).

Among other penalties for defaulting,[47] the government can garnish 15 percent of a borrower's wages and offset their yearly tax refund.[48] This authority extends to seizing 15 percent of a borrower's Social Security disability or retirement benefits (programs designed to keep older Americans out of poverty).[49] ED's authority also includes seizing money that should have gone to the borrower through the EITC and CTC programs, both of which were designed to lift families out of poverty.[50]

The direct financial results of debt collection are unsurprising yet staggering

If an individual is in default, they are likely on the brink of poverty, if not experiencing poverty already. Any loss of income or benefits necessarily imperils these borrowers. This is particularly true for borrowers and families reliant on the EITC or CTC where the EITC, alone, can lift a family out of poverty.[51] One student loan borrower said: "Having them take my tax refund last year has thrown me into the red every single month since then because that was my catch-up fund. That was my money that was actually going to pay my landlady and enable me to get ahead a tiny bit. I have nothing in retirement, and probably never will. This system perpetuates itself."[52]

[47] In addition to ED's collection efforts, there are consequences that ED imposes on borrowers who default. For example, the borrowers lose eligibility for federal student aid and Pell grants. They are also ineligible to enroll in an income driven repayment program (denying them the chance to pay an affordable amount or $0 on their loans and to work towards eventual loan forgiveness). And, as with other defaulted debt, the borrower takes a hit to their credit.

[48] *See generally* Abigail Johnson Hess, *Here's what happens – and what to do – if you can't pay your federal student loans,* CNBC (May 31, 2021), https://www.cnbc.com/2021/05/31/what-happens-when-you-do-not-pay-your-federal-student-loans.html.

[49] *Id.*

[50] *See* Center on Budget and Policy Priorities, *Policy Basics: The Earned Income Tax Credit* (Updated Dec. 10, 2019), https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit; Elizabeth Warren, Cory Booker, Ayanna Pressley, et al, Letter to Secretary Miguel Cardona (July 14, 2021) (discussing authorities for collections and impact of EITC seizure).

[51] *Supra* note 42*; see also* Persis Yu, *Voices of Despair: How Seizing the EITC is Leaving Student Loan Borrowers Homeless and Hopeless During a Pandemic* (July 2020) available at https://www.nclc.org/images/pdf/student_loans/voices-of-despair-seizing-eitc-in-pandemic.pdf.

[52] *Supra* note 26. To effectuate this authority, the Department has created an extensive collections infrastructure. However, the system is so convoluted that, even in the face of a Congressional command or Court order requiring the Department to halt involuntary collections, ED has been unable to do so. *See, e.g., Barber v.* DeVos, No. 20-cv-01137 Am. Compl., ECF No. 9 (May 7,

The harms from this financial shock cascade. The unexpected collection pushes these borrowers—and, in some instances, their family members—further into a cycle of poverty. Borrowers of color are more likely to experience default and involuntary debt collection, which deepens the racial wealth gap.[53] As detailed below, a *single* instance of involuntary collection can leave a borrower unable to pay for necessities, compound their financial woes and debt, prevent them from securing or maintaining affordable and safe housing, threaten their employment, harm family members, and cause medical problems and additional medical debt. A brief survey of these harms is necessary to comprehend the full scope of the government's damage.

Necessities

One of the obvious ways that involuntary collection harms borrowers is that it deprives them of money needed to pay for other necessities. Borrowers have reported that they needed the seized money to "make ends meet" and that they lack extra income to replace the lost earnings.[54] They are forced to sacrifice a necessity. For some, it means skipping meals. For others, it means going without utilities for weeks on end.[55] Simply put: the government's seizure of money literally takes food and other necessities off these borrowers' tables.

Compounding debt

Many borrowers who default on their loans are also delinquent or in default on other bills. The government's involuntary collection prevents them from paying other debts (which, in turn, can cause those debts to increase, go into collections, or yield a lawsuit). As one borrower said, they were "expecting to use the money to catch up on bills I was behind on,"[56] but could not do so.[57] This also deprives borrowers of the autonomy to financially plan for their future and to structure their financial lives (including by determining which debts make the most sense

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2020) (failure to stop collections following CARES Act prohibition); *Calvillo Manriquez v. DeVos*, 18-cv-07210 Order Re: Sanctions, ECF No. 130 (Oct. 24, 2019) (contempt finding for failure to stop collections following preliminary injunction).

[53] *Supra* pp. 76-78.

[54] *See Sweet v. Cardona,* No. 19-cv-03674, Pls' Mot for Class Certification (N.D. Cal.), Ex. B, Part 3, p. 503 & Ex, C, Part 2, p. 494; *see also* Yu, *Voices of Despair 2020* at p. 6-7.

[55] *See Calvillo Manriquez v.* DeVos, No. 17-cv-07210, Br. of Amicus Debt Collective, EC NO. 45 (N.D. Cal. April 16, 2018).

[56] *Sweet*, Mot. for Class Cert at Ex. B, Part 1, p. 13.

[57] *See also id.* at Ex. B, Part 1, p. 371.

to pay off the quickest). It fosters an endless cycle of debt that can make it impossible for the borrower to escape poverty.

Housing

ED's involuntary collection efforts can jeopardize a borrower's secure and affordable housing. For many, ED seizes money designated for a security deposit,[58] for monthly rent,[59] or for savings to eventually afford their own apartment.[60] ED's involuntary collection also prevents borrowers from building wealth through home ownership, as it seizes money that could be used for a down payment,[61] or to afford a monthly mortgage payment.[62] For those who lose their housing, the loss yields a range of other financial consequences (such as losing possessions, having to start from scratch, and making it more difficult to find a new place to live).[63] It also widens the gap between classes of individuals able to accumulate wealth through home ownership.

Employment

Even where borrowers have employment, the involuntary seizure can impact their ability to maintain their job. Notwithstanding legal protections that may exist, borrowers have reported job loss as a direct result of a student loan wage garnishment.[64] In other words, to collect on loans designed to help individuals get well-paying jobs, the government may leave the borrower unemployed.[65] This, too, then leads to additional unplanned costs and instability.

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[58] *Id. at* Ex. B, Part 3, p. 20.

[59] *Id.* at Ex B Part 3 p. 104; *see also* Yu, *Voices of Despair 2020* at p. 8.

[60] *Id.* at Ex B, Part 2, p. 127.

[61] *Id.* at Ex. B, Part 3, p.111.

[62] *Id.* at Ex. C, Part 2, p. 214.

[63] *See generally* Matthew Desmond, *Evicted.*

[64] *Supra* note 52 at Ex B, Part 1, p. 235; Ex. B, Part 3, p. 615.

[65] The government's collection efforts are also likely to threaten an individual's ability to pay their car note (resulting in repossession) or fix any problems with their car. Both issues can prevent someone from getting to work. *See* Yu, *Voices of*

Impacts on others

The harm is not just limited to the borrower. An involuntary collection can prevent a person from securing childcare and affording necessities for their children. Seizure of the EITC may disproportionately impact children because the program "is designed to provide significantly more support to families with children."[66] The ripple can also impact other family and community members. As one borrower explained, they "have family that needs my help and it hurts deeply not being able to help them because I can't as I have no disposable income at all."[67] High-income people of color already disproportionately pass their wealth to other members of their age group or to older family members, while their white counterparts typically pass their wealth to younger generations.[68] ED's involuntary collection efforts thus harm those other family members and exacerbate this racial generational wealth gap.

Medical impact and anxiety

The government's collection efforts can also manifest in physical and mental health problems. Doctors have informed borrowers that the collections were "affecting [their] health" because of the "constant[]" stress about the possible collections.[69] Others have documented high blood pressure as a result of the collections.[70] In turn, a

Despair at p. 7. Moreover, the default itself may endanger the individual's ability to pass a background check or get a security clearance (thus eliminating categories of jobs that they can obtain).

[66] Persis Yu, *Voices of Despair: Student Borrowers Trapped in Poverty When the Government Seizes Their Earned Income Tax Credit* (March 2018).

[67] *Supra* note 52 at Ex B, Part 3, p. 503

[68] *See generally* Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambaugh, *Examining the Black-white Wealth Gap,* Brooks Institute (Feb. 27, 2020) available at https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/.

[69] *Supra* note 52 at Ex B, Part 1, p. 335.

[70] *Id.* at Ex C, Part 2, p. 482.

borrower may have increasing medical bills that they cannot pay because of the collection. This yields "high debt with medical bills" and continued "medical difficulties."[71]

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These are only a sample of the harms that borrowers experience. If the purpose of the HEA is to move people out of poverty and create a more equitable society, then these harms illustrate how ED's collection efforts actively undermine that purpose.

Conclusion

Despite this grim history, we *can* fulfill the HEA's promise. There are numerous intervention points to change a borrower's narrative—including fully funding public institutions, improving oversight of for-profit schools, and building a better income-driven repayment program. In some ways, though, the lowest hanging fruit lies in the involuntary collection system. It is illogical and cruel to seize wages and benefits that keep people out of poverty solely to pay back loans that were designed to keep people out of poverty. As it stands, the system is cruel and illogical; it is also contrary to the very law that it purports to serve.

[71] This, too, has further consequences. As one borrower has described, after the Department seized their tax refunds for eight consecutive years, they were unable "to pay off any" medical bills on time, yielding a court order and forcing them to "borrow in order to pay the bill immediately." *Id.* at Ex C, Part 1, p. 24.

TURN THE SHIP: THE MORAL IMPERATIVE AND LEGAL AUTHORITY TO PROTECT RETIREES WITH DEFAULTED STUDENT LOANS FROM SOCIAL SECURITY OFFSET

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Introduction

Patricia Gary is 73 and worried. Her Social Security Retirement payment has been slashed by $167 again to recover a student loan she borrowed in the 80's to attend a beauty school. Now short of cash, she must decide whether to re-fill a prescription or buy groceries.[1]

Walter Jones, a 65-year-old veteran and retired bus driver is "depressed" and "drained." His Social Security Widower check was cut to $757 for a 1987 student loan he was duped into signing, but ED won't forgive. The school, a for-profit, closed in the early 90's owing ED more than $3 million.[2]

Fermina Soto, age 72, has lost over $6,000 through Social Security offsets for a student loan she took out in 1988 to attend a trade school that went out of business in 1991. She now relies on her children and a soup kitchen to make ends meet.[3]

The plight of these elderly debtors is sadly typical. Today, at least 250,000 Social Security recipients aged 62 and older are likely to experience a 15 percent reduction of their monthly Social Security check through "Treasury Offset,"[4] a mandatory debt collection program used to recover outstanding federal debts, such as a defaulted student loan.[5] Most of these elderly Social Security Retirement recipients are low-income, people of color,

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[1] Mallike Miltra, Money Magazine, *A Pandemic Relief Program Offered Struggling Student Loan Borrowers a Lifeline. Most Never Knew About It*, (March 1, 2022), available at https://money.com/student-loan-borrowers-exit-default-pandemic/.

[2] Stacy Cowley, The New York Times, *7 million Bad Student Loans with No Way Out, for Anyone*, (May 25, 2022), available at https://www.nytimes.com/2022/05/25/business/student-loans-default-forgiveness.html.

[3] Amended Consolidated Complaint, ECF # 23, para. 275 et seq. , *Rodriguez v. DeVos*, 16-CV- 5476, (filed Sept. 20, 2017, EDNY) (Social Security disability recipients challenge pre-offset notice that fails to advise them that the Total and Permanent Disability discharge will protect them from offset.).

[4] 31 C.F.R. § 285.4e(1)(ii).

[5] 321,000 Americans ages 65 and older were in default at the end of 2015. General Accounting Office, *GAO- 17-45, Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permanent Relief*, p.10 (December 2016) (Hereinafter *GAO Offset Report*, p.10), available at https://www.gao.gov/assets/gao-17-45.pdf About 75 percent are thought to never have received Social Security *disability* benefits that might protect them from offset, leaving a vulnerable elderly population of 250,000 Social Security Retirement recipients. *GAO Offset Report*, p. 11.

disabled, victims of for-profit education, and incapable of stopping the Treasury offset.[6] Most will not receive protection from proposed regulations designed to automate the discharge process for persons who receive Social Security *disability* or from "*Fresh Start*" that will bring defaulted loans current.

But the U.S. Department of Education ("Department" or "ED") is not powerless. It both has the moral imperative[7] and legal authority to stop seizing Social Security benefits from elderly (62+) borrowers in default. An under-utilized law allows an agency to exempt an entire class of debtors from Treasury Offset, the debt collection process that leads to the reduction of Social Security payments. [8] This paper explains the history of offset; why recent policy changes by ED, including *Fresh Start*, will not protect the elderly; and why the regulatory test for exempting all retirement-aged borrowers in default from Social Security offset is easily met.

The American Safety Net Meets the Debt Collection Improvement Act

The Social Security system was created over 85 years ago to "save men and women from the rigors of the poor house,"[9] and to protect them from "the hardships of existence."[10] Disabled and elderly persons rely heavily on Social Security payments to make ends meet. Indeed, Social Security accounts for 90 percent of all income for 1 in 3 recipients over the age of 65.[11]

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[6] The Institute for College Access & Success, *Students at Greatest Risk of loan Default*(April 2018) available at https://ticas.org/files/pub_files/students_at_the_greatest_risk_of_default.pdf.

[7] For a discussion of an agency's obligation to act ethically and with integrity, *see* General Accounting Office, GAO-14-704G, *Standards for Internal Control in the Federal Government*, p.22 (September 2014) available at https://www.gao.gov/assets/gao-14-704g.pdf.

[8] 31 U.S.C. § 3716(c)(3)(B) and 31 C.F.R. § 285.12(d)(5).

[9] *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

[10] *United States v. Silk*, 331 U.S. 704, 711 (1947).

[11] *GAO Offset Report*, p. 5. *See* Liz Knueven, Business Insider, *A financial expert calls retirement planning a 'wobbly three-legged stool' — and Social Security is the only leg holding steady* (August 16, 2020) available at https://www.businessinsider.com/personal-finance/elizabeth-white-social-security-three-legged-stool-retirement-2020-8.

Monthly Social Security payments are even more important for elderly retirees who defaulted on their student loans. Their average Social Security Retirement payment is much lower than non-defaulters ($974 [12] a month as compared to $1,329[13]) because poverty, race, and predatory for-profits precluded them from capitalizing on their educations and repaying their loans.[14]

Despite their limited dollar value, Social Security benefits have enjoyed one important feature since the Depression: no one, other than a child-support creditor[15], could take them to satisfy a debt.[16] At least that was the case until 1996.

In 1996, Congress enacted the Debt Collection Improvement Act (DCIA) to ensure all federal agencies, including ED, take certain actions to recover debts in default.[17] The target of the DCIA was not ED, which had about $16

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[12] In 2015, the median offsets for borrowers in default was $142 for those aged 50 to 65 and $146 a month for those aged 65 and older. *GAO Offset Report*, p. 15. Given that no more than 15 percent of a check can be offset, the median underlying Social Security payment was $947 and $973 respectively. In 2015, the poverty line for a family of 1 was $981 a month. https://aspe.hhs.gov/2015-poverty-guidelines.

[13] Social Security Administration, *Fast Facts & Figures About Social Security, 2015*, p. 16 (September 2015) available at https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2015/fast_facts15.pdf . While more recent data on average Social Security payments is available, the last comprehensive study on offsets against Social Security recipients by the General Accounting Office used 2015 data. *Supra* note 6. Hence any comparison to that study uses 2015 data.

[14] *Supra* note 7.

[15] 42 U.S.C. § 659(h)(1)(A)(ii)(II).

[16] 42 U.S.C. § 407a. For an example of the broad nature of this protection, *see Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973) (welfare cannot take retroactive Social Security payment to recover support it provided while disability application was pending).

[17] *See* 31 U.S.C. § 3716; 31 C.F.R. § 285.5(a)(1); *see* also Exec. Order No. 13,019, 61 Fed. Reg. 51,763 (Sept. 28, 1996) ("[T]he primary purpose of the Debt Collection Improvement Act is to increase the collection of nontax debts owed to the Federal Government. . . .").

billion in defaulted loans[18] that it was collecting effectively.[19] Rather the DCIA was focused on other agencies that had neglected $36 billion in unpaid bills.[20]

Still the DCIA was and remains transformative for all agencies including ED. The DCIA's arsenal of cheap and effective collection tools are numerous and include: "administrative wage garnishment," whereby a creditor agency skips court and goes directly to the employer to garnish a debtor's wages;[21] waiver of any statute of limitations in collecting a federal debt;[22] salary offsets of federal employees including members of the armed forces and reserves;[23] and mandatory referrals to collection agencies and credit reporting agencies.[24]

An additional collection tool of the DCIA is the Treasury Offset Program, an electronic dragnet that continually searches and then takes Treasury payments due to a debtor.[25] Such payments range from the ubiquitous—tax refunds, to the obscure—travel reimbursement vouchers. Pursuant to the DCIA, federal creditors are allowed (unlike any other creditor, including a state welfare agency[26] or state prison[27]) to take Social Security—but with

[18] In 1998, the outstanding defaulted federal debt that the DCIA was enacted to address was $50 billion, of which $16 billion was ED's. *Oversight of the Implementation of the Debt Collection Improvement Act*: Hearing before the Subcomm. on Government Management, Information, and Technology of the House Comm. on Government Reform and Oversight, 105th Congress, 2nd Sess. 1 (1998); and *The Debt Collection Improvement Act of 1996: How well is it Working?* Hearing before the Subcomm. on Government Efficiency, House Comm. on Government Reform, 107th Congress, 1st Session, (2001), available at https://www.govinfo.gov/content/pkg/CHRG-107hhrg81549/htm.l/CHRG-107hhrg81549.htm.

[19] 142 Cong. Rec. 55, 267 (April 25, 1996) (Congressman Horn supported the DCIA because of "the disappointing performance of nearly every agency, *with the exception of the Department of Education,* in assessing and collecting [] [debts] . . . .") available at https://fiscal.treasury.gov/files/dms/dmhorn.txt..

[20] *The Debt Collection Improvement Act of 1996: How well is it Working?* Hearing before the Subcomm. on Government Efficiency, House Comm. on Government Reform, 107th Congress, 1st Session, (2001), available at https://www.govinfo.gov/content/pkg/CHRG-107hhrg81549/html/CHRG-107hhrg81549.htm.

[21] 31 U.S.C. § 3720D.

[22] *See Lockhart v. United States*, 546 U.S. 142 (2005).

[23] 5 U.S.C. § 5514(a)(1).

[24] 31 U.S.C. § 3711(f), and § 3718.

[25] 31 U.S.C. § 3716.

[26] *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973).

[27] *Bennett v. Arkansas*, 485 U.S. 395 (1988).

one huge caveat; the borrower has to retain $750 a month (well above the poverty line at the time in 1996)[28] to prevent the hardships that the Social Security Act was supposed to prevent—hunger, unpaid rent, eviction notices, "furniture and bedding on the sidewalk, [and] the old lady weeping over it . . . ."[29]

Recognizing that offset can cause "financial hardship" to debtors, Treasury also allows an agency, including ED, to exempt an individual debtor after reviewing their financial situation to determine if a reduction, or total exemption, from offset is warranted.[30] Finally, the DCIA and Treasury allow an entire class of debtors to be excluded from the offset program,[31] such as retirees facing Social Security offset, after three factors are considered.[32] The latter is the subject of this paper.

Student Loan Defaults: When, Who, How Many, and Remedies

Default on a federal loan occurs when a borrower fails to make a payment without permission for 270 days.[33]

By-and-large, student loan borrowers have not chosen to default on their loans. Rather, they typically cannot pay due to circumstances that are beyond their control. Almost half (48 percent) of borrowers in default went to for-profit institutions that promised easy entry into higher paying jobs but left them with large debts and few marketable skills.[34] Over two-thirds were raised in households with income under 200 percent of the poverty line,

[28] 31 U.S.C. § 3716(c)(3)(a)(ii). $645 was the poverty line for a family of one in 1996. *See* https://aspe.hhs.gov/1996-hhs-poverty-guidelines.

[29] Frances Perkins, Sec. of Labor, Address at U.S. Social Security Admin. Headquarters, Baltimore, MD: The Roots of Social Security (Oct. 23, 1962), available at http://www.ssa.gov/history/perkins5.html.

[30] 31 C.F.R. § 285.5(d)(12).

[31] *Supra* note 9.

[32] *See* discussion *infra* at note 86.

[33] 34 C.F.R. § 685.102(b).

[34] The Institute for College Access & Success, *Students at Greatest Risk of loan Default* (April 2018) available at https://ticas.org/files/pub_files/students_at_the_greatest_risk_of_default.pdf.

and hence lacked savings that hindered their educational and financial success.[35] A disproportionate number of these borrowers are Black and Latino/a, groups that historically have been (and continue to be) deprived of a quality education, well-paying jobs, and other wealth creating opportunities such as home ownership.[36] Half failed to complete their programs, and hence lacked credentials needed for better work.[37]

Currently, about 7 million borrowers have defaulted on their loans[38] and hence are subject to the DCIA's collection methods including administrative wage garnishment, tax refund intercepts, debt collection calls, credit reporting and, for a few, Social Security offset if they are in receipt of such benefits.

Borrowers in default can protect themselves from Social Security offset, but it requires considerable persistence and knowledge that few, particularly the elderly and disabled, possess. One form of relief is to discharge the debt due to disability. But the General Accounting Office (GAO) concluded in 2016 that most fail to qualify for such a discharge due to "unclear requirements" that make successful completion of the discharge "difficult for borrowers of any age with total and permanent disabilities . . ."[39]

Another type of discharge that protects a defaulted borrower from Social Security offset relates to the malfeasance of a school, such as when a school employee forges a loan, guarantees a job after graduation, or falsifies a test result to show a person without a high school diploma is academically prepared for college.

[35] The Institute for College Access & Success, *Casualties of College Debt, What Data Show and Experts Say About Who Defaults and Why*, p. 7 (June 2019) available at https://ticas.org/wp-content/uploads/legacy-files/pub_files/casualties_of_college_debt_0.pdf.

[36] *Id. See also* The Federal Reserve*, Disparities in Wealth by Race and Ethnicity*, (Sept. 28, 2020)(Whites have about seven (7) times more assets than Blacks and Latino/as) available at https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm.

[37] *Supra* note 36.

[38] *See* Portfolio by Delinquency Status (DL, ED-Held FFEL, ED-Owned), 2022 Q1, available at https://studentaid.gov/data-center/student/portfolio.

[39] *GAO Offset Report*, pp. 34, 43.

However, few such applications are approved, even with legal help, given their complexity and need for overwhelming supporting evidence.[40]

Rehabilitation and Consolidation are two other ways bringing a defaulted loan current,[41] but each has significant complexities. Rehabilitation requires nine, monthly, on-time payments over ten months, after which the loan is brought current. So often is a payment not credited toward that nine-payment goal that the Consumer Financial Protection Bureau (CFPB) described Rehabilitation as "dead end' and "do-over" process that keeps many borrowers in default indefinitely.[42] Consolidation, while a quick process (typically two months or less) with no up-front payments, is not favored by ED. Consequently, it and its collectors steer borrowers toward Rehabilitation that is unlikely to stop the offset.[43]

Even the "financial hardship" exception that Treasury encourages[44] is ridiculously difficult to obtain from ED. GAO reports that most Social Security recipients who apply qualify,[45] which is not surprising given the typical offset reduces their monthly payment from $960 to $826.[46] Yet ED does not tell borrowers about the hardship exemption unless the borrower complains they cannot make ends meet.[47] In 2016, ED promised to change this

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[40] For a broad overview, *see* the *Student Aid* website maintained by the U.S. Department of Education*, How do I apply to have my federal student loan discharg*ed?, available at https://studentaid.gov/help-center/answers/article/how-to-apply-to-have-loans-discharged.

[41] The *Student Aid* website maintained by the U.S. Department of Education details how to get out of default at https://studentaid.gov/manage-loans/default/get-out.

[42] Annual report of the CFPB Student Loan Ombudsman, *Transitioning from Default to an Income-Driven Repayment Plan*, 24 (Oct. 2016), available at https://files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf.

[43] This steering practice away from Consolidation is currently being challenged. Complaint, ECF # 1, *Perez v. Cardona*, 22-CV-00126 (filed January 7, 2022 in the Federal District Court for the Eastern District of New York.).

[44] 31 C.F.R. § 285.5(d)(12).

[45] *GAO Offset Report*, p. 40.

[46] *Supra* note 13.

[47] *GAO Offset Report*, pp. 26, 41.

practice,[48] although such changes have still not occurred.[49] In contrast, Treasury, the enforcer of the Debt Collection Improvement Act, advises *tax debtors* that they can avoid Social Security offset by filing a hardship application.[50]

If there are any doubts about the ability of disabled and elderly Social Security recipients to stop offset on their own, GAO puts them to rest. The GAO analyzed the fate of borrowers subjected to Social Security offset over five years. The majority of borrowers were unable to stop the offset.[51] Among retirees who did stop the offset during the five years, more did so *by dying* than by getting their loans discharged due to disability or exempted due to financial hardship.[52]

Treasury Offset increasingly snares Social Security recipients that Congress wanted to protect when it enacted the DCIA

Initially, the offset program was problematic but largely unnoticed. This in part was because more than 1,200 for-profit schools had closed in the 1990's,[53] thereby reducing a huge driver of defaults: costly educations that

[48] *GAO Offset Report*. p. 45.

[49] As of July 31, 2022, the *Student Aid* website maintained by the U.S. Department of Education still fails to mention the existence of a financial hardship exemption for those facing Social Security offset. *See* the *Collections on Defaulted Loans* page where possible relief is detailed at https://studentaid.gov/manage-loans/default/collections. The servicer of defaulted loans, DMCS, is equally silent regarding the financial hardship exemption to offset. https://myeddebt.ed.gov/borrower/#/home However, the hardship application is posted on-line for those who know about the relief and need the form. https://fsapartners.ed.gov/sites/default/files/attachments/2019-09/ReqStopReduceOffsetSocSecBenefits.pdf.

[50] *GAO Offset Report*, p. 42.

[51] 56 percent were unable to stop the offset over five years. *GAO Offset Report,* p. 23.

[52] *Id.* at 66.

[53] *See* Testimony of Robert Shireman to the Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies U.S. House of Representatives, 2, (March 12, 2019), available https://docs.house.gov/meetings/AP/AP07/20190312/109074/HHRG-116-AP07-Wstate-ShiremanR-20190312.pdf.

provide no skills to "some of the most disadvantaged, and most vulnerable members of society."[54] Indeed, in 2002, the first full year that ED initiated offsets, only 36,000 borrowers faced Social Security offset,[55] of which 6,000 were Retirees over the age of 65.[56] Moreover, none of them had their benefits reduced below the poverty line.[57]

But the number of defaulted borrowers has grown with the resurgence of for-profits following regulatory weakening in 1998 and 2002,[58] and policy changes by states and the federal government whereby students pay for their college educations with loans. By 2005, 4.5 million borrowers were in default, of which 800,000 were over age 50,[59] all of whom were exposed to a myriad of DCIA collection tactics such as tax refund intercepts and wage garnishment. But even in 2005, the $750 exemption embedded in the DCIA protected many Social Security recipients from offset. That year, 44,000 Social Security recipients had their payments offset, but the majority were left with a monthly check above the poverty line.[60] Moreover, only 6,100 retirees over the age of 65 faced Social Security offset in 2005.[61]

Defaults increased to 8.5 million borrowers by 2015 of which 2.1 million were older Americans (age 50+).[62] Not unrelated to this increase was the April 2015 closing of the for-profit chain, Corinthian Colleges, which left

[54] Letter from Secretary of Education William Bennett to Senator Edward Kennedy, quoted in "Bennett Asks Congress to Put Curb On 'Exploitative' For-Profit Schools," *Education Week,* February 17, 1988.

[55] *GAO Offset Report*, p. 11.

[56] General Accounting Office, GAO-14-866T*, Older Americans Inability to Repay Student Loans May Affect Financial Security of a Small Percentage of Retirees,* p. 17 (September 10, 2014), available at https://www.gao.gov/assets/gao-14-866t.pdf.

[57] *GAO Offset Report* pp. 67-69.

[58] *See* Testimony of Robert Shireman to the Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, U.S. House of Representatives, 2, (March 12, 2019), available at https://docs.house.gov/meetings/AP/AP07/20190312/109074/HHRG-116-AP07-Wstate-ShiremanR-20190312.pdf.

[59] *GAO Offset Report*, pp. 60-61.

[60] *Id.* at 67-69.

[61] *Id.* at 69.

[62] *GAO Offset Report*, pp. 60-61.

560,000 students with even more worthless credentials.[63] With respect to offsets that year, the $750 safe-harbor exemption protected hardly anyone due to inflation. Consequently, 173,000 borrowers had their Social Security checks offset in 2015, or almost four-times more than in 2005, including 26,715 retirees (age 65+).[64] 118,000 (or 68 percent) of these elderly and disabled borrowers were pushed below or further below the poverty line, including 15,500 retirees (65+).[65] For the typical retiree, this meant their Social Security was slashed each month by $147 from $974 a month (already below the poverty line) to $824.[66]

Despite this significant increase in Social Security offset, the practice is neither efficient nor particularly profitable. Pursuant to the DCIA, ED collects twenty times more through administrative wage garnishment and tax refund offsets than Treasury offsets of Social Security.[67] In addition, collection fees related to Social Security offsets are disproportionately huge, on average 30 cents per $1.00 collected, as compared to tax refund offsets of 4 cents per $1 collected.[68]

These fees, together with monthly interest, diminish the amount of offset applied to the loan's principal, effectively making offset a life-time sentence for defaulted borrowers in receipt of Social Security. Student loan balances actually increase for one of every three older borrowers (age 50+) whose Social Security is offset for a student loan.[69]

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[63] *See* U.S. Dept. of Education, Press Release, Education Department Approves $5.8 Billion Group Discharge to Cancel all Remaining Loans for 560,000 Borrowers who Attended Corinthian (June 1, 2022) available at https://www.ed.gov/news/press-releases/education-department-approves-58-billion-group-discharge-cancel-all-remaining-loans-560000-borrowers-who-attended-corinthian-colleges.

[64] *GAO Offset Report*, pp. 67-69.

[65] *Id.*

[66] *Supra* note 13.

[67] In 2015, $1.36 billion was collected through administrative wage garnishment and $2.1 Billion through tax refunds intercepts (total $3.46 billion) as opposed to $171 million through Social Security offset. *GAO Offset Report*, pp. 8, 17, 18.

[68] In 2015, Social Security offsets generated $73 million in Treasury Offset fees while netting only $171 million in payments to the Department. *GAO Offset Report*, pp. 17, 18. In contrast, Tax Refund offsets generated $79 million in fees while netting $2.1 billion in payments. *Id.*

[69] *GAO Offset Report*. p. 24.

ED's Efforts to Protect Borrowers from Social Security Offset

In response to the GAO's conclusion that disabled borrowers could not protect their benefits from offset due to their disabilities,[70] as well as negative press coverage [71] and litigation,[72] ED alerted over 550,000 borrowers in receipt of Social Security *Disability* benefits (not retirement) that they *per se* qualified for a discharge[73] and only needed to sign and mail back an attached form to have their loan erased.[74] But the vast majority (77 percent) of these disabled borrowers did not understand, trust, or in some cases, receive ED's letter asking them to sign a document that offered to forgive an ancient debt.[75] Consequently, ED flipped the model on its head in 2021, making the discharge automatic to the *per se* category of disabled borrowers it identified unless they opted out. [76]

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[70] *Id*. at 43.

[71] E.g. Gerri Detweiler, Credit.com, *My Social Security Income Is Being Zapped for Student Loans!* (August 1, 2012); Patrick M. Sheridan CNN Business, *Retirees' Social Security checks garnished for student loans* (August 24, 2014); Elizabeth Olson, New York Times, *Student Loan Debt Burdens More Than Just Young People* (Sept. 12, 2014); Danielle Douglas-Gabriel, The Washington Post, *The disturbing trend of people losing Social Security benefits to student debt* (Dec. 20, 2016); Michelle Conlin, Reuters, *Student loan borrowers, herded into default, face a relentless collector* (July 25, 2017); Clare Lombardo & Cory Turner, NPR, *Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised, NPR* (Dec. 4, 2019).

[72] *Supra* note 4.

[73] Press Release, U.S. Dept. of Educ., *U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities* (Apr. 12, 2016), available at: https://www.ed.gov/news/press-releases/us-department-education-actsprotect-social-security-benefits-borrowers-disabilities.

[74] Between 2016 and 2019, ED identified over 550,000 Social Security disability recipients with student loans who were per se eligible for a discharge. *See infra* note 76. *Per se* eligibility occurs when the Social Security Administration rates their disability as "Medical Improvement Not Expected (MINE)," meaning their disability will last more than five years. Department regulations equate such a rating as meeting the statutory TPD eligibility requirement. 34 C.F.R. § 685.213(b)(2)(ii). For a more detailed discussion of the initiative's failure to provide relief, *see infra* note 76.

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

[76] Automatic Total and Permanent Disability Discharge through Social Security Administration Data Match (EA ID: GENERAL-21-49) (August 19, 2021) available at https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2021-08-19/automatic-total-and-permanent-disability-discharge-through-social-security-administration-data-match-ea-id-general-21-49.

New regulatory changes will automate discharges to a much larger group of Social Security *Disability* recipients starting July 1, 2023.[77]

Most Social Security Retirement Recipients are Not Protected by the Proposed, Automated Disability Discharge Regulations

Unfortunately, the recent efforts of ED to ensure that disabled borrowers keep their Social Security payments have no impact on the vast majority of Social Security *Retirement* recipients, even those who are clearly disabled but unable to successfully apply for a discharge. This is because more than three-quarters (77 percent) of retirees with defaulted loans never received disability benefits.[78] Receipt of Social Security Disability benefits is the marker that qualifies a borrower for an automated discharge.[79]

The number of retirees who never received Social Security Disability and have student loan debt is large and growing. In 2015, there were 870,000 Americans aged 65 and older repaying their loans; 37 percent of those (or 321,000 borrowers) were in default.[80] Those numbers have increased over the last seven years inasmuch as 6 million borrowers were approaching retirement age in 2015, of which almost 2 million were in default.[81]

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[77] *See* U.S. Dept. of Education, Press Release, *Education Department Releases Proposed Regulations to Expand and Improve Targeted Relief Programs* (July 6, 2022) available at https://www.ed.gov/news/press-releases/education-department-releases-proposed-regulations-expand-and-improve-targeted-relief-programs.

[78] *GAO Offset Report*, p. 11.

[79] *Supra* note 78. *See* also Proposed Regulatory Text for Issue Paper #1: Total and Permanent Disability Discharge Session Three: December 6 -10, 2021, available at https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/1tpd.pdf.

[80] *GAO Offset Report,* p. 10.

[81] 29 percent of 6.3 million borrowers between the ages of 50 and 65 (or 1.827 million borrowers) were in default in 2015. *GAO Offset Report,* p. 10.

Fresh Start is not a Long-Term Solution

Fresh Start is an ED action that is supposed to bring all defaulted borrowers (7 million individuals) out of default.[82] It will stop offsets for at least 12 months, after which those who re-default will be subject again to Treasury Offset.

While no one can say for sure what the re-default rate will be, some believe it will be very high given re-default rates among similar borrowers.[83] For example, 45 percent of borrowers who rehabilitate their loans out of default, re-default *within three years*.[84] Re-default rates under *Fresh Start* are likely to be much higher since *Fresh Start* borrowers will gain their "current" status automatically without taking the initiative to learn of their rights and responsibilities regarding repayment. In contrast, those who rehabilitate (almost half of whom still re-default) receive some counseling regarding how to stay current through income driven repayment after taking the initiative to call ED.

ED has Legal Authority to Exempt all Retirees (age 62+) from Social Security Offset

Given the financial hardship that offset imposes on the elderly and disabled, and the difficulty Social Security recipients have in stopping offsets, exempting retirees from the Social Security offset program would avert plunging hundreds of thousands of retirees further into poverty. An agency can exempt an entire class of debtors

[82] U.S. Dept. of Education, *Press Release, Biden-Harris Administration Extends Student Loan Pause Through August 31* (April 6, 2022) available at https://www.ed.gov/news/press-releases/biden-harris-administration-extends-student-loan-pause-through-august-31

[83] Ama Takyi-Laryea, Ilan Levine & Phillip Oliff, The Pew Charitable Trusts, *Government Hits Reset on Student Loan Defaults, But Many Could Experience Default Again*, (June 14, 2022), available at https://www.pewtrusts.org/en/research-and-analysis/articles/2022/06/14/government-hits-reset-on-student-loan-defaults-but-many-could-experience-default-again

[84] The CFPB Student Loan Ombudsman*, Transitioning from Default to an Income-Driven Repayment Plan,* p. 4 (May 16, 2017), available at https://files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf Another study found a 41 percent re-default rate five years after borrowers consolidated or rehabilitated their loans out of default. Jason D. Delisle, Preston Cooper, and Cody Christensen, American Enterprise Institute, *Federal Student Loan Defaults: What Happens after Borrowers Default and Why*, p. 15 (2018) available at https://www.aei.org/wp-content/uploads/2018/08/Federal-Student-Loan-Defaults.pdf?x91208;

(in this case elderly (62+) borrowers in default on their student loans) from Social Security offset after demonstrating that exemption makes sense in light of three factors, which are:

(A) Whether an exemption is the best means to protect the government's financial interest, taking into consideration the number, dollar amount, age and collection rates of the debts for which exemption is requested;

(B) Whether the nature of the program under which the delinquencies have arisen is such that the transfer of such debts would interfere with program goals; and

(C) Whether an exemption would be consistent with the purposes of the Debt Collection Improvement Act of 1996.[85]

The First Factor: Whether an exemption is the best means to protect the government's financial interest, taking into consideration the number, dollar amount, age, and collection rates of the debts for which exemption is requested

Public data suggests that the government can save money by exempting Social Security Retirement recipients from the offset program. There are 41,295 retirees who had their Social Security taken by Treasury Offset in 2015 who never received disability benefits and hence will not benefit from the automated disability discharge process.[86] The average outstanding debt of these retirees was $27,000 per borrower[87] with an average collection of $146 per month.[88] Almost half the loans were more than 20 years old and 86 percent were more than ten years old.[89] Parent Plus loans, that are taken to benefit children and occasionally grandchildren, constituted a small

[85] 31 C.F.R. § 285.12(d)(5).

[86] This number was determined as follows: 53,630 retirees had their Social Security offset, as compared with 119,370 disability recipients in 2015. *GAO Offset Report,* p. 11. 23 percent of the retirees had previously received disability benefits and hence will benefit from proposed regulations, leaving 77 percent or 41,295 retirees in the offset pool without any automated discharge process. *Id.*

[87] *GAO Offset Report*, p. 64.

[88] *Id.* at 15.

[89] *Id.* at 70.

percentage (10 percent) of these defaulted loans.[90] In 2015, only $41 million was collected through Social Security offset from retirees,[91] as compared to $4.325 billion from tax refund intercepts, wage garnishment, and other DCIA collection tools.[92] Slowing the process of ED's recovery were Treasury Offset Program fees. In 2015, 30 cents of each dollar taken by ED through Social Security offset went to Treasury.[93]

Given the low collection rate, large debt, and the age of such debts, recovery is an endless treadmill that eats up ED resources. While $41 million seems like a lot of money, that number is almost certainly going to drop in coming years when ED publicizes the "financial hardship" exemption to retirees facing offset. In response to GAO criticism, ED promised in 2016 to publicize the hardship exemption in its default notice and website.[94] It further stated it would work with Treasury so that the hardship exemption was also included in Treasury's notices.[95] Assuming these changes are implemented,[96] many more retirees will contact ED and apply for the hardship exemption. Moreover, almost all who complete the application will qualify for it, according to the GAO,[97] thereby significantly reducing offset revenue and making the application process, (detailed below) a huge waste of taxpayer money.

Processing a large influx of hardship applications will be expensive. Each application, by regulation,[98] must be done on a case-by-case basis. The process starts with the borrower contacting ED, which then sends out a

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[90] *Id.* at 56.

[91] The $41 million figure was calculated as follows. In 2015, $171 million was netted by offsetting the Social Security of 173,000 Social Security recipients. *GAO Offset Report*, p. 11 and 17. The 41,295 retirees who never received disability payments represent 23 percent of the pool of 173,000 off-setted Social Security recipients, hence 23 percent of the net collections, or $41 million.

[92] *GAO Offset Report*, p. 8, 17.

[93] *Supra* note 69.

[94] *GAO Offset Report*, p. 45.

[95] *GAO Offset Report*, p. 45. Treasury sends a notice after each offset advising the Social Security recipient who took their money and how to fix the problem. The inclusion of the financial hardship exemption in such recurring notices would increase hardship applications significantly.

[96] As of this article, it has done neither. *Supra* note 50.

[97] *GAO Offset Report*, p. 40.

[98] 31 C.F.R. § 285.5(d)(12). *See* also *GAO Offset Report*. p. 39-43.

packet requesting income and expense information.[99] Once it is returned (U.S. Postal Service mail only), ED has 45 days to "determine eligibility based on a comparison of an individual's documented income and qualified expenses [such as housing, utilities, health care, and transportation], rather than a specific income threshold."[100] Hence human-beings, not computers, must process mail, analyze handwritten documents, calculate "unqualified expenses," issue written determinations, and then input data into computers to stop the Social Security offset.

A further complication is that the hardship exemption is good for only one year,[101] although ED fails to follow its own policy.[102] If required to re-evaluate such claims annually, ED's expenses would catapult and retirees living in poverty would be confused and harmed.

Even if the hardship exemption remains hidden (in violation of federal integrity and ethics rules and ED's promise to publicize the exemption)[103] other collection costs already diminish the value of what is offset from Social Security Retirement recipients. Many retirees contact ED, its collectors, Treasury, public officials, and the Social Security Administration when their Social Security is offset, which contributes to additional staff burdens and inefficiencies.[104]

The GAO likewise found that 37 percent of retirees take some administrative action to try to protect their Social Security payments from offset.[105] Such actions include applying for a disability discharge, rehabilitating their loans out of default, seeking some other form of discharge, or filing a hardship exemption.[106] All of these

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[99] The Financial Hardship application, is posted on-line by an ED contractor, allowing advocates and informed Social Security recipients to obtain it more quickly. https://fsapartners.ed.gov/sites/default/files/attachments/2019-09/ReqStopReduceOffsetSocSecBenefits.pdf

[100] *GAO Offset Report*, p. 40.

[101] *GAO Offset Report*, p. 42.

[102] *Id.*

[103] *Id. citing* General Accounting Office, GAO-14-704G, *Standards for Internal Control in the Federal Government*, p.22 (September 2014) available at https://www.gao.gov/assets/gao-14-704g.pdf

[104] For example, 72-year-old Fermina Soto (*see supra* note 4) twice made in person visits to her Social Security office in an attempt to stop the offset, while also calling the debt collector at least twice. She eventually got help at Legal Services after a number of visits, after which she filed a disability discharge application (which was approved).

[105] *GAO Offset Report*, pp. 23-24, 65.

[106] *Id.*

processes add thousands of hours of counseling and processing to the work loads of ED contractors, adding expenses that reduces the value of what is collected. And some of this servicer activity does not permanently fix the problem. Almost half (45 percent) of borrowers who rehabilitate their loans out of default re-default within three years due to the complexity of the program.[107]

Finally, the government has a financial interest in making sure retirees have enough income with which to meet their basic needs. Treasury offsets of Social Security drive almost 60 percent of defaulted borrowers over the age of 50 below or further below the poverty line.[108] Moreover, the offset is not a temporary deprivation of needed income, but in reality a life-time sentence to poverty.[109] Only one-quarter of retirees are able to repay their defaulted loan over five years through offset.[110] The loss of such income requires borrowers to access other charities and social services, many of which receive government funding. Clearly, the Treasury Offset Program is broken if charities and non-profits are called upon to care for persons who had been self-sufficient prior to offset, like Ms. Soto.[111]

The Second Factor: Whether the nature of the program [Federally Insured Loans to attend College] under which the delinquencies have arisen is such that the transfer of such debts [to the Treasury Offset Program] would interfere with program goals

A principal goal of Title IV lending is to fight poverty. In his address to Congress in support of the 1965 Higher Education Act, President Johnson stated that the federally insured student loan program was needed as part of

[107] *Supra* note 85.

[108] 67,300 of 113,734 borrowers over the age of 50 were driven below or further below the poverty line by offsets in 2015. *GAO Offset Report* p. 29 and p. 73.

[109] *See* discussion *Supra* at note 70.

[110] *GAO Offset Report*, p. 65.

[111] *Supra* note 4.

the "war on poverty," noting that only "one in three" students from low-income families were entering college, as compared to "four out of five" students from wealthy families.[112]

Exempting Social Security retirees from the Treasury Offset Program does not interfere with that goal, rather it is consistent with it. As mentioned, a large percentage of borrowers in default were experiencing poverty and/or harmed by systemic racism when they took out the loans.[113] Hence, retirees who have defaulted on their federal loans have, by and large, failed to exit poverty. Offset pushes the majority of retirees below or well below the poverty line.[114] Therefore, exempting this group from offset is consistent with the ED's mission of creating greater economic opportunity through Title IV lending.

Moreover, almost half of defaulted borrowers are victims of for-profit education.[115] Since the end of the Second World War, ED has tried to hold accountable schools to such fraud, with very mixed results.[116] Exempting retirees from offset is completely consistent with such efforts and the Borrower Defense rule,[117] which forgives loans of students defrauded by for-profit schools.

Offsetting Social Security from retirees is counter-productive because it diverts important resources from ED's efforts to hold colleges and trade schools accountable. As discussed above, ED expends considerable capital processing paperwork related to retirees trying to stop offsets that would be better directed to its core mission.[118]

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[112] Lyndon B. Johnson, *Message to Congress on Education*, pp. 6,12, 13 (January 12, 1965), available at http://acsc.lib.udel.edu/items/show/43.

[113] *Supra* notes 35, 36, and 37.

[114] *Supra* at note 66.

[115] *Supra* notes 35, 36, and 37.

[116] *See* Robert Shireman, The Century Foundation, *The For-Profit College Story: Scandal, Regulate, Forget, Repeat* (Jan. 24 ,2017) available at https://tcf.org/content/report/profit-college-story-scandal-regulate-forget-repeat/?session=1

[117] 34 CFR § 685.206.

[118] *See* discussion *supra* at note 107.

The Third Factor: Whether an exemption would be consistent with the purposes of the Debt Collection Improvement Act of 1996

Exempting retirement recipients from Social Security offset is consistent with the Debt Collection Improvement Act of 1996. The DCIA included a provision directing that a debtor's Social Security not fall below $750 a month,[119] which at the time was 116 percent of the poverty line for a family of one.[120] That $750 floor did not include an automated cost of living increase and hence has been eroded. If a cost-of-living index had been included, 75 percent of Social Security recipients (including retirees) would be fully or partially protected from offset.[121] Accordingly, when Congress enacted the DCIA in 1996, it intended to protect the same retirees from offset that a blanket exemption would achieve.

Moreover, Treasury provide a safety valve for those retirees above the poverty-line (about 25% of retirees) who nevertheless face financial hardship.[122] But adjudicating the individual claims of such borrowers will be expensive, especially since approval is likely.[123] Accordingly, exempting all retirees from Social Security offset is far more economical and hence consistent with the DCIA goal of collecting outstanding debts while protecting individuals from financial hardship.

Conclusion

In 2020, Ms. Gary and Mr. Jones were desperate for relief from the offset of their Social Security Retirement benefits. The received it not from publicized remedies that protect elderly borrowers from hardship, but rather from the Covid-19 pandemic, which triggered a collection pause.[124] Unfortunately, they (and tens of thousands of

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[119] *Supra* note 29.

[120] *Id.*

[121] *GAO Offset Report,* p. 29.

[122] 31 C.F.R. § 285.5(d)(12). See also *GAO Offset Report,* p. 39 ("Borrowers with Social Security benefits below the poverty guideline as well as borrowers with higher benefits may apply.")

[123] *See* discussion *supra* note 99.

[124] *See* U.S. Dept. of Education, Ed Review, *Breaking News: Testing Waivers and Student Loan Relief* (March 20, 2020) available at https://www2.ed.gov/news/newsletters/edreview/2020/0320.html

Retirement recipients like them) will soon be back in the path of the offset dragnet under the existing regime. The Debt Collection Improvement Act includes a safe harbor clause for discrete groups of debtors. ED is empowered to invoke it, and, if it does so, can steer its offset collection dragnet away from the elderly.

APPENDIX

Memorandum

To: U.S. Department of Education; Negotiated Rulemaking Committee
From: Persis Yu and Joshua Rovenger, Negotiators for Legal Assistance Organizations that Represent Students and/or Borrowers; Bethany Lilly and John Whitelaw, Negotiators for Individuals with Disabilities or Groups Representing them

Date: October 4, 2021

Re: Additional Topics to add to Rulemaking: Protections for Defaulted Borrowers

Introduction

Roughly 9 million borrowers are in default on their federal loans.[1] Defaulted borrowers experience extraordinarily punitive collection tactics, such as wage garnishment, social security offset, and tax refund offset--including seizure of the Child Tax Credit and Earned Income Tax Credit, that undermine the social safety net and siphon funds away from life's necessities like food, rent, childcare, and medication.

As one borrower shared with the National Consumer Law Center, "*I am a single mother of 2 children and struggling to not be homeless. I fell behind on student loans after the death of my husband due to the fact that now my household had become a single income. I was counting on my return this year to get back on track and save some money to help with those unforseen bumps in life. Now I'm left in the middle of an ocean with no life support, the U.S department of education has taken all of my federal and state income tax. My loans are in a rehabilitation program, but not knowing about this program before filling taxes this year, it was to late to stop the offset. I don't believe it is right for them to take everything.*"[2]

The government can engage in these tactics all without a court order. These harsh realities are overwhelmingly more likely to be felt by families of color. Because of decades of structural inequities and discrimination, student loans have burdened Black and Latinx borrowers more than other groups, and, as a result, these borrowers default at twice the rate of their white peers.[3]

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[1] U.S. Dep't of Educ., Federal Student Aid Default Management, Official Cohort Default Rates for Schools, available at https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html.
[2] For more stories from borrowers experiencing offset *see* Persis Yu, National Consumer Law Center, Voices of Despair: How Seizing the Eitc is Leaving Student Loan Borrowers Homeless and Hopeless During a Pandemic (July 2020) available at https://bit.ly/Road-to-Relief-Student-Debt.
[3] Judith Scott-Clayton, The looming student loan default crisis is worse than we thought, Economic Studies at Brookings (Jan. 2018), available at https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/; Ben Miller, The Continued Student Loan Crisis for Black Borrowers, Center for American Progress (Dec. 2 2019), available at https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers.

Borrowers in default who are subject to the government's vast extra-judicial collection powers often pay thousands of dollars more per year than if they were in an income-driven repayment plan.[4] For example, a single parent with two children who works full time earning minimum wage was eligible for a $5,800 Earned Income Tax Credit payment in 2020, which would add 39% to the family's pretax income and lift their family just above the poverty line.[5] If the parent were in IDR, she would not owe anything on her loans that year due to her income level. Yet if she were instead in default, the entire EITC credit could be seized, forcing the family to pay a huge portion of their poverty-level income for the year toward student debt instead of necessities. Similarly, the GAO has reported on borrowers whose social security benefits are offset to collect on student loans yet live below the poverty line,[6] these borrowers may have $0 a month payments if instead enrolled in IDR. The effect of these involuntary collection tactics can have devastating effects on borrowers, their children, and, in aggregate, their communities.

The limited programs currently available to help borrowers in default are not sufficient to guard against financial devastation for borrowers. Through this rulemaking, the Department has the opportunity to rethink how it treats defaulted student loan borrowers. The Department should not impose so many barriers to orders for them to be in good standing on their loans and avoid harsh punishment.

The Department of Education has the authority to do more for defaulted borrowers, including authority under the Higher Education Act to eliminate some of the most harmful collection practices and to provide more options for defaulted borrowers. Specifically, though this rulemaking, the Department should amend its regulations in order to:

- Create additional pathways out of default; and
- Eliminate the acceleration clause upon default; and
- Limit the amount collected to the IDR amount when involuntary collection is used.

Proposal 1: Create additional pathways out of default

Statutory cites: §455(d)(5) of the Higher Education Act of 1965, as amended;
Regulatory cites: 34 CFR § 685.211(d)(3)(ii))

Currently, there are only four pathways out of default: rehabilitation, consolidation, settlement, and payment in full. Our low-income clients can rarely afford to settle their loans under current Department settlement guidelines, nor can they afford to pay their loans in full. Thus, for most borrowers, rehabilitation and consolidation are the only two viable paths for getting out of

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[4] See Consumer Financial Protection Bureau, Annual report of the CFPB Student Loan Ombudsman (Oct. 2016), available at https://files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf.
[5] Economic Policy Institute, The EITC and minimum wage work together to reduce poverty and raise incomes (Jan. 2020), available at https://www.epi.org/publication/eitc-and-minimum-wage-work-together/.
[6] U.S. Gov't Accountability Office, Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief, GAO-17-45 (Dec. 2016), available at https://www.gao.gov/products/gao-17-45.

default. Unfortunately, borrowers are limited in the number of times that they are allowed to consolidate or rehabilitate their loans, leaving many borrowers stuck in default with no way out. Concerningly, the CFPB found that the “vast majority (greater than 90 percent) of borrowers who rehabilitated one or more defaulted loans were not subsequently enrolled and making IDR payments within the first nine months after ‘curing’ a default.”[7]

The HEA does not limit the pathway out of default to rehabilitation and consolidation. Rather, it defines how a borrower gets into default, but is *silent* on getting out

The Department has the authority to create additional pathways for borrowers to exit default. In particular, the Department should utilize the authority in 20 U.S.C. § 1087e(d)(5), authorizing the Secretary to place “any borrower who has defaulted on a loan made under this part to … repay the loan pursuant to an” income-driven repayment plan, to create a pathway out of default for borrowers who opt into an income-driven repayment plan. There is no requirement under the HEA which requires that once the defaulted borrower is placed into an IDR plan that their loans be treated as if they are still in default. Selecting this option would effectively cure the borrower’s default. Then these payments should all be qualifying payments towards forgiveness and there should be no limit to the number of times a borrower can get out of default.

Proposal 2: Eliminate the acceleration clause and limit involuntary collection to the income-driven repayment amount

Statutory cites: §§455(d)(5) & 493C of the Higher Education Act of 1965, as amended;
Regulatory cites: 34 CFR §§ 682.215, 685.209, & 685.221

Currently, when a borrower is more than 270 days behind, the loan goes into default and the Department accelerates it (i.e, the entire loan balance becomes due and payable in full).. This is why borrowers in default can face seizure of their entire tax refund, including thousands of dollars in EITC and CTC funds intended to lift families out of poverty, even if the borrower only missed a few hundred dollars worth of payments. Borrowers who default are almost always financially distressed and struggling with the affordability of their loans. Utilizing involuntary collection tools such as administrative wage garnishment, administrative offsets, and tax refund offset (including, for many of our clients,their Earned Income Tax Credit and this year the Child Tax Credit), student loan borrowers in default pay significantly more than they would under an Income-Driven Repayment (IDR) plan. This inequitable result causes significant financial distress.

IDR has the potential to ensure that federal loan repayment will be affordable regardless of one’s income after graduation. But acceleration has the effect of making borrowers responsible for payment of their entire loan balance at a time when they can least afford it. The HEA does

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[7] 1 Consumer Financial Protection Bureau, Update from the CFPB Student Loan Ombudsman (May 16, 2017),
https://files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf.

not require acceleration and, where discussed in the master promissory note, it is discretionary.[8] The government should not expect or require these struggling borrowers to pay more toward their loans than borrowers who have been able to stay current on their loans.

To remedy this situation, the Department should end its policy of accelerating the entire loan balance when a borrower defaults on their loan. The Department should then use its authority to require defaulted borrowers to repay pursuant to an IDR plan, thus limiting any amounts certified for involuntary collection to be capped at the amount not paid under an IDR plan.[9]

[8] 20 U.S.C. § 1087dd(c)(1)(B) (loan terms "shall include provision[s] for acceleration of repayment of the whole, or any part, of such loan, at the option of the borrower[.]").
[9] 20 USC § 1087e(d)(5) ("Repayment after default. The Secretary may require any borrower who has defaulted on a loan made under this part to… (B) repay the loan pursuant to an income contingent repayment plan.").