ARTICLE

STUDENT LOAN REFORM: RIGHTS UNDER THE LAW, INCENTIVES UNDER CONTRACT, AND MISSION FAILURE UNDER ED

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I. Introduction

Something is wrong with the federal student loan program. Over five million people holding more than $100 billion in federal student loan debt are in default and millions more are delinquent on their loans.[1] Yet, all borrowers with direct federal loans are eligible to have their payments reduced to an affordable amount based on their income.[2] Federal student loan borrowers also have the right to debt relief if they experience disability, if their schools close, and in numerous other situations.[3] We would expect that these rights, coupled with the severe consequences the federal government imposes when borrowers default, would bring the default rate close to zero.[4] The system for administering student loan repayment and debt relief, however, is dysfunctional.

Student borrowers, for instance, have the right to discharge of their loans if they become permanently and totally disabled.[5] In 2019, the United States Department of Education ("ED" or "the Department") identified 555,000 student loan borrowers with disabilities sufficient to qualify them to have their loans discharged, but ED discharged only a little more than a third, 200,000 of the loans.[6] Even worse, the government reinstated the debt of 44,000 of the 200,000 student borrowers who had obtained discharges because they failed to file follow-up paperwork.[7]

Most would agree that the student loan repayment and debt relief programs have resulted in unacceptable levels of default. In this article, we identify two key obstacles to effective reform. First, the ED is committed to treating student loan repayment as a form of creditor-rights loan servicing.[8]

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[1] Available default rate data is not precise and substantially undercounts borrower distress. *See infra* Section III.A.1.

[2] Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 215, 237 (2014) ("Given the broad array of default-avoidance tools . . . few, if any, borrowers should find themselves forced to default on their student loans. Nevertheless, an incredible number of borrowers default.").

[3] *See infra* Section II.B.2.

[4] A zero default rate is what the Education Department envisioned when the program was created. *Field Hearing on Student Debt in Milwaukee, WI,* Consumer Fin. Prot. Bureau (Jan. 30, 2017), https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-on-student-debt/ [https://perma.cc/AB4L-BVKC].

[5] *Total and Permanent Disability Discharge*, U.S. Dep't of Educ., Off. of Fed. Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation/disability-discharge [https://perma.cc/4HV2-DFV2].

[6] Clare Lombardo & Cory Turner, *Student Loan Borrowers with Disabilities Aren't Getting Help They Were Promised*, NPR (Dec. 4, 2019), https://www.npr.org/2019/12/04/776058798/why-student-loan-borrowers-with-disabilities-arent-getting-the-help-they-deserve?eType=emailBlastContent&eId=5499c4db-afcf-4ebf-acc5-041bcf3088c0 [https://perma.cc/W76B-DTF8]. The loans were discharged pending proof of continued lack of income. *Id.*

[7] *Id.*

[8] *See infra* Section IV.C. We use the terms market-based, credit markets, and for-profit interchangeably to refer to consumer loan markets in which the government is not a party to credit transactions. Mortgages and other housing debt, auto loans, credit cards, and small dollar personal loans are examples of loans seen in credit markets. Private student loans also function in credit markets. *See generally* Prentiss Cox, Stacey Tutt & Judy Fox, *Forgotten*

Most consumer loans are characterized by creditor control of choices and processes. Borrowers have few rights. In contrast, with student loans, the federal government has granted borrowers multiple repayment rights and debt relief options.[9] As a result, borrowers have the power to make decisions that result in affordable payments or discharge of their loans altogether.

The federal government, and ED in particular, has an obligation to manage the student loan program in ways that ensure that borrowers can understand and exercise the rights to which they are entitled. ED's adoption of a creditor-rights approach to student loan repayment is contrary to the mission of the student loan program and has had devastating consequences for borrowers.

Second, ED is the wrong agency to ensure borrowers' rights. In short, ED and the Office of Federal Student Aid ("FSA"), which is a semi-autonomous unit of ED, have failed at effectively administering student loans. Student borrowers are not entering income-driven repayment ("IDR") in the numbers they should, and borrowers who are eligible for loan discharges encounter obstacles when they attempt to secure discharges. As we describe in this article, the federal agency charged with responsibility for the higher education system has, somewhat ironically, proven itself unable to lead reforms in the student loan repayment system.

We, thus, argue that Congress should create the Student Borrower Protection Agency ("SBPA") with a mandate to adopt borrower-centered student loan servicing in lieu of the ED's current servicing model designed for private credit markets.

The first two parts of this Article provide the background needed to understand federal student loans and the problem of student loan default. Part II describes the dominance of federal student loans, the rights given (and denied) to student loan borrowers in repayment, and the structure of the federal government apparatus nominally designed to deliver those rights. Part III describes the massive number of student loan defaults, their consequences for borrowers and society, and the repeated failure of ED and its contracted servicers to turn student borrower rights into a reality for millions of borrowers.

The next three parts of the Article present the argument for a new agency with a different mission. Part IV makes the theoretical argument for why a creditor-rights servicing model employed with market-based loans is an ill fit for administration of a government loan program. Part V looks at how ED, including FSA, has ignored borrowers' repayment rights, adopted a servicing model from private contracting that is unsuitable for student loans, and has actively obstructed borrowers' exercise of their rights. Part VI expli-

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Borrowers: Protecting Private Student Loan Borrowers Through State Law, 11 U.C. Irvine L. Rev. 43 (2020) (detailing the sparse protections afforded to private student loan borrowers).

[9] Federal statutes mandate the terms, conditions, and benefits that must be made available to borrowers including interest rates, repayment options, and grace periods. *See* 20 U.S.C. § 1087(e).

cates the mission and culture that make ED the wrong entity to entrust with reforming student loan repayment.

Part VII advocates for the creation of the SBPA guided by the principle that the federal government has a duty to proactively engage borrowers and assist them in effectively exercising their rights to repayment and debt relief. A critical part of our recommendation is the creation of a research and policy division within the SBPA, the findings and recommendations of which would be essential to designing systems and interventions to better serve student borrowers.

In the remainder of the Article, we use the term "student loan" to mean a federal direct student loan, and we use the term "student borrower" to mean a person who is obligated on such a student loan.

II. Federal Student Loans and Borrowers' Rights

Over the last few decades, the United States has made a public policy choice to fund higher education through an ever-rising level of student debt.[10] As shown in Figure 1, outstanding student loan balances exceeded $1.6 trillion by the end of 2019, which is almost triple the outstanding amount of student loan debt in 2006.[11] Student loans are the second largest type of consumer debt in the United States, eclipsed in size only by the mortgage market.[12] Student loans held by the federal government constitute about 89% of the dollar value of all student loans.[13] The remainder are primarily private student loans.[14]

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[10] *See* Seth Frotman, *Broken Promises: How Debt-Financed Higher Education Rewrote America's Social Contract and Fueled A Quiet Crisis*, 2018 Utah L. Rev. 811, 818 (describing higher education funding policies as a "series of discrete and intentional policy decisions by state and federal lawmakers that led to unprecedented levels of student loan borrowing"); John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 Geo. L.J. 229, 248 (2016) ("[T]he overall mix of financial aid began to shift toward loans starting in the late 1970s.").

[11] *Consumer Credit Outstanding (Levels)*, Bd. of Governors Fed. Rsrv. Sys., https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html [https://perma.cc/929G-XEAV].

[12] Adam Looney, David Wessel & Kadija Yilla, *Who Owns All That Student Debt? And Who'd Benefit If It Were Forgiven?*, Brookings Inst. (Jan. 28, 2020), https://www.brookings.edu/policy2020/votervital/who-owes-all-that-student-debt-and-whod-benefit-if-it-were-forgiven/ [https://perma.cc/445C-GKV2] ("Students [sic] loans are now the second largest slice of household debt after mortgages, bigger than credit card debt.").

[13] Kevin James, *Private Markets for Student Financing*, 28 Nat'l Affs. 21, 27 (2016).

[14] *Trends in Student Aid 2018*, Coll. Bd. (2018), https://trends.collegeboard.org/sites/default/files/2018-trends-in-student-aid.pdf [https://perma.cc/A76V-QJMX]. Private student loans are market-based products that lenders underwrite. *See generally* Elan Amir et al., The MeasureOne Private Student Loan Report, MeasureOne (Dec. 7, 2020), https://f.hubspotusercontent00.net/hubfs/6171800/assets/downloads/MeasureOne%20Private%20Student%20Loan%20Report%20Q3%202020%20FINAL%20VERSION.pdf [https://perma.cc/VR4Z-GN7L].

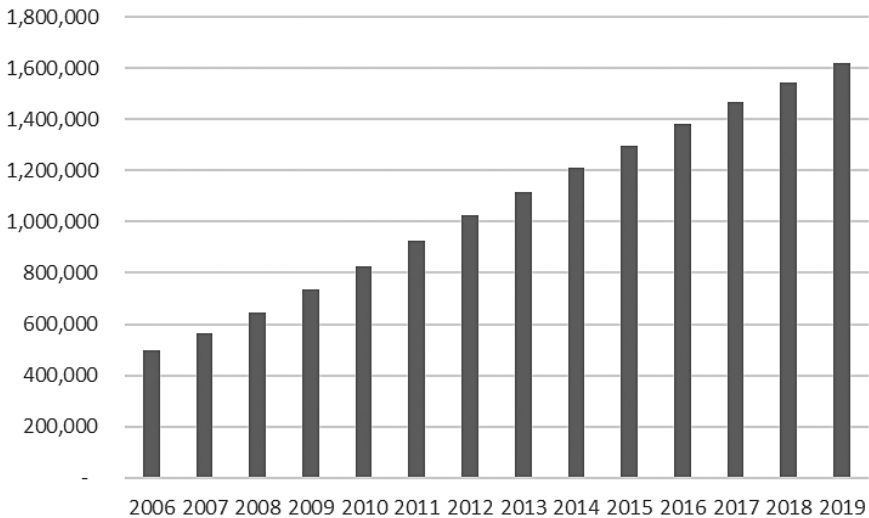

FIGURE 1. OUTSTANDING STUDENT LOAN BALANCES (MILLIONS OF DOLLARS)[15]

A. *Federal Student Loans*

The federal government began its foray into student loans in 1958 with Perkins Loans authorized under the National Defense Education Act. Colleges and universities made Perkins Loans to financially needy students, and the federal government guaranteed their repayment until 2018 when the program ended.[16] Seven years after establishing Perkins Loans, Congress passed the Higher Education Act ("HEA"), which created the Federal Family Education Loan ("FFEL") program. With FFEL loans, the federal government paid lenders to make student loans and guaranteed their repayment.[17] Decades later, in 1994, Congress passed a law creating the William D. Ford Direct Loan program ("the Direct Loan Program"), which authorized ED to begin making subsidized and unsubsidized loans directly to students.[18] FFEL

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[15] *Consumer Credit Outstanding (Levels)*, BD. OF GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html [https://perma.cc/929G-XEAV].

[16] *See* National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958); Arianne Hutchins, *What Happened to the Federal Perkins Loan?*, U.S. NEWS (July 24, 2019), https://www.usnews.com/education/blogs/student-loan-ranger/articles/2019-07-24/what-happened-to-the-federal-perkins-loan [https://perma.cc/XAF3-EYWT].

[17] ALEXANDRA HEGJI, CONG. RSCH. SERV., R43351, THE HIGHER EDUCATION ACT (HEA): A PRIMER 13 (2018).

[18] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 4021, 107 Stat. 312, 341. There are five types of Direct student loans: Direct Subsidized, Direct Unsubsidized, Direct Consolidation, Grad PLUS, and Parent PLUS. *Federal Student Loans for College or Career School are an Investment in Your Future*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID (2019), https://studentaid.gov/understand-aid/types/loans [https://perma.cc/6RU3-XQQ9]

and Direct Loans had almost identical terms; however, Direct Loans were slow to take off. In 2010, FFEL loans dominated the federal student loan arena and Direct Loans represented only 20% of all federal loans.[19]

The 2008 financial crisis drastically changed ED's responsibility for administering student loans. Banks were suddenly desperate for liquidity and the federal government responded by offering to purchase the guaranteed student loans that the banks held on their books.[20] Many, but not all, banks took advantage of this offer. As a result, many FFEL loans are now owned by the federal government. The rest are commercially held.[21]

Two years later, Congress further transformed the student loan market by ending any new FFEL loans and establishing the government as the sole entity originating federal student loans through the Direct Loan Program.[22] As shown in Figure 2, the outstanding balance of FFEL loans has declined since 2008 and should eventually recede to a small fraction of outstanding student loan debt.[23]

[hereinafter *Federal Student Loans for College or Career*]. Subsidized loans are need-based and do not begin to accrue interest until the start of the repayment period. With unsubsidized loans, the federal government begins charging interest once the loan funds are disbursed. *The U.S. Department of Education Offers Low-Interest Rate Loans to Eligible Students to Help Cover the Cost of College or Career School*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID (2019), https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized [https://perma.cc/V68X-JJUF].

[19] *The Volume and Repayment of Federal Student Loans: 1995-2017*, CONG. BUDGET OFF. (Nov. 2020), https://www.cbo.gov/publication/56754#footnote-024-backlink [https://perma.cc/PWD9-79WC].

[20] Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, 122 Stat. 740; Letter from Margaret Spellings, U.S. Sec'y of Educ., to CEOs of Loan Servicers (May 21, 2008), https://www2.ed.gov/policy/highered/guid/secletter/080521.html [https://perma.cc/9YYA-FKVX].

[21] The law provides some special protections for borrowers with FFEL loans that are not relevant to our discussion. *See* DEANNE LOONIN ET AL., STUDENT LOAN LAW § 3.2.2 (2019).

[22] Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074.

[23] *See Federal Student Loan Portfolio by School Type*, U.S. DEP'T OF EDUC., NAT'L STUDENT LOAN DATA SYS., https://studentaid.gov/sites/default/files/fsawg/datacenter/library/Portfolio-by-School-Type.xls [https://perma.cc/LZ2X-GG6A] (showing FFEL borrowers account for 28% of all Federal Student Aid borrowers, a 47.8% decline since 2007).

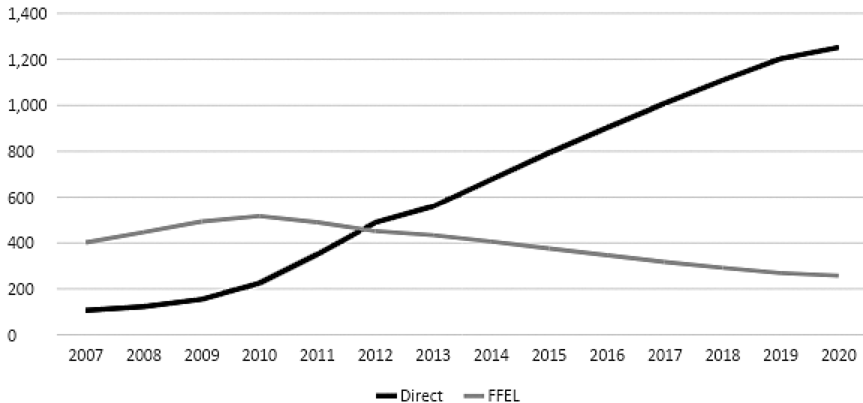

FIGURE 2. FFEL AND DIRECT LOAN OUTSTANDING BALANCES (MILLIONS OF DOLLARS)[24]

ED makes student loans to borrowers on behalf of the federal government. Among its many responsibilities, ED drives the development and promulgation of federal student loan policies and regulations.[25] FSA, which sits within ED, is responsible for "managing administration and oversight of . . . federal student aid programs," including Direct Loans and the FFEL loans that the government owns.[26]

FSA outsources many of its responsibilities to loan servicers, who are the primary point of contact for borrowers.[27] It is part of FSA's charge to monitor servicers to make certain they are complying with federal law and with their contracts with ED.[28] Servicers' roles include collecting and processing student loan payments, managing borrowers' accounts, communicating with borrowers, helping them to understand and enroll in affordable federal payment programs, and working to prevent borrowers from becom-

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[24] *Federal Student Aid Portfolio Summary*, U.S. DEP'T OF EDUC., NAT'L STUDENT LOAN DATA SYS., https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls [https://perma.cc/DM4W-N7NQ].

[25] *See* ALEXANDRA HEGJI & HENRY B. HOGUE, CONG. RSCH. SERV., R46143, THE OFFICE OF FEDERAL STUDENT AID AS A PERFORMANCE-BASED ORGANIZATION 16 (2019); STUDENT LOAN SERVICING, CONSUMER FIN. PROT. BUREAU, 11, 17 (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [https://perma.cc/XXV3-3WJZ] [hereinafter STUDENT LOAN SERVICING].

[26] HEGJI & HOGUE, *supra* note 25, at 16.

[27] *See infra* Section VI.A.

[28] To simplify the discussion, in Parts II-IV of this article, we refer solely to ED. In Part V, we analyze in detail the separate history and roles of ED and FSA. This is not an exhaustive list of the entities that are involved with student loans and student loan debt. For example, credit rating agencies collect and provide information on borrowers' student loan debts and delinquencies, the Internal Revenue Service plays a role when it withholds or reduces income tax refunds if they are in default, and private debt collectors, who contract with FSA, collect overdue loan payments.

ing delinquent.[29] Borrowers have an array of complex repayment options, which makes servicers critically important to borrowers' ability to select the best repayment plan given their situations.

B. Student Loan Repayment and Debt Relief Rights

Student loans are loans. Borrowers receive money to attend school, and they are obligated to pay back the money with interest. Yet, federal student loans are wholly unlike market-based consumer credit. At origination, the front-end of the loan, students have a right to the loan without regard to a demonstrated ability to repay.[30] In addition, once borrowers with federal loans enter repayment, they have a plethora of repayment and debt relief options. None of these rights are typically available with market-based loans, whether they are private student loans or are other types of credit.[31]

1. Repayment Rights

When student loan borrowers enter repayment, they can select different options for repayment, choosing from a standard plan, graduated plan, extended repayment, or a form of Income-Driven Repayment ("IDR"). The standard plan, which is the default option, provides for a fixed monthly payment based on a term of ten to thirty years, depending on the amount due. Repayment under the graduated plan starts with low monthly payments that increase over time. For borrowers with large loan balances, extended repayment provides an option to mix standard and graduated repayment for up to twenty-five years.[32]

Most importantly, student borrowers can opt-in to one of several forms of IDR plans. All of the IDR plans set a monthly payment based on borrowers' annual income and they all feature loan forgiveness after twenty to twenty-five years of repayment. As student borrowers' incomes rise, so too do their loan payments. Student borrowers in the relatively generous Pay As You Earn ("PAYE") program, for example, pay the lesser of 10% of their discretionary income or the standard plan amount. Borrowers in the PAYE

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[29] *See* HEGJI & HOGUE, *supra* note 25, at 18; STUDENT LOAN SERVICING, *supra* note 25, at 119.

[30] *Federal Student Loans for College or Career*, *supra* note 18 ("You don't need a credit check or a cosigner to get most federal student loans.").

[31] *Federal Versus Private Loans*, U.S. DEP'T OF EDUC., FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans/federal-vs-private [https://perma.cc/XQ5S-RMED].

[32] *See Choose The Federal Student Loan Repayment Plan That's Best For You*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/plans [https://perma.cc/XMP2-KXYH] [hereinafter *Choose The Federal Student Loan Repayment Plan That's Best For You*]; *Income-Based Repayment*, FINAID, https://finaid.org/loans/ibr/ [https://perma.cc/RV6B-QLC6]. In addition to standard, graduated, or extended repayment, student borrowers can seek a specialized repayment plan for up to thirty years based on "exceptional circumstances." LOONIN ET AL., *supra* note 21, at § 3.2.

program have any remaining principal or accrued interest forgiven after twenty years of qualifying payments.[33] IDR plans are designed to make student loan payments affordable regardless of a borrower's later earnings.[34]

In addition, federal student loans have less onerous default provisions than typical market-based consumer loans. The latter loans are technically in default after one missed payment, but lenders often will wait thirty to ninety days to begin collection, or to initiate action to repossess collateral or obtain a money judgment.[35] In contrast, student loans are not in default until after 270 days of non-payment, and collection does not begin until more than 360 days of non-payment.[36] To forestall default, many student borrowers can invoke rights to defer repayment, often without accruing interest. They can also forbear making payments; however, loan interest accrues during forbearance. Borrowers not in an IDR plan who cannot afford their loan payments can, depending on the circumstances, switch to IDR to avoid default.[37]

Even after default, borrowers have a one-time right to "consolidate" loans and a one-time right to "rehabilitate" their loans. Rehabilitation requires payments that can be as low as $5 per month during a nine-month period, after which borrowers are obligated to make payments under one of the IDR options.[38] Consolidation after default, on the other hand, involves refinancing multiple loans into a new student loan with IDR repayment.[39]

2. *Debt Relief Rights*

Student borrowers have another bundle of potential rights in the form of debt relief, including disability discharge and rights to early discharge of their loan obligations for engaging in socially useful employment.

Student borrowers are protected by what amounts to a government insurance benefit: they can have their loans fully discharged with proof of total

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[33] 34 C.F.R. § 685.209 (a)(6)(ii) (2020); Loonin et al., *supra* note 21, at §§ 3.3.1, 3.3.2, 3.3.8.

[34] *See* John R. Brooks, *The Case for More Debt: Expanding College Affordability by Expanding Income-Driven Repayment*, 2018 Utah L. Rev. 847, 847 ("At its core, the promise of IDR is that higher education will always be affordable, no matter what a person's income is after the person leaves school.") [hereinafter Brooks, *The Case for More Debt*].

[35] Libby Wells, *Debt Delinquency Timeline: What to Expect*, BankRate (Mar. 29, 2019), https://www.bankrate.com/finance/debt/debt-delinquency-timeline-what-to-expect-1.aspx [https://perma.cc/FP9P-HQ7J].

[36] *Student Loan Delinquency and Default*, U.S. Dep't of Educ., Off. of Fed. Student Aid, https://studentaid.gov/manage-loans/default [https://perma.cc/Y77N-3FJH] [hereinafter *Student Loan Delinquency and Default*].

[37] Loonin et al., *supra* note 21, at §§ 4.3.1, 4.4.3, 6.21, 7.1.

[38] *Id.* at §§ 7.2–7.3.

[39] 34 C.F.R. § 685.220 (2020). There is no right to rehabilitate private student loans. Borrowers who have private loans or a mixture of private and direct loans can consolidate their loans into private loans, but the private consolidated loans will not have the benefit of IDR.

and permanent disability.[40] Student loans are also discharged on the death of the borrower.[41]

Student borrowers who engage in certain professions or types of work that Congress has deemed socially beneficial can be eligible for early discharge of their loans. The Public Service Loan Forgiveness ("PSLF") program, enacted in 2007, entitles borrowers to government discharge of their loans after they have worked for a public service employer for ten years and have made 120 payments.[42] Eligibility for PSLF covers "careers, including teaching, social work, law enforcement, and public health that traditionally pay more modest wages relative to many private sector fields that require comparable levels of advanced education."[43] As much as a quarter of all jobs in the nation are PSLF-eligible.[44] And, more than 60% of borrowers pursuing PSLF report earning less than $50,000 per year.[45]

Special federal programs forgive $17,500 of the student loan debt of borrowers who teach math, science, and special education in certain low-income schools.[46] Similar federal loan forgiveness programs are available to people who pursue other professions that benefit the public.[47]

Finally, borrowers can discharge their loans if the higher education institution they attended closed prior to the completion of their degree program,[48] or if the school made a false certification about its eligibility to participate in the student loan program.[49] These discharges, based on the status or conduct of a school, generally are not automatic, but rather require borrowers to submit applications for discharge that ED determines whether to approve.[50] Student borrowers also have the right to employ the "borrower defense" rule to obtain a partial or full discharge if the borrower's school

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[40] 20 U.S.C. § 1087; 34 C.F.R. § 685.102 (2020) (applicable to Direct Loans). Borrowers meeting the disability standard are subject to a review of income during the succeeding three years to verify continued eligibility for discharge. *See* Loonin et al., *supra* note 21, at § 10.8.2 (describing three-year period and history of disability discharge process).

[41] 20 U.S.C. § 1087.

[42] *Id.* at § 1087(m); 34 C.F.R. § 685.219 (2020).

[43] CONSUMER FIN. PROT. BUREAU, STAYING ON TRACK WHILE GIVING BACK 7 (2017), https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf [https://perma.cc/H66A-G5AK] [hereinafter STAYING ON TRACK WHILE GIVING BACK].

[44] CONSUMER FIN. PROT. BUREAU, PUBLIC SERVICE & STUDENT LOANS 2 (2013), https://files.consumerfinance.gov/f/201308_cfpb_public-service-and-student-debt.pdf [https://perma.cc/4QMN-T6XE].

[45] STAYING ON TRACK WHILE GIVING BACK, *supra* note 43, at 7, 21.

[46] *Wondering Whether You Can Get Your Federal Student Loans Forgiven for Your Service as a Teacher?*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/manage-loans/forgiveness-cancellation/teacher [https://perma.cc/CV54-YYHL].

[47] LOONIN ET AL., *supra* note 21, at § 10.11–10.13.

[48] *Id.* at § 10.3.1.

[49] *Id.* at § 10.4.1. Federal student loan borrowers also can discharge loans based on unpaid refunds by the school. *Id.* at § 10.5.1.

[50] *See Closed School Discharge*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/manage-loans/forgiveness-cancellation/closed-school [https://perma.cc/SVP6-W56B]; *False Certification Discharge*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/manage-loans/forgiveness-cancellation/false-certification [https://perma.cc/92T7-ZDCC].

failed to perform its contractual obligations or if the school engaged in misrepresentations or similar conduct.[51]

Student borrowers can use all of these repayment and discharge rights to which they are entitled; with rare exceptions, they are not mutually exclusive.[52] It is important to note that the existence of these federal rights is a different matter than effective implementation of these rights, which we discuss in Section IV.B.

3. *Default and Lack of Bankruptcy Rights*

While the government affords student borrowers generous rights prior to default, if borrowers default, the consequences are harsh: "the government can garnish a borrower's wages without a judgment, seize the borrower's tax refund (even an earned income tax credit), seize portions of federal benefits such as Social Security, and deny the borrower eligibility for new education grants or loans."[53] These remedies are not available to private student loan creditors.[54] Furthermore, there is no limitations period on collecting a student loan debt.[55] As a respected commentator on student loans put it, "[t]he government can literally pursue borrowers to the grave."[56]

The ultimate defense of a debtor to an unsecured debt is bankruptcy, but that failsafe is not readily available to student loan borrowers.[57] Since 1998, student borrowers can only discharge their loans in bankruptcy if they are able to prove "undue hardship"; this hurdle does not apply to other consumer debts.[58] Even when a student borrower has evidence that should be

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[51] Loonin et al., *supra* note 21, at § 10.6. *See infra* Section VI.D.

[52] Borrowers in PSLF cannot also obtain a discharge through Teacher Loan Forgiveness. Melanie Lockert, *Can You Double Up on Student Loan Forgiveness Programs?*, Student Loan Hero (June 12, 2019), https://studentloanhero.com/featured/student-loan-forgiveness-programs-double-up/ [https://perma.cc/3FJ8-QME3].

[53] Loonin et al., *supra* note 21, at § 6.3.1.

[54] Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III (CCPA), U.S. Dep't of Labor, Wage & Hour Div. (2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs30.pdf [https://perma.cc/VYM6-F2XT].

[55] Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, § 3, 105 Stat. 123, 124–25.

[56] Nat'l Consumer L. Ctr., *NCLC Calls for Reform of Student Loan Programs*, Outlook, Fall 2006, at 6.

[57] Bankruptcy is one of the few protections for borrowers who have been victims of fraud or who cannot afford to repay their debts. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 70 (2008) ("There are essentially two *ex post* judicial tools available to protect consumers. The first is the common law of contracts, and the second is the fallback protection of bankruptcy.").

[58] Higher Education Amendments of 1998, Pub L. No. 105-244, § 971, 112 Stat. 1581, 1837 (eliminating seven-year limit on requiring proof of undue hardship). Prior to 1976, student loans were treated no differently than other types of debts in bankruptcy. *See* Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, 363 (2013). Between 1976 and 1990, a student debtor had to wait five years to discharge a loan in bankruptcy unless the student could prove "undue hardship." *Id.* at 363. That period was extended to seven years between 1990 and 1998. *Id.* at 363–64.

sufficient to warrant an undue hardship discharge, the courts tend to require a higher level of proof than they would with other consumer bankruptcy petitions, and the outcome is uncertain, all of which discourages most borrowers from initiating the process.[59]

III. Student Borrower Repayment Distress Creates Massive Public Harm

As student loan balances sharply rose in the 2000s,[60] the federal government committed to ensuring that all student loan borrowers would have affordable loan payments—a promise that remains unfulfilled.[61] In Section III.A, we describe the astronomical default and delinquency rates on student loans. We also examine the characteristics of borrowers in default, including the substantial burden student loan debt imposes on people of color, and the consequences of student loan debt for the long-term health of borrowers and the economy. Section III.B describes how, even though borrowers have rights to help them avoid defaulting, servicers regularly fail to inform borrowers of their rights and how to exercise them.

A. Borrower Distress and Its Consequences

As of early 2020, more than 22% of loan recipients of federally-managed student loans in a loan stage requiring repayment had defaulted on their loans,[62] and the cumulative default amount in dollars surpassed $167 bil-

[59] There is a debate whether undue hardship is an insurmountable mountain or a sometimes realistic, if inconsistently applied, option for student loan debtors. *Compare* Consumer Fin. Prot. Bureau, Private Student Loans 71 (2012), https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf [https://perma.cc/Y54P-7RCG] (stating that student loans "are virtually immune from discharge in bankruptcy"), *with* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. Cin. L. Rev. 405, 437 (2005) (finding some relief granted in more than half of 286 undue hardship decisions).

[60] Adam Looney & Constantine Yannelis, Brookings Inst., Borrowers with Large Balances: Rising Student Debt and Falling Repayment Rates 5 (2018).

[61] President Obama adopted a policy to ease the burden of student loan debt and make repayment easier for student borrowers. Press Release, The White House, FACTSHEET: Making Student Loans More Affordable (June 9, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/06/09/factsheet-making-student-loans-more-affordable [https://perma.cc/CLQ4-CP4V].

[62] *Portfolio by Loan Status*, U.S. Dep't of Educ., Nat'l Student Loan Data Sys., http://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/PortfoliobyLoanStatus.xls [https://perma.cc/J6TE-8GCK] [hereinafter *Portfolio by Loan Status*] (excludes recipients in school and in grace period before repayment required). 20.03 million borrowers were delinquent on their loans as of the end of the first fiscal quarter of 2020. *Portfolio by Delinquency Status*, U.S. Dep't of Educ., Nat'l Student Loan Data Sys., https://studentaid.gov/sites/default/files/fsawg/datacenter/library/DLPortfoliobyDelinquencyStatus.xls [https://perma.cc/VL48-REXA] [hereinafter *Portfolio by Delinquency Status*].

lion.[63] Another 7% of student borrowers were delinquent and approaching default.[64] Researchers have also found that default occurs disproportionately among borrowers who are poor, non-white, and have attended two-year colleges.[65] The economic effects of default damage student borrowers' financial lives and the larger economy.[66]

1. Default and Delinquency Rates

By any measure, student borrowers default at very high rates.[67] In 2018, Seth Frotman, the former Student Loan Ombudsman for the Consumer Financial Protection Bureau ("CFPB"), stated, "[T]he rate of student loan defaults in 2016 was comparable to the foreclosure rate following the mortgage meltdown."[68] Unlike the mortgage crisis, which was a discrete event, high rates of student loan default are a perpetual problem. From 2015 through 2018, an average of more than 1.1 million borrowers with more than $21 billion in student loan debt entered default each year.[69] ED projects lifetime default rates of approximately 18% for all federal student loans over a twenty-year period, while independent research analyzing ED data predicts that up to 40% of student borrowers will default on their student loans by 2023.[70]

Student borrowers exhibit much higher levels of default than borrowers with other types of debt, with rates up to five times higher than mortgage, credit card, or auto loan defaults.[71] This greater rate of default occurs even though student borrowers, relative to debtors with other kinds of credit, can miss payments for much longer periods of time before being placed in default.[72] Furthermore, student borrowers have the right to defer or forbear their payments to forestall default, to rehabilitate or consolidate their loans to cure default, and to change their repayment plans so they can have afford-

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[63] The total outstanding student loan balance of the federally managed loan portfolio as of the end of the first fiscal quarter of 2020 was $1.339 trillion. *Portfolio by Loan Status*, *supra* note 62.

[64] *Id.*

[65] *See infra* Section III.A.2.

[66] *See infra* Section III.A.3.

[67] Student loan default rates are difficult to calculate with precision. *See generally* Deanne Loonin & Julie Margetta Morgan, *Federal Student Aid: Can We Solve A Problem We Do Not Understand?*, 2018 UTAH L. REV. 897.

[68] Frotman, *supra* note 10, at 860.

[69] *See Default Rates*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/data-center/student/default [https://perma.cc/ACL6-AAA8].

[70] U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, DEFAULT RATES FOR COHORT YEARS 2007–2011 (2013), https://ifap.ed.gov/sites/default/files/attachments/eannouncements/060614DefaultRatesforCohortYears20072011.pdf [https://perma.cc/47J9-SQBU].

[71] *See* FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT (2020).

[72] Al Krulick, *Defaulting on Your Loans*, DEBT.ORG (July 3, 2017), https://www.debt.org/credit/loans/default/ [https://perma.cc/B8MN-YZHJ].

able payments—rights that are not routinely available with other forms of credit.[73]

Student loan default rates do not include the substantial number of borrowers who are delinquent and experiencing repayment distress, but are not yet technically in default.[74] In 2020, 3.4 million people representing 18.7% of student borrowers were delinquent.[75] Delinquency rates would roughly double if borrowers who had used deferment, forbearance, rehabilitation, or consolidation to postpone their loan payments were included in the delinquency rates.[76]

2. *Characteristics of Borrowers in Default and Disparate Impact*

Several factors have an impact on a borrower's ability to avoid default and successfully pay off student loan debt. It is challenging to empirically discern the factors that increase default risk because a single borrower could have multiple intertwined characteristics that could be associated with default. Some factors clearly matter, however. Borrowers who start college at a younger age, live in more affluent communities, or come from families with higher incomes default at much lower rates than borrowers who do not have these advantages.[77] In addition, first-generation college students default at a rate of 23% while their counterparts whose parents have attended college have a 14% default rate.[78]

The type of degree borrowers receive, whether they completed the educational programs in which they were enrolled,[79] and the quality of their education influence their ability to obtain jobs and earn enough to manage their student loan debt.[80] Default rates are significantly higher for borrowers

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[73] *See infra* Section IV.B.

[74] *What are Loan Delinquency and Default?*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/help-center/answers/article/what-is-loan-delinquency-default [https://perma.cc/Y47A-SLZA].

[75] *Portfolio by Delinquency Status*, *supra* note 62.

[76] Although some borrowers may enter into deferment or forbearance without ever defaulting, one in six borrowers in deferment or forbearance eventually enters default. Lance J. Lochner & Alexander Monge-Naranjo, *Default and Repayment Among Baccalaureate Degree Earners* 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19882, 2014).

[77] ADAM LOONEY & CONSTANTINE YANNELIS, BROOKINGS INST., A CRISIS IN STUDENT LOANS? HOW CHANGES IN THE CHARACTERISTICS OF BORROWERS AND IN THE INSTITUTIONS THEY ATTENDED CONTRIBUTED TO RISING LOAN DEFAULTS 33 (2018).

[78] Andrej Bastrikin, *Student Loan Debt Statistics*, EDUCATIONDATA.ORG (Apr. 12, 2020), https://educationdata.org/student-loan-debt-statistics/ [https://perma.cc/X73M-TBHJ].

[79] Michael Itzkowitz, *Want More Students to Pay Down Their Loans? Help Them Graduate*, THIRD WAY (Aug. 8, 2018), https://www.thirdway.org/report/want-more-students-to-pay-down-their-loans-help-them-graduate [https://perma.cc/5CHD-QLLY] ("Students who complete college are at least 20 percentage points more likely than non-completers to begin paying down their loan principal at every year of measurement.").

[80] *See* LOONEY & YANNELIS, *supra* note 77, at 32 ("Nontraditional borrowers tended to attend institutions with relatively poor completion rates, and many appear to have failed to complete the programs they started. These latter factors, in particular, are associated with relatively poor labor market and loan outcomes.").

who attend for-profit or two-year degree programs, reaching as high as 47% and 38% respectively for one cohort.[81] Borrowers who attend the most selective, four-year, non-profit institutions have an average default rate of less than 10%.[82] Those who attend less selective four-year, non-profit schools have default rates under 20%.[83] This is, in large part, because borrowers who graduate from four-year degree programs earn substantially more than borrowers who graduate from two-year degree programs or from for-profit institutions. Borrowers who attend for-profit institutions or two-year programs have average annual earnings between $20,900 and $23,900 while graduates from four-year, not-for-profit institutions, on average, earn between $29,100 and $42,300.[84]

For-profit schools have long been associated with higher student loan default rates even after adjusting for student demographics.[85] Government reports, scholarship, and litigation by public enforcement agencies have documented the extensive fraud and deception in this sector of higher education.[86] For-profit schools also have used fraudulent practices to maintain federal student loan eligibility.[87]

African-Americans are disproportionately represented among borrowers in default. The twelve-year default rate is 32% among African-American

[81] *Id.* at 50.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 39.

[85] Luis Armona et al., *How Does For-Profit College Attendance Affect Student Loans, Defaults, and Labor Market Outcomes?* 24 (EconStor, Working Paper No. 811, 2017); DEANNE LOONIN & JILLIAN MCLAUGHLIN, NAT'L CONSUMER L. CTR., THE STUDENT LOAN DEFAULT TRAP: WHY STUDENTS DEFAULT AND WHAT CAN BE DONE ABOUT IT, 12–14 (2012), https://www.studentloanborrowerassistance.org/wp-content/uploads/File/student-loan-default-trap-report.pdf [https://perma.cc/X4DB-JLYE].

[86] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010), https://www.gao.gov/assets/gao-10-948t.pdf [https://perma.cc/6R5F-VJDM] (delivered as testimony before the Committee on Health, Education, Labor, and Pensions, U.S. Senate, by Gregory D. Kutz, Managing Director, Forensics Audits and Special Investigations); STUDENT BORROWER PROT. CTR., AFFIRMING ACCOUNTABILITY (2020), https://protectborrowers.org/wp-content/uploads/2020/12/Affirming-Accountability.pdf [https://perma.cc/6HNZ-EQAA]; Christopher J. Salemme, *Unpatriotic Profit: How For-Profit Colleges Target Veterans and What the Government Must Do to Stop Them*, 32 BYU J. PUB. L. 89 (2017); Michael Stratford, *What's Next for CFPB's Work on Education Issues*, POLITICO (Nov. 20, 2017, 10:00 AM), https://www.politico.com/newsletters/morning-education/2017/11/20/whats-next-for-the-cfpbs-work-on-education-issues-028600 [https://perma.cc/DY6Y-AWJ8] (listing CFPB cases against for-profit schools); State v. Minn. Sch. of Bus., Inc., 935 N.W.2d 124, 138–39 (Minn. 2019).

[87] *See* Memorandum from The Institute for College Access & Success to Interested Parties on Steps the Education Department Should Immediately Take to Curb Default Rate Manipulation (Aug. 21, 2012), https://ticas.org/files/pub_files/TICAS_memo_on_CDR_evasion_082112.pdf [https://perma.cc/7WY2-ZPW7] (explaining manipulation of default rates by for-profit schools to maintain federal student loan eligibility); STUDENT BORROWER PROT. CTR., *supra* note 86; Prentiss Cox et al., *Forgotten Borrowers: Protecting Private Student Loan Borrowers Through State Law*, 11 U.C. IRVINE L. REV. 43, 51–53 (2020) (explaining how private schools manipulate the requirement that federal loans cannot account for more than 90% of tuition).

college graduates, 20% for Hispanics, and 13% for whites.[88] Among those who did not graduate, the corresponding rates are 65%, 48% and 38%.[89] A 2019 study found that, over a twenty-year repayment period, "the median debt of white borrowing students [dropped by] 94%—with almost half holding no student debt—whereas Black borrowers at the median still owe[d] 95% of their cumulative borrowing total."[90] One explanation for the racial differences is that Black students, on average, come from families with lower incomes and less wealth and, thus, must borrow more money for college, which translates into higher loan payments.[91] Racial disparities in earnings compound the situation for borrowers of color because it means they have less money to put toward loan payments.

3. *Consequences of Student Borrower Distress*

The consequences of default extend beyond the debt itself. Borrowers in default take substantial hits on their credit scores that can relegate them to subprime lending as their only source of credit. Insurance companies examine credit scores when making decisions to extend credit, employers look at credit scores in deciding to hire, and landlords accept or reject rental applications, in part, based on credit scores.[92] To collect student borrowers' debts, the government can garnish their wages and seize their tax refunds.[93] Defaulting on a student loan can also disqualify borrowers from receiving federal financial aid in the future, which limits their ability to return to school to complete unfinished degrees or advance their education.[94] In some states, driver's licenses and professional licenses, including licenses for teachers, firefighters, and nurses, can be revoked if the borrower defaults.[95] Borrowers who default on their student loans may have to delay major life purchases and social milestones.[96] And, the financial struggle can

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[88] Paul Fain, *Default Crisis for Black Student Borrowers*, INSIDE HIGHER ED (Oct. 17, 2017), https://www.insidehighered.com/news/2017/10/17/half-black-student-loan-borrowers-default-new-federal-data-show/ [https://perma.cc/865E-2M89].

[89] *Id.*

[90] LAURA SULLIVAN ET AL., INSTITUTE ON ASSETS AND SOCIAL POLICY, STALLING DREAMS: HOW STUDENT DEBT IS DISRUPTING LIFE CHANGES AND WIDENING THE RACIAL WEALTH GAP 4 (2019).

[91] Jonnelle Marte, *Black Student Loan Borrowers are Defaulting at Nearly Twice the Rate of Whites: NY Fed*, REUTERS (Nov. 13, 2019), https://www.reuters.com/article/us-usa-fed-debt-race/black-student-loan-borrowers-are-defaulting-at-nearly-twice-the-rate-of-whites-ny-fed-idUSKBN1XN25M [https://perma.cc/2JRJ-RLST].

[92] *See* Bill Fay, *What Is A Credit Score & How Is It Calculated?*, DEBT.ORG (Mar. 27, 2012), https://www.debt.org/credit/report/scoring-models/ [https://perma.cc/J33X-A9L7].

[93] *See supra* Section II.B.3.

[94] *See Student Loan Delinquency and Default*, *supra* note 36.

[95] *See* Courtney Nagle, *Student Loan Debt Could Affect Your Job in 13 States*, U.S. NEWS (Apr. 10, 2019, 11:19 AM), https://www.usnews.com/education/blogs/student-loan-ranger/articles/2019-04-10/these-states-could-revoke-your-professional-license-over-student-loan-debt [https://perma.cc/BJC5-66FZ].

[96] *See* Arianna Castonguay, *An Economic Analysis of Student Loan Default* (May 10, 2019) (Ph.D. dissertation, University of Maine) (available at https://digitalcommons.library.

lead borrowers to experience emotional distress that can impede their access to opportunities that might help them manage their debt.[97]

Even borrowers who do not default often find that the debt keeps them from moving forward in their lives. For every $1,000 increase in student loans, homeownership rates decline by 2.5%,[98] and one-third of student loan holders between 18 and 34 years old report delaying marriage because of student loan debt.[99] Student loan debt also reduces small business creation and drastically lowers wealth creation,[100] all of which is associated with a lower gross domestic product and higher unemployment.[101] Student borrowers also pay higher costs for other types of credit, such as auto loans and credit cards, with that cost increasing for borrowers in repayment distress.[102]

B. Failure to Deliver on the Promise of Student Borrower Rights

Massive distress and defaults when borrowers have rights to affordable loan payments mean either that those rights are ill-designed to meet borrowers' needs or that there is an impediment to borrowers taking advantage of their rights. This Section surveys the evidence that ED, either directly or through private contractors, has failed to assist borrowers in exercising their rights and has failed to implement the choices borrowers have made.

1. Failure to Assist Borrowers to Avail Themselves of Their Rights

This subpart examines two of the most important student borrower rights that are substantially under-utilized: disability discharge and IDR.

a. Disability Discharge

As noted in the Introduction, between 2016 and 2019, a little more than one-third (200,000 of 555,000) of student borrowers who were in default and eligible for a disability discharge actually obtained a discharge. In addition, over one-fifth of the borrowers who did receive discharges had their loans

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umaine.edu/cgi/viewcontent.cgi?article=4054&context=etd [https://perma.cc/CVJ9-SGHV]).

[97] *See* Lila MacLellan, *It's Time to Talk About the Mental Health Effects of Student Loan Debt*, QUARTZ AT WORK (Oct. 28, 2019), https://qz.com/work/1732070/the-emotional-toll-of-student-loan-debt-at-work/ [https://perma.cc/Q5T3-WG7K].

[98] Alvara A. Mezza et al., *Student Loans and Homeownership*, 2016-010 FIN. AND ECON. DISCUSSION SERIES 1, 3 (2016).

[99] *See* Jessica Menton, *In Sickness and In Health, But Not In Debt*, USA TODAY (Jan. 31, 2020, 2:55 PM), https://www.usatoday.com/story/money/2020/01/31/student-loans-more-millenials-gen-zers-delay-marriage-reduce-debt/4612295002/ [https://perma.cc/SA7D-MFJ2].

[100] Mezza et al., *supra* note 98, at 6.

[101] *See* Scott Fullwiler et al., Levy Econ. Inst., The Macroeconomic Effects of Student Debt Cancellation 8 (2018).

[102] STUDENT BORROWER PROT. CTR. & CREDIT BUILDER ALL., THE SECRET PRICE OF STUDENT DEBT (2020), https://protectborrowers.org/wp-content/uploads/2020/05/The-Secret-Price-of-Student-Debt.pdf [https://perma.cc/QBQ6-5MUG].

reinstated for failure to file paperwork that ED admitted it does not even review.[103] Similarly, a December 2016 report of the U.S. Government Accounting Office ("GAO") identified a growing problem with the Internal Revenue Service ("IRS") seizing the social security benefits and tax refunds of older borrowers, who were in default on student loans, yet were eligible for disability discharges.[104]

One disabled student loan borrower, Drew Lehman, described struggling to deal with student loan repayments when, one day, an employee of his loan servicer said, "kind of quietly," like "he really wasn't supposed to be telling me about it," that Lehman was eligible for a disability loan discharge.[105] Even then, the employee told him he didn't have any information on the discharge and that Lehman "should look it up."[106] Another disabled borrower paid on her student loans for a decade, leaving her "trapped and exhausted," until she overheard a conversation in a doctor's office about the student loan disability discharge.[107]

In 2012, ED began to allow borrowers to rely on their Social Security Administration disability designation when applying for a student loan discharge.[108] In 2016, ED identified 387,000 borrowers who were eligible for a discharge, almost half of whom were in default, and sent letters to these borrowers stating that they might be eligible for discharge of their loans.[109] In February 2018, a bipartisan group of six U.S. Senators and two Representatives urged a more comprehensive and effective solution—that ED "immediately discharge outstanding student loans for totally and permanently disabled Americans."[110] ED did not respond. ED had previously claimed that it was unable to proactively work to assist student borrowers entitled to disability discharges because of possible adverse tax conse-

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[103] U.S. Gov't Accountability Off., GAO-17-45, Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief, 34 (2016) [hereinafter GAO-17-45]. The definition of disability for purposes of a student loan discharge substantially overlaps with the definition used for social security disability benefits. Thus, it is possible to determine the number of disabled Americans with student loans who are eligible for discharges. *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities (Apr. 12, 2016), https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities [https://perma.cc/H45D-2P9Y].

[104] GAO-17-45, *supra* note 103, at 6.

[105] Lombardo & Turner, *supra* note 6.

[106] *Id.*

[107] *Id.*

[108] U.S. Dep't of Educ., supra note 103.

[109] *See id.*

[110] Press Release, Senator Rob Portman (R-Ohio), With New Tax Law in Place, Sens. Portman, Coons, & King Urge Trump Administration to Discharge Outstanding Federal Student Loans for Totally & Permanently Disabled Americans (Feb. 27, 2018), https://www.portman.senate.gov/newsroom/press-releases/new-tax-law-place-sens-portman-coons-king-urge-trump-administration [https://perma.cc/8XEX-V2CN].

quences. Just the same, when Congress eliminated this obstacle effective January 1, 2018, ED still did not change its practice.[111]

Another group also eligible for student loan disability discharges are servicemembers who the Veterans Administration ("VA") determines are not employable for reasons related to military service.[112] Automatic discharge is possible for these borrowers by comparing VA's list of disabled veterans to ED's list of student borrowers.[113] Yet, until recently, ED continued to demand student loan payments from about half of the approximately 50,000 veterans who qualified for a disability discharge.[114] The problem was only remedied in 2019 when the Trump administration directed ED, under a "policy of the Federal Government to facilitate—in a manner that is quick, efficient, and minimally burdensome—the discharge of Federal student loan debt for totally and permanently disabled veterans."[115] The President did not issue similar instructions for the much larger number of civilian student borrowers with total, permanent disabilities.

b. Income-Driven Repayment

Borrowers who have unaffordable loans and lack sufficient financial resources to repay them can elect the option of IDR. Those who enter one of the IDR programs experience lower rates of loan distress, including default, and better financial outcomes than similarly situated borrowers who remain enrolled in the ten-year repayment plan into which ED defaults all student borrowers.[116]

There is substantial evidence that IDR is underused by student borrowers, resulting in needless repayment distress. A 2012 study by the Department of Treasury found that borrowers in IDR had a default rate of under

[111] John R. Brooks, *Why is the Department of Education Dragging Its Feet on Debt Relief for Disabled Veterans*, MEDIUM (Dec. 13, 2018), https://medium.com/whatever-source-derived/john-brooks-why-is-the-department-of-education-dragging-its-feet-on-debt-relief-for-disabled-e06118c89e9 [https://perma.cc/ZSB6-8KH6].

[112] Memorandum from President Donald Trump to the Sec'y of Educ. & the Sec'y of Veterans Aff. (Aug. 21, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900561/pdf/DCPD-201900561.pdf [https://perma.cc/3SU8-AY2D] [hereinafter Memorandum from President Trump].

[113] Press Release, U.S. Dep't of Educ., U.S. Department of Education and U.S. Department of Veterans Affairs Team Up to Simplify Student Loan Discharge Process for Disabled Veterans (Apr. 16, 2018), https://www.ed.gov/news/press-releases/us-department-education-and-us-department-veterans-affairs-team-simplify-student-loan-discharge-process-disabled-veterans [https://perma.cc/Z96V-MAVB].

[114] Memorandum from President Trump, *supra* note 112.

[115] *Id.*

[116] *See generally* Daniel Herbst, *Liquidity and Insurance in Student-Loan Contracts: The Effects of Income-Driven Repayment on Borrower Outcomes* (May 27, 2020), https://djh1202.github.io/website/IDR.pdf [https://perma.cc/N2LZ-CK96] [hereinafter Herbst, *Liquidity*].

1%.[117] Data from the same study revealed that 70% of borrowers in default were eligible for, but were not using, IDR.[118] Similarly, a 2015 CFPB report found that borrowers not in any IDR program were almost seven times more likely to default than their counterparts who participated in the PAYE version of IDR.[119] Lastly, a 2015 GAO study found a default ratio of more than fourteen to one when comparing borrowers on the standard payment plan with those participating in IDR.[120] GAO also found that less than one-third of borrowers eligible for IDR were in an affordable payment plan.[121]

The IDR programs are complex and helping borrowers to identify the IDR plan that best meets their needs is not easy. ED has failed to effectively inform borrowers of their options, much less routinely assist borrowers in making beneficial choices. Although it is servicers who actually communicate with borrowers, ED controls the servicers and is responsible for deficiencies in the information and advice they provide. GAO concluded that servicers were inconsistent in providing information to borrowers and that "[t]he inconsistency and gaps we identified in how Education and its loan servicers communicate with borrowers about income-driven repayment raise questions about the sufficiency of this information. Without such information, borrowers who are unaware of these plans may miss the opportunity to reduce their risk of delinquency or default."[122]

The Office of the Inspector General ("OIG") similarly found that all student loan servicers have failed in some capacity to adequately inform borrowers of available repayment options.[123] The OIG found that over 90% of monthly FSA samples of recorded calls with servicers "included at least 1 instance of the servicer representative not sufficiently informing borrowers about available repayment options."[124] In May 2017, the OIG reviewed calls

[117] U.S. Gov't Accountability Off., GAO-15-663, Federal Student Loans: Education Could Do More to Help Ensure Borrowers are Aware of Repayment and Forgiveness Options 20 (2015) [hereinafter GAO-15-663].

[118] *Id.* at 13 n.21.

[119] Student Loan Servicing, *supra* note 25.

[120] GAO-15-663, *supra* note 117, at 20–21.

[121] *Id.* at 13.

[122] *Id.* at 24. *See also* Brief for Petitioner, Consumer Fin. Prot. Bureau v. Navient Corp., (No. 3:17-CV-101) 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017) (alleging that Navient steers borrowers into forbearance instead of options in the best interests of borrowers).

[123] U.S. Dep't of Educ., Off. of Inspector Gen., ED-OIG A05Q0008, Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans 11 (2019), https://www.oversight.gov/sites/default/files/oig-reports/a05q0008.pdf [https://perma.cc/NY2K-934T] [hereinafter Federal Student Aid: Additional Actions Needed]; *see also* U.S. Dep't of Treasury, A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, & Innovation 124 (2018), https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf [https://perma.cc/TG6U-DXTG] ("Borrowers in the same financial situation who contact two different servicers in the federal student loan program to enroll in a more affordable repayment plan may end up with different results and advice, which may result in a financial impact on the borrowers.").

[124] Federal Student Aid: Additional Actions needed, *supra* note 123.

between the servicer Pennsylvania Higher Education Assistance Agency ("PHEAA") and borrowers who had missed numerous loan payments. It found that in 24.2% of the calls, PHEAA placed the borrowers' accounts into forbearance without telling the borrowers of all their possible options.[125]

ED officials have conceded that the current system is ineffective, reporting to GAO "ongoing concerns about (IDR) awareness, noting that feedback they have obtained from borrowers suggests borrowers are less aware of income-driven repayment plans and many borrowers have not considered these plans because they did not have enough information about them."[126] In the words of student loan expert Deanne Loonin, "some of the most vulnerable borrowers never know about the lifelines that could help them get a fresh start and climb out from under mountains of student loan debt."[127]

A study by economist Daniel Herbst demonstrated direct links among higher delinquency rates, underuse of IDR, and inadequate loan servicing.[128] Using data from a student loan servicer that randomly assigned agents to call borrowers in delinquency, Herbst uncovered "variability in agents' tendencies to induce IDR take-up."[129] He then looked at the outcomes for borrowers who spoke with agents who had a tendency to induce borrowers to elect IDR and those who did not. Borrowers who spoke with the former group of agents were more likely to elect IDR than borrowers who spoke to agents who were less effective in advising borrowers of IDR.[130] Not surprisingly, Herbst's results echoed others' findings that borrowers in IDR are less likely to default.[131] Herbst also found that "IDR reduces delinquency rates (i.e., late payments) by 22.2 percentage points within eight months of take-up,"[132] and that IDR improves borrowers' cash-on-hand and balance sheets.[133] Herbst concluded, "Given the prevalence and severity of student loan defaults, estimates of delinquency effects alone suggest IDR may go a long way towards improving the financial welfare of student borrowers."[134]

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[125] *Id.* at 13.

[126] GAO-15-663, *supra* note 117, at 22; *see also* Federal Student Aid: Additional Actions Needed, *supra* note 123, at 13; Ass'n. of Cmty. Coll. Tr., A Closer Look at the Trillion: Borrowing, Repayment and Default at Iowa's Community Colleges 4 (2015), https://www.acct.org/files/Publications/2015/ACCT_Borrowing-Repayment-Iowa_CCs_09-28-2015.pdf [https://perma.cc/6GCJ-VJNW] (collecting data on default by Iowa community college students and concluding that there is massive underuse of repayment rights other than IDR that "is likely driven by the complexity of the repayment system and lack of information about debt burdens and repayment obligations").

[127] Deanne Loonin, *Overhauling Student Loan Repayment: Part One*, Medium (June 12, 2017), https://medium.com/@db.loonin/overhauling-federal-student-loan-repayment-part-one-a2856a1bae89 [https://perma.cc/232F-Z4HW] [hereinafter Loonin, *Overhauling*].

[128] Herbst, *Liquidity*, *supra* note 116.

[129] *Id.* at 2.

[130] *Id.* at 40 fig. 2.

[131] *Id.* at 1–3.

[132] *Id.* at 2.

[133] *Id.* at 3.

[134] *Id.* at 3. The benefits of IDR continue long-term. Even a one-year enrollment in an IDR plan increases a borrower's likelihood of moving to a higher-income zip code by 2%, increases the likelihood of holding a mortgage within three years by 2%, and increases a borrower's

The evidence suggests that servicers fail even the most distressed borrowers—those who are in default. In 2017, the CFPB analyzed borrowers' transitions to IDR after they completed post-default rehabilitation or consolidation—the two options for exiting default status.[135] Only 2% of borrowers were enrolled in an IDR program on completing rehabilitation.[136] Nine months after rehabilitation, the rate rose to 10%, even though "the range of widely-available IDR plans should ensure payments remain affordable and repayment success is possible over the long-term."[137] Consistent with the overall impact of IDR on default rates, the CFPB found that "[w]hen comparing three-year outcomes for borrowers who rehabilitate a loan, borrowers in our sample who did not enroll in IDR were five times more likely to redefault than those who did enroll in IDR within the first three-to-four years following the successful rehabilitation of their defaulted loans."[138]

Consolidation requires enrollment in IDR, which explains why the redefault rates are markedly lower for borrowers who consolidate their loans relative to those who opt for rehabilitation without IDR. Despite the compelling benefit of consolidation, borrowers are much more likely to enroll in rehabilitation than consolidation, which could be the result of steering. ED pays debt collectors a percentage of borrowers' loans for directing borrowers into rehabilitation; in contrast, debt collectors receive a flat amount of $27.35 per consolidation. Additionally, rehabilitation entails less documentation, whereas consolidation involves significant documentation, particularly if a borrower has numerous types of loans with different servicers.[139] It is not surprising, therefore, that the CFPB found that debt collectors misrepresented to borrowers the benefits of rehabilitation.[140]

2. *Failure to Execute Borrowers' Choices*

ED has stymied many student borrowers who know of their rights to IDR or debt relief and have sought to exercise them. This subpart looks at

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credit score by an average of 5.6 points compared to those similarly situated who did not enroll in an IDR plan. *Id.*

[135] *See* CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 30 (2017).

[136] Seth Frotman & Rich Williams, *New Data Documents a Disturbing Cycle of Defaults for Struggling Student Loan Borrowers*, CONSUMER FIN. PROT. BUREAU (May 15, 2017), https://www.consumerfinance.gov/about-us/blog/new-data-documents-disturbing-cycle-defaults-struggling-student-loan-borrowers/ [https://perma.cc/P6BN-MEBT].

[137] *Id.*

[138] CONSUMER FIN. PROT. BUREAU, UPDATE FROM THE CFPB STUDENT LOAN OMBUDSMAN 4 (2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Update-from-Student-Loan-Ombudsman-on-Redefaults.pdf [https://perma.cc/28NF-J68K].

[139] Contract between U.S. Dep't of Education and Navient, LLC 4 (Aug. 27, 2014) (available at https://studentaid.gov/sites/default/files/ED-FSA-09-D-0015_MOD_0085_Navient.pdf [https://perma.cc/EM7M-F8NK]) [hereinafter Contract between U.S. Dep't of Education and Navient, LLC].

[140] CONSUMER FIN. PROT. BUREAU, SUPERVISORY HIGHLIGHTS 6 (2015).

the PSLF program and the implementation of borrowers' repayment choices, including repayment under IDR.

a. Public Service Loan Forgiveness

For students who have planned their lives around their right to a loan discharge, ED's failure to implement their repayment choices can be devastating. A stark example of this problem is the administration of the PSLF program.

Student borrowers who engage in certain professions or types of work that Congress has deemed socially beneficial can be eligible for early discharge of their loans. Enacted in 2007, PSLF entitles borrowers to government discharge of their loans after they have worked for a public service employer for ten years and have made 120 payments.[141] Eligibility for PSLF includes "careers, including teaching, social work, law enforcement, and public health that traditionally pay more modest wages relative to many private sector fields that require comparable levels of advanced education."[142] As many as a quarter of all jobs in the nation qualify for PSLF.[143] More than 60% of borrowers pursuing PSLF reported earning less than $50,000 per year.[144]

In 2017, as the first cohort of student borrowers who worked in the public or non-profit sectors approached the ten-year mark, at which point ED was to forgive the balance of their loans, the CFPB issued a report warning of multiple failures in PSLF servicing that would block the promised loan forgiveness. For example, "borrowers complain that their servicer did not enroll them into a qualifying repayment plan, despite expressly telling their servicer that they are pursuing PSLF."[145] When PSLF reached its ten-year anniversary in 2017, ED granted PSLF loan discharges to only 55 of 19,321 applicants, alleging that the remaining 19,266 borrowers failed to complete the proper paperwork needed to qualify for PSLF relief.[146] GAO

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[141] 20 U.S.C. § 1087e(m); 34 C.F.R. § 685.219 (2020).

[142] Staying on Track While Giving Back, *supra* note 43, at 7.

[143] Consumer Fin. Prot. Bureau, Public Service & Student Loans 2 (2013), https://files.consumerfinance.gov/f/201308_cfpb_public-service-and-student-debt.pdf [https://perma.cc/477X-LSZW].

[144] Staying on Track While Giving Back, *supra* note 43, at 7, 21.

[145] *Id.* at 33. For a detailed example of how ED servicing process stymies obtaining PSLF discharge, see Adam S. Minsky, *Whistleblower: Dept. of Education Deliberately Thwarted Loan Forgiveness Process*, Forbes (June 23, 2020, 9:45 AM), https://www.forbes.com/sites/adamminsky/2020/06/23/whistleblower-dept-of-education-deliberately-thwarted-loan-forgiveness-process/#60b5fe3bb23f [https://perma.cc/59LE-P2YV].

[146] U.S. Gov't Accountability Off., GAO-18-547, Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers 11 (2018) [hereinafter GAO-18-547]; *see also* Minsky, *supra* note 145 (providing example of how ED servicing process stymies obtaining PSLF discharge); Cory Turner & Chris Arnold, *Dept. Of Education Fail: Teachers Lose Grants, Forced To Repay Thousands In Loans*, NPR (Mar. 28, 2018), https://www.npr.org/sections/ed/2018/03/28/596162853/dept-of-education-fail-teachers-lose-grants-forced-to-repay-thousands-in-loans [https://perma.cc/JAW5-JMHD].

concluded that this situation "suggests that many borrowers do not understand or are not aware of these requirements."[147] As an example, Myles Braccio recounted his servicer "giving him bad advice about loan consolidation, wiping away close to two years of qualifying [PSLF] payments, restoring them after he complained to the federal Department of Education's ombudsman's office, and then taking them away again after he made another inquiry."[148]

Congress responded to the paucity of borrowers who qualified for PSLF by appropriating $700 million for a temporary program that would retroactively allow student borrowers to obtain the PSLF discharges for which they should have qualified.[149] In September 2019, GAO reported almost total failure by ED to implement this temporary program—ED having "approved 1 percent (661) and denied 99 percent (53,523)" of applicants under the temporary program.[150] This second collapse in ED's implementation of PSLF led GAO to conduct yet another study of ED's PSLF loan forgiveness program, which concluded that the ED process was confusing and "not borrower-friendly."[151]

ED's abysmal performance with PSLF reflects a failure of the government to fulfill promises that borrowers relied on in planning their careers and other life choices.[152] A military veteran and police officer in Michigan stated, "[m]y decision to be a public servant, join the military, was 100% based on that government promise."[153] His spouse, a public-school teacher, similarly expected PSLF debt relief after ten years of payments. But after making student loan payments for eight years, they were told that none of those payments were eligible for PLSF debt relief and they remained obligated on $119,000 in student debt. "It's hard not to feel betrayed," the couple said.[154]

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[147] GAO-18-547, *supra* note 146, at 11. *See also Lawson-Ross v. Great Lakes*, NAT'L STUDENT LEGAL DEF. NETWORK, https://www.defendstudents.org/cases/lawson-ross-v-great-lakes [https://perma.cc/FJ4E-A9B7] (lawsuit alleging that borrowers were told to rely on student loan servicer Great Lakes for advice, but were routinely given incorrect information that made the borrowers ineligible for the discharge).

[148] Ron Lieber, *A $350 Million Fund Helps Many Public Servants. Meet the Ones Left Out*, N.Y. TIMES (Apr. 6, 2018) https://www.nytimes.com/2018/04/06/your-money/public-servants-student-loans.html [https://perma.cc/56H4-H4V2].

[149] U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-595, PUBLIC SERVICE LOAN FORGIVENESS: IMPROVING THE TEMPORARY EXPANDED PROCESS COULD HELP REDUCE BORROWER CONFUSION 1 (2019).

[150] *Id.* at 11.

[151] *Id.* at 9–10.

[152] *See generally* STUDENT BORROWER PROT. CTR., BROKEN PROMISES: EMPLOYER CERTIFICATION FAILURE 3 (2020).

[153] Ailsa Chang, *Consumer Protection Agency is Failing Student Loan Borrowers, Lawsuit Says*, NPR (Nov. 25, 2019, 10:49 AM), https://www.npr.org/transcripts/782460891 [https://perma.cc/283R-7LTP].

[154] *Id.*

b. Repayment and IDR

Reports summarizing complaints to the CFPB, public enforcement actions, and private lawsuits have surfaced a variety of servicer errors in payment processing. The 2016 CFPB annual report on student lending found payment processing and IDR were the top two categories for student borrower complaints about servicing, accounting for 37% of all complaints.[155] For example, Navient, the largest student loan servicer, has allegedly divided payments among borrowers' outstanding loans even when the borrowers directed their payments to go toward a specific loan; as a result, the borrowers have paid more in interest and received negative credit reports.[156] Borrowers also report that when they have made prepayments to reduce the principal balance of their loans, servicers have instead reset their monthly payment amounts. As a result, the borrowers had to pay more in interest than they would have paid had the servicers heeded their instructions.[157]

Borrowers using IDR have encountered problems recertifying their eligibility. Student borrowers in IDR plans must annually recertify their IDR status and provide evidence of their income. In 2018, the Massachusetts Attorney General filed a suit against PHEAA, alleging that the servicer did not process IDR recertifications in a timely manner and placed borrowers in forbearance while the recertification was pending, which postponed the borrowers' eligibility for a discharge under PSLF and similar programs.[158] "Between July 2011 and March 2015, more than 60% of Navient's borrowers who enrolled in IDR plans failed to renew their enrollment."[159] The CFPB has reported that borrowers transitioning from default to IDR "describe a range of communication, paperwork processing, and customer service breakdowns at every stage of the default-to-IDR transition."[160] Similarly, the Herbst study found that 60% of borrowers fail to recertify after the first year

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[155] CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 8 (2016).

[156] *See* Complaint, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. 2017); *see also* Jennifer Wang, *Student Loan Repayment Should Be a No-Brainer, Right?*, YOUNG INVINCIBLES (May 14, 2015), https://younginvincibles.org/student-loan-repayment-should-be-a-no-brainer-right/ [https://perma.cc/P6FG-FK2W] (reporting that a survey of members showed that student borrowers "sent instructions to their servicer with a payment (like asking their servicer to apply their payment to highest interest loan) and those instructions were not followed.").

[157] Seth Frotman, *You Have the Right to Pay Off Your Student Loan as Fast as You Can, Without a Penalty*, CONSUMER FIN. PROT. BUREAU BLOG (Sept. 26, 2016), https://www.consumerfinance.gov/about-us/blog/you-have-right-pay-your-student-loan-fast-you-can-without-penalty/ [https://perma.cc/S7YH-FG8U].

[158] *See* Commonwealth v. Pa. Higher Educ. Assistance Agency, 34 Mass. L. Rep. 616 (Mass. Super. Ct. 2018).

[159] Pennsylvania v. Navient Corp., 967 F.3d 273, 281 (3d. Cir. 2020).

[160] CONSUMER FIN. PROT. BUREAU, ANNUAL REPORT OF THE CFPB STUDENT LOAN OMBUDSMAN 4 (2016).

of IDR enrollment, with the "likely explanation" being the burden of the recertification process.[161]

While we have cataloged the many ways that ED, FSA, and servicers have neglected borrowers, there are others who share the blame for borrower distress. Congress passed multiple laws that have complicated the administration of student loans. The new programs included: PLUS loans for graduate and professional students, TEACH Grants, IBR, PAYE, New IBR, REPAYE, the Service Members Civil Relief Act capping interest on federal student loans during military service, and Public Service Loan Forgiveness.[162] There were also new provisions allowing discharge of loans in certain circumstances.[163] With each new program, ED, FSA, and servicers have had to implement new policies and procedures, update their technology, and train their staff. Congress imposed a heavy burden on FSA seemingly without regard for the operational demands that arose from the new laws. Commentators have argued that "Congress must understand that its own actions with respect to FSA can affect ultimate outcomes achieved on student loan repayment, the cost to make changes, or other key measures of success."[164]

IV. The Fallacy of Applying a Creditor-Rights Servicing Model to Student Loans

ED's failure to help borrowers access student loan repayment and discharge rights is puzzling at first glance. This indifference to student loan borrowers makes sense, however, if one recognizes that ED has adopted principles and practices from private credit market servicing of loans.

Federal student loans are not part of a credit market; the [student] loan program is fundamentally different from the private market; it was created to provide financing for all students. The generosity of its programs—from income-based repayment to substantial options for postponing payments—is aligned with that vision."[165] The administration of student loans, thus, should be conducted as a public service, not as a market transaction.

Accordingly, this Part builds the theoretical argument for why the proper starting place for ameliorating student loan distress is to replace a creditor-rights perspective with a focus on how the government can deliver existing legal rights to borrowers. Section A describes the role of loan servicing in the for-profit consumer finance markets, and looks at the duties, or absence thereof, of creditors to inform and assist borrowers in loan distress,

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[161] Herbst, *Liquidity*, *supra* note 116, at 20.

[162] Loonin et al., *supra* note 21, at §§ 3.3.3–3.3.4, 10.10–10.12.

[163] *Id.* at §§ 10.8, 12.7.

[164] Ben Miller & Jason Delisle, Ensuring Accountability and Effectiveness at the Office of Federal Student Aid, Ctr. for Am. Progress 25 (2019).

[165] Colleen Campbell, *How Congress Can Fix Student Loan Repayment*, Ctr. for Am. Progress (Mar. 7, 2019, 9:00 AM), https://www.americanprogress.org/issues/education-postsecondary/reports/2019/03/07/467005/congress-can-fix-student-loan-repayment/ [https://perma.cc/SS7Z-UCSE].

as well as the problems that arise with outsourced third-party servicers. In Section B, we describe the differences between market-based servicing and a public entity administering student loans and the accompanying benefits. In Section C, we explain why obstacles to employing a borrower-centered repayment process in private credit markets should not apply to student loan repayment.

A. Creditor-rights Servicing in For-Profit Loan Markets

Market-based consumer loans are typically made after an underwriting process that evaluates a consumer's ability to repay the loan. Underwriting involves an evaluation of the potential borrower's income, assets and liabilities, credit repayment history, and the current and projected value of property that will serve as collateral for the loan, if any. This process determines whether the lender will extend credit, and if so, at what interest rate and other terms.[166]

After a loan is originated, the creditor services the loan, either through an in-house unit or by outsourcing to a third-party servicer with whom the creditor has a contractual relationship.[167] Subpart 1 below describes the loan servicing process for market-based loans.[168] Subpart 2 looks at rights and obligations of servicers in credit markets.[169]

1. Loan Servicing Basics

Servicing of loans involves two functions. The primary responsibility of most servicers can be described as *routine servicing conduct.* For all types of credit, servicers are responsible for determining periodic payment amounts due and informing borrowers of these amounts, collecting payments, tracking loan balances, properly allocating payments to different accounts, responding to borrower inquiries or concerns, filing or transmitting documents reflecting loan payoff amounts, and complying with federal and state laws.[170] For borrowers who never become seriously delinquent, routine servicing

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[166] There are a few loan markets in which underwriting does not occur. These markets tend to engage in abusive lending and thus are subjects of continuous consumer protection concerns. *See, e.g.*, *Payday, Vehicle Title, and Certain High-Cost Installment Loans—Revocation Rule*, Consumer Fin. Prot. Bureau (July 7, 2020), https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/payday-vehicle-title-and-certain-high-cost-installment-loans-revocation-rule/ [https://perma.cc/SQK2-TTS4].

[167] *See generally* Consumer Fin. Prot. Bureau, CFPB Examination Procedures: Mortgage Origination (2015), https://files.consumerfinance.gov/f/201505_cfpb_mortgage-origination-exam-procedures.pdf [https://perma.cc/Z3QP-A7KE].

[168] *See infra* Part IV.A.1.

[169] *See infra* Part IV.A.2.

[170] David E. Worsley, *Loan Servicing, Default, and Enforcement Issues*, 61 Consumer Fin. L.Q. Rep. 499, 499 (2007); *see also* Scott D. Samlin, *Common Loan Servicing Compliance Issues-Designing Servicer Best Practices*, 61 Consumer Fin. L.Q. Rep. 12 (2007) (describing compliance issues for all types of loan servicers).

functions will be their only interactions with their lenders or their third-party servicers during the life of their loan. Third-party servicers receive a fixed fee for performing routine servicing. Mortgage servicers, for instance, typically will receive an annual fee of between .25% and .50% of the outstanding loan amount, depending on the type of loan.[171]

The other general function in loan servicing is distressed loan management. Nonpayment by the borrower usually will trigger late charges under the loan contract, but an extended period of nonpayment will result in the delinquent loan being deemed distressed or in default.[172] Creditors have the option to initiate debt collection on default, including filing a lawsuit seeking a money judgment against the borrower. Secured creditors can also exercise rights against the secured property, by repossessing a motor vehicle or initiating a mortgage foreclosure proceeding.

Another option, especially for mortgage lenders, is to offer loan modifications that change the terms, rates, or other conditions of the loans to make them affordable. Creditors can also allow distressed borrowers to forbear payments, settle debts for less than their face value, or enter other arrangements that lessen the burden of repayment in recognition of the borrowers' inability to repay.

Creditors employing third-party servicers sometimes use a "master servicer" to handle routine servicing and a "special servicer" when loans go into default.[173] Similarly, debt collection is sometimes handled by the same servicer who conducts loan servicing and other times is referred to a collection agency.

2. *Rights and Obligations of Creditors in Distressed Loan Management*

While there is much to be said about distressed loan management, three points are critical for our purposes. First, and not surprisingly, it is a creditor's evaluation of its own interests that controls its decisions about the options for handling a distressed loan. As Adam Levitin and Tara Twomey have explained in their discussion of distressed mortgage loans, "If the loan defaults, the lender will address the default with the goal of maximizing the loan's net present value, subject to its own valuation idiosyncrasies, such as

[171] Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities* 15 (Fin. & Econ. Discussion Series, Working Paper No., 2008–46, 2008).

[172] Yowana Wamala, *What Does It Mean to Default on a Loan? What Happens When You Default?*, ValuePenguin (June 17, 2020), https://www.valuepenguin.com/loans/what-does-it-mean-to-default-on-a-loan [https://perma.cc/P54E-TMDA].

[173] Beverly J. Quail & Joseph E. Lubinski, *How Borrowers Should Deal with Special Servicers*, 26 Prob. & Prop. 21, 21 (2012) (describing specialty servicers as "the companies that step in when a loan fails to perform as expected and the loan is transferred from the master servicer to the special servicer.").

liquidity needs."[174] Navient described this calculus in a securities filing concerning its private student loans, which are market-based loans: "We modify the terms of loans for certain customers when we believe such modifications may increase the ability and willingness of a customer to make payments and thus increase the ultimate overall amount collected on a loan."[175]

Second, creditors in market-based transactions have no obligation to assist borrowers who are in distress or default. They have no duty to understand borrowers' circumstances and discern their best interests. And, they do not have to provide borrowers with information that might enable the borrowers to obtain lower payments or discharge of their debt. Rather, servicers' conduct is constrained only by the law that governs any commercial transaction, such as the limits of good faith and fair dealing in contract law,[176] common law fraud, or statutory prohibitions on Unfair or Deceptive Acts or Practices ("UDAP").[177]

Third, even if a creditor wanted its servicer to assist borrowers in navigating their financial situations, the creditor likely would be unwilling to pay the additional costs associated with having the servicer advise borrowers. In large credit markets, many creditors use the same servicer. It would be difficult to coordinate all the creditors to implement such a change. Furthermore, no one creditor acting alone would have sufficient incentives to invest in the training and monitoring of the servicer's staff, to make changes in the servicer's culture, and to adopt new incentives needed to develop the advising functions. This is because that one creditor would bear all the costs; yet, the benefits would spill over to the other creditors, who did not invest in the changes. Economists refer to this predicament as a common agency problem.[178]

B. Student Loan Repayment Differs Markedly from Market-based Loan Servicing

The relationship between the federal government and student borrowers differs in significant ways from the relationship between lenders and borrowers with market-based loans— or at least it should differ. Student loans are a federal benefit provided to borrowers. The latter are market-based transactions between self-interested parties.

Figure 3 provides a chronological summary of the core functions of servicers for market loans and student loans. The term "creditor" is used in

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[174] Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 11 (2011).

[175] NAVIENT CORP., ANNUAL REPORT (FORM 10-Q) (2014).

[176] KEVIN M. LEWIS & NICOLE VANTKO, CONG. RSCH. SERV., R45917, FEDERAL AND STATE REGULATION OF STUDENT LOAN SERVICERS: A LEGAL OVERVIEW 19 (2019).

[177] *See* LOONIN ET AL., *supra* note 21, at § 14.3.3.2.

[178] Brigham Frandsen et al., *Sticking Points: Common-Agency Problems and Contracting in the U.S. Healthcare System*, 50 RAND J. ECON. 1, 7 (2019). Agency problems with servicers are discussed in more detail in Section V.C.2.

this Figure to include the actions of servicers acting as agents of market creditors or ED.

	Market-Based Loan Servicing	**Student Loan Servicing**
1. Loan Origination	Creditor determines whether borrower is eligible for loan and the price.	Borrower exercises right to obtain loan. No underwriting occurs; just determination of eligibility under HEA.
2. Initial Payment	Creditor determines payment amount based on loan contract and charges the Borrower.	Borrower makes a choice to accept standard/extended/graduated repayment or enroll in IDR. Borrower is responsible for documenting IDR, if applicable.
3. Routine Payment	Creditor determines amounts owed, creates billing, credits and allocates payments, and controls related processes.	Creditor determines amounts owed, creates billing, credits and allocates payments, and controls related processes. Borrowers are responsible for documenting IDR eligibility and requesting/documenting discharge rights, if applicable.
4. Loan Distress	Creditor determines period from nonpayment to placement of loan in default. Creditor decides when and how to seek collection or other recourse. Creditor determines loan and payment modifications to offer Borrower, if any.	Borrower determines whether and when to exercise rights of forbearance, deferment, rehabilitation, or consolidation (and switch to IDR, if appropriate). Creditor implements remedy, if any selected. Collections start after one year of default, but borrowers retain the right to rehabilitate after collections begin.
5. Loan Discharge	Creditor discharges loan only after full repayment required by loan contract (with any modifications) or borrower obtains bankruptcy or other judicial discharge.	Creditor: discharges loan after full payment (with any modifications as a result of borrowers participating in IDR); Creditor discharges balance of loan on IDR completion; Creditor discharges balance of loan when borrower documents PLSF or disability discharge; Borrower obtains administrative discharge (full or partial) based on other discharge right; or Borrower obtains bankruptcy (rare) or other judicial discharge.

FIGURE 3. COMPARISON OF MARKET-BASED LOANS AND STUDENT LOANS

A consistent point of difference between the two loan processes is who has control. With market-based lending, the creditor or its servicer makes all the decisions and takes all the actions under the terms of the contract with the borrower. In contrast, with student loans, borrowers have control over multiple features of their loans, including the ability to exercise unique statutory rights—rights that usually have no parallel in a market transaction.

Furthermore, unlike student loan servicing, creditors in credit markets base their decisions on their own interests and rights, and do not take borrowers into account except to the extent disclosure or unfairness doctrines might restrict their actions.[179] The only time that market-based servicing functions a bit like student loan servicing is when mortgage servicers restructure distressed loans. As an alternative to foreclosure, mortgage servicers are typically empowered by the mortgage note holder to offer forbearance on payments followed by modification of loan repayment terms. The decision by market-based lenders whether to offer a loan modification, and under what terms, is a function of whether the value of the loan to the creditor is higher if the servicer proceeds to foreclosure or if it modifies the loan.[180]

The expired Home Affordable Modification Program ("HAMP") created during the mortgage crisis provided government support for loan modifications in lieu of foreclosures by offering subsidies to servicers.[181] But, even then, the options for distressed borrowers were within the context of a creditor-rights framework. HAMP did not grant homeowners any rights to a loan modification; it just attempted to influence servicers acting on behalf of the creditors to make modifications. In contrast, student borrowers have repayment and relief rights guaranteed under federal law.

Even at the point of loan discharge for reasons other than full repayment of loans, creditors' obligations to borrowers differ starkly. In market-based transactions, creditors have no obligation to tell borrowers that they have the option of seeking bankruptcy or to provide helpful information about when and how to exercise their right to seek bankruptcy protection. With student loan servicing, however, the federal government has granted borrowers various rights to relief from the burden of their loan payments. From this flows an obligation of the ED to provide borrowers with the information and assistance that would enable them to exercise their rights to loan relief.

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[179] *See supra* Part IV.A.3.

[180] *See supra* Part IV.A.2.

[181] *See* U.S. Dep't. of the Treasury et al., Joint Report on Guiding Principles for the Future of Loss Mitigation 6 (2016) (describing the history and implementation of HAMP).

C. There is No Reason Why ED has to Employ a Creditor-Rights Servicing Model for Student Loans

In this Section, we examine and reject two arguments that could be made in support of ED's practice of limiting borrowers' exercise of their rights. In subpart 1, we argue that it is a false choice to suggest that ED must balance taxpayer interests with borrower rights. In subpart 2, we argue that ED could focus on the needs of borrowers even when using third-party servicers.

1. The False Choice Between Taxpayer and Borrower Interests

One argument for supporting a creditor-rights approach for student loans is the notion that ED is serving taxpayers' interests by limiting borrowers' ability to exercise their rights.[182] The former Acting Assistant Secretary for Postsecondary Education at ED, David Bergeron, offered this observation of how student loan repayment is currently administered: "[A]t the end of the day, what FSA is judged by is not customer service, but how much money is returned to the Treasury. Their default option is to think of taxpayers first and borrowers as an afterthought."[183]

It is obviously true that when borrowers exercise their rights to reduce the amount of repayment, there will be a decrease in federal government revenue from those loans. But this situation is no different than the exercise of any other federal statutory right given to individuals. Imagine that the IRS decided that it could increase tax collections if it obscured from taxpayers the right to deduct contributions made to traditional Individual Retirement Accounts ("IRA") by eliminating the line where taxpayers would otherwise report their IRA contributions. It would be no defense to this interference with taxpayers' rights that the IRS has a mission to maximize tax revenue. Neither the IRS nor ED has the authority to withhold information in order to provide a benefit to taxpayers.

The HEA provides student borrowers with what David Super has described as a "positive entitlement."[184] Student borrowers have a legally enforceable individual right to select an IDR payment or to obtain a loan

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[182] Loonin & Morgan, *supra* note 67, at 903 ("It may seem obvious that the success of the student loan program would be measured primarily by how well it serves students, but this is not the case. As a government-sponsored, taxpayer-funded program, the student loan program is measured by both borrower outcomes and taxpayer outcomes. In many cases, the best outcome for a borrower conflicts with the best outcome for a taxpayer.").

[183] Shahien Nasirpour, *DeVos Tells CFPB To Back Off on Student Loans*, BLOOMBERG (Sept. 8, 2017), https://www.bloomberg.com/news/articles/2017-09-08/betsy-devos-tells-cfpb-to-back-off-on-student-loans [https://perma.cc/Q5X8-L4L3].

[184] *See generally* David A. Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633, 648–49 (2004).

discharge on proof of total and permanent disability. Federal agencies cannot, in order to save money, restrict people's positive entitlements.[185]

ED is selective in its concern with the cost of student loans. If, in fact, ED is concerned with minimizing the cost of the student loan program to taxpayers, one would expect it not only to try to reduce the uptake of IDR and reduce access to discharge rights at the back end, but also, at the front end, to try to limit borrowers' access to the types of loans that borrowers are least likely to be able to repay. This has not been ED's practice. ED makes loans readily available to students who attend for-profit schools, despite the high default rates among students who attend those schools. But when students attempt to defend against loan repayment based on the pervasive fraud in these schools, the ED has placed roadblocks in the way of using borrower fraud defenses.[186] The result is that student loans currently bear no resemblance to a credit market at the front end of loan origination, but look a lot like a credit market at the back end of loan repayment.

The purported trade-off between borrower rights and taxpayer interests is a false choice for practical reasons as well. Student loans historically have been "a cash cow for the government," producing a profit for the federal government.[187] This has changed as more borrowers have elected IDR. Just the same, even with the uptick in the number of borrowers in IDR, Professor John Brooks has estimated that loans made to student borrowers in 2019 will result in essentially a break-even payback over the course of the loans.[188]

It is also possible to argue that ED's approach to student loan administration amounts to a slow-walk of student borrower entitlements as a means of maximizing ED's limited resources. If, in fact, ED leaders view the congressionally mandated rights of student borrowers as too costly, they should raise their concerns with Congress, and not usurp congressional power by adopting practices that conflict with the law.

2. *ED Could Adopt Borrower-Centered Servicing without Giving Rise to the Servicing Issues that Plague Credit Markets*

One could argue that the problems that have arisen in student loan servicing are inherent when servicing is outsourced.[189] Two concerns arise when loan ownership and servicing are separated: errors from non-uniformity and conflicts between the interests of principals and agents when principals do not have sufficient incentives to supervise. In this subpart, we explore why

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[185] *Id.*

[186] *See infra* Part VI.D.

[187] Camilla E. Watson, *Reforming the Tax Incentives for Higher Education*, 36 VA. TAX REV. 83, 120 (2017).

[188] John R. Brooks, *Curing the Costs of the Disease: Legal Education, Legal Services and the Role of Income-Contingent Loans*, 68 J. LEGAL EDUC., 521, 539 n.76 (2019) [hereinafter Brooks, *Curing the Costs*].

[189] The HEA authorizes the use of contract servicers by ED, but nothing in federal law requires their use. 20 U.S.C. § 1087(f).

these problems should not arise with the outsourcing of student loan servicing.

a. Non-Uniformity is Not an Issue

Outsourced servicing to a single servicer has economic utility in credit markets, primarily because there are economies of scale in aggregating the billing, payment, and collection of the debts held by multiple creditors. Aggregation makes it possible for the fixed costs and the training of servicers' employees to be spread over a large number of loan products and creditors. Servicers, therefore, usually bill and collect for many companies. Handling the accounts of multiple creditors, where each creditor has a substantial number of standard loan contracts with different pricing, repayment, and collection terms, is challenging.[190] The lack of uniformity makes servicing difficult because servicers need to have processes for each creditor's rights to repayment in each loan contract. Put simply, non-uniformity makes servicing errors more likely. Recurrent and substantial problems in routine payment servicing have been rampant in the mortgage market.[191]

The market forces that drive routine payment servicing errors in credit-markets should not arise with student loans. The federal government is the only creditor for federal direct student loans, and servicers are not managing the accounts for hundreds or thousands of creditors who have many and varied loan contracts. Student loan programs are complex, but a servicer focused on federal student loan administration should be able to master the limited universe of loan terms. In addition, the fixed cost of developing systems to effectively service student loans is much lower than it would be in credit markets where the systems have to take into account all the variations among creditors and their products.

b. Absence of Common Agency Problem

The common agency problem that we briefly discussed earlier[192] should not arise when there is only one creditor.

With student loans, there is only one creditor and that creditor can impose requirements on one or more servicers without any risk of spillover effects benefitting other creditors because, quite simply, there are no other

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[190] Nick Bourke, Pew Charitable Trs., Safe Credit Card Standards 5–6 (2009), https://www.pewtrusts.org/-/media/assets/2009/03/31/final8247_pct_creditcard_v3.pdf [https://perma.cc/4JLV-9HKW] (discussing challenges arising from a market in which multiple creditors adopt varying terms in their contracts).

[191] *See* Sarah Bloom Raskin, Governor, Fed. Rsrv. Sys., Address at the National Consumer Law Center's Consumer Rights Litigation Conference: Problems in the Mortgage Service Industry (Nov. 12, 2010) (transcript available at https://www.federalreserve.gov/newsevents/speech/raskin20101112a.htm [https://perma.cc/S6KV-J3HJ]).

[192] *See supra* Part IV.A.2.

creditors.[193] Thus, the federal government can bear the cost of assuring effective servicing, including advising student borrowers, with no risk of other creditors free-riding. However, as we discuss in the following Part, ED has not supervised its servicers to ensure that borrower rights are implemented.

V. The Education Department has Adopted a Creditor-Rights Servicing Model

In Section A of Part V, we lay out ED's basic servicing arrangements that reflect a creditor-rights framework. In Sections B and C, we explain ED's and FSA's failure to shape servicer contracts and oversee servicers in ways that would enable borrowers to take advantage of income-driven repayment and debt relief options. Finally, in Section D, we show that ED has not only failed to act, but has also directly opposed efforts to introduce a borrowers' rights perspective to student loan repayment.

A. The Creditor-Rights Framework of Student Loan Repayment under ED

ED treats student loan repayment as the province of its private servicers, and both ED and its servicers treat student loan repayment from a creditor-rights perspective.

ED has delegated the job of managing student loan repayment to private servicers, including routine servicing, advising borrowers, documenting their loan choices and collecting related materials, and reaching out to borrowers. ED directs student borrowers to contact their servicers for guidance on repayment options, telling them to "[c]ontact your loan servicer if you would like to discuss repayment plan options or change your repayment plan."[194] Servicers also represent that they will help borrowers. Navient tells student borrowers "to reach out if they are experiencing problems, asserting that the corporation has the resources and expertise to help borrowers 'achieve financial success' and 'make the right decision for [their] situation.'"[195]

At the same time, servicers have stated that they have no obligation to assist student borrowers beyond the express requirements of federal law. In briefs filed in a suit that the CFPB and four state attorneys general brought against Navient, the servicer stated that "the servicer acts in the *lender's* interest [here that lender is often the federal government itself], and there is

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[193] Frandsen et al., *supra* note 178, at 252–54 (describing agency problems resulting from spillover effects and how these may be mitigated by a single payer). Agency problems with servicers are discussed in more detail in Section V.B.2.

[194] *Choose the Federal Student Loan Repayment Plan That's Best for You*, *supra* note 32.

[195] Sean R. Whelehan, *Tying Fiduciary Duties to Student Loans: One Small Step Out of the Massive Debt*, 22 N.C. Banking Inst. 209, 215–16 (2018) (alteration in original) (quoting and summarizing Navient's website).

no expectation that the servicer will 'act in the interest of the consumer.'"[196] As Navient explains, "Borrowers could not reasonably rely on Navient to counsel them into alternative payment plans unless Navient had an *affirmative duty* to provide such individualized financial counseling," and it finds no such duty in federal law.[197] In a variety of cases, PHEAA has similarly argued that its obligations to student borrowers should be judged solely by compliance with federal regulations.[198]

B. Servicing Contracts

FSA is in charge of contracting with student loan servicers. It could use this authority to better design incentives for servicers to provide higher levels of service to borrowers. It has not done so.[199] In the following subparts, we identify specific FSA failings: its failure to mention borrowers' rights in servicers' contracts, its adoption of contract incentives that discourage servicers from fully advising borrowers on their options, and its allocation of new loans to servicers without taking into account how well the servicers have attended to existing borrowers' situations.

1. Failure to Include Borrower Rights in Contracts

FSA's contracts with servicers[200] reveal how little attention FSA gives to ensuring that student loan borrowers understand their rights and options. ED created a uniform servicing contract in 2009 and then amended the boilerplate contract in 2014. The terms in the 2009 servicer contract almost ex-

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[196] Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(6) or, in the Alternative, for a More Definite Statement Under Rule 12(e) at 20–21, CFPB v. Navient Corp., No. 3:CV-17-00101-RDM, 2017 WL 3380540 (M.D. Pa. Aug. 4, 2017), ECF No. 29 (alteration in original).

[197] *Id.* at 28 (alteration in original).

[198] *See* New York v. Pa. Higher Educ. Assistance Agency, No. 19 Civ. 9155, slip op. at 7 & n.4 (S.D.N.Y May 1, 2020).

[199] Before FSA was created in 1998, the government offered borrowers FFEL loans and Direct Loans. The originators of FFEL loans directly serviced their loans or outsourced the servicing to other entities. *See* STUDENT LOAN SERVICING, *supra* note 25, at 48–49. The Office of Student Financial Assistance Programs ("SFAP"), located within ED, managed the servicing of Direct Loans and contracted with a single entity, ACS Education Solutions, LLC, to service the direct federal loans. *See* POSTSECONDARY NAT'L POL'Y INST., FEDERAL STUDENT LOAN SERVICING PRIMER 8 (2018), http://pnpi.org/wp-content/uploads/2019/01/Federal-Student-Loan-Servicing-Primer_December-2018.pdf [https://perma.cc/6V9T-7432] [hereinafter FEDERAL STUDENT LOAN SERVICING PRIMER].

[200] For a detailed discussion of FSA contracts with servicers, *see* Eric M. Fink & Roland Zullo, Federal Student Loan Servicing: Contract Problems and Public Solutions 4–9 (2014) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459090 [https://perma.cc/95WH-G98F]). Between 2008, when the government began making Direct Loans, and 2020, ED has had contracts with as few as one servicer and as many as fifteen. *See* FEDERAL STUDENT LOAN SERVICING PRIMER, *supra* note 199, at 8; FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED, *supra* note 123, at 5; *Who's My Student Loan Servicer?*, U.S. DEP'T OF EDUC., OFF. OF FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/servicers [https://perma.cc/85KG-2YNN].

clusively address operational issues. Nowhere in the contract does ED explicate any responsibilities servicers owe to borrowers.[201]

The seventy-three page 2009 contract lists many hundreds of obligations that servicers have to ED, governing everything from records retention and transactions management to security and the methodology for allocating new contracts to servicers.[202] There is no language indicating that servicers have an obligation to assist borrowers. Student loan borrowers are referred to as "customers" and the first mention of customers is in an attachment twenty-three pages into the document where it says: "The Department expects each servicer to provide commercially available services that will yield high performing portfolios and high levels of customer satisfaction."[203] There is no mention of borrowers' federally-created rights or to servicers' duties to assist borrowers in knowing about and exercising their rights.[204]

When FSA issued an amendment in 2014 to the 2009 servicer contract, it did not address the problem of inadequate servicing. Like the original 2009 contract, the amendment makes no mention of any borrower rights. For example, even though multiple forms of IDR pre-dated the 2014 amendment, the amendment did not require servicers to inform borrowers of their right to IDR or to help borrowers navigate the process of enrolling in IDR. To date, servicers continue to retain vast discretion when establishing their policies and practices.[205] A 2015 CFPB report explained that "[t]here are no consistent, market-wide federal standards for student loan servicing and servicers."[206]

The FSA contract did influence servicer behavior in one dimension, albeit in the wrong direction. Navient, one of the largest student loan servicers, responded to an audit by the ED by saying, "We (are not) aware of any requirement that borrowers receive all of their repayment options . . . on each and every call." The company further indicated that "if the Department

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[201] In discussing the terms in servicer contracts, we rely on the 2009 contract between ED and Nelnet and the 2014 contract between ED and Navient. Contract between U.S. Dep't of Educ. and Nelnet Servicing, LLC (June 17, 2009) (available at https://www2.ed.gov/policy/gen/leg/foia/contract/nelnet-061709.pdf [https://perma.cc/9QDR-ESER]) [hereinafter *Nelnet Loan Servicing Contract* (2009)]; Contract between U.S. Dep't of Education and Navient, LLC, *supra* note 139.

[202] *See Nelnet Loan Servicing Contract* (2009), *supra* note 201, attach. A-1–A-3.

[203] *Id.*; *see also* Contract between U.S. Dep't of Education and Navient, LLC, *supra* note 139, at 9 (discussing "borrower satisfaction with the servicer").

[204] *Cf.* Gretchen Morgenson, *A Student Loan System Stacked Against the Borrower*, N.Y. Times (Oct. 9, 2015), https://www.nytimes.com/2015/10/11/business/a-student-loan-system-stacked-against-the-borrower.html [https://perma.cc/S5CU-NPVV] (describing servicers' failures to explain borrowers' options to them).

[205] FSA describes its delegation as follows: "Federal Student Aid provides its federal loan servicers broad latitude to determine how best to service their assigned loans in order to yield high-performing portfolios and high levels of customer satisfaction." *Servicer Performance Metrics and Allocations*, U.S. Dep't of Educ., Off. of Fed. Student Aid, https://studentaid.gov/data-center/business-info/contracts/loan-servicing/servicer-performance/ [https://perma.cc/3PNA-M5KF].

[206] Student Loan Servicing, *supra* note 25, at 3.

of Education chose to require all servicers to discuss income-driven repayment plans with all borrowers, the Department of Education needs to redo its contract with Navient."[207]

According to a 2014 ED Press Release, "[t]he renegotiated terms of the federal student loan servicer contracts are structured to create additional incentives for servicers to focus on the Department's priorities: effective counseling and outreach to ensure borrowers select the best payment option for them."[208] The 2014 contract amendment included two types of incentives—revenue incentives and loan allocation incentives. In the following two subparts, we explain why these contract incentives likely played a factor in servicers' failure to enroll borrowers in affordable repayment plans.

2. *The Compensation Incentives in Servicer Contracts Have Not Encouraged Servicers to Advise Borrowers of Their Rights*

Most of the compensation paid to servicers is performance-based, taking into account the number of loans they service, and the payment status of each loan. The 2009 contract set servicers' initial compensation rates based on the status of each loan as reflected in the chart below. The problem was that the FSA contract paid only about twenty cents more for a loan in repayment, which would include IDR, than a loan in forbearance.[209] Servicers could make more money shuttling borrowers in financial distress into forbearance with a few keystrokes than they could by counseling borrowers on ways to avoid delinquency—a time-consuming process designed to benefit borrowers. Servicing is a business and servicers have every incentive to reduce their servicing costs by spending as little time as possible helping borrowers. Professors Fink and Zullo examined the 2009 contracts and concluded that "the incentives to reduce operational costs far outweigh the incentives to be responsive to the needs of borrowers."[210] They further observed that "the most direct and effective way [for servicers] to lower costs is by hiring less skilled employees and then instructing them to minimize the time spent assisting borrowers."[211]

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[207] Ken Sweet, *Gov't Questions Unfair Student Loan Practices*, AP NEWS (Nov. 20, 2018), https://apnews.com/article/eeebf667026a420c9893220215e542cb [https://perma.cc/67RR-7FF8] (quoting Navient statement).

[208] Press Release, U.S. Dep't of Educ., U.S. Department of Education Strengthens Federal Student Loan Servicing (Aug. 29, 2014) https://www.ed.gov/news/press-releases/us-department-education-strengthens-federal-student-loan-servicing [https://perma.cc/RB4L-CF9Z].

[209] Recall that borrowers who elect forbearance do not have to make loan payments, but they are accruing interest during the forbearance period.

[210] Fink & Zullo, *supra* note 200, at 3.

[211] *Id*. at 10. Fink and Zullo describe another problem with the servicer contracts: FSA awards new loan accounts to servicers based on their performance relative to the other servicers. As the authors explain, "because the contractors are assessed against each other, rather than against independent standards, all the contractors could perform poorly and face no punitive consequences; slightly more new accounts would be allocated to the 'least of the worst' among the contractors." *Id*. at 3. In FSA's 2014 contract amendment, FSA noted that it had the

Worse yet, because "a profit-maximizing contractor will avoid the non-routine, labor-intensive services associated with assisting borrowers with distressed loans,"[212] borrowers in the greatest need of assistance from servicers are likely to receive the least amount of help. Recall that the borrowers in default are disproportionately Black, first generation college attendees, and from less wealthy families and communities. The contract incentives, therefore, steer servicers away from assisting these borrowers.

Advocates brought the problem of servicers steering borrowers into forbearance to the attention of elected representatives. In March 2014, congressional committees held hearings to learn about the incentives imbedded in servicer contracts and their impact on borrowers.[213] In response, FSA issued the 2014 amendment, which, in part, changed servicers' compensation rates.

	Grace Period	In Repayment	In Deferment	In Forbearance	Delinquent[214]
2009	$1.90-2.11	$1.90-2.11	$1.73-2.07	$1.73-2.07	$.50-1.62[215]
2014	$1.68	$2.85	$1.68	$1.05	$.45-2.11[216]

TABLE 1. SERVICER PAYMENT AMOUNTS IN 2009 CONTRACT AND 2014 AMENDMENT

The new rate schedule reduces the compensation for loans in forbearance and increases the payments for loans in repayment. The 2014 amendment also provides bonus payments if servicers reduce their delinquency rates below set levels. The extra payments are as high as $500,000.[217] Data since 2014 show a decrease in default rates, which suggests that the changes in servicer compensation may have been effective. There is, however, another explanation for the decline that is not related to the amendment in the servicer contract. Until the COVID-19 crisis, the economy had been strong, which likely enabled borrowers to obtain jobs that provided them with sufficient income to make their loan payments.[218] Whatever effect the amendment

discretion to not award any new loans to a servicer. Contract between U.S. Dep't of Education and Navient, LLC, *supra* note 139, at 8.

[212] Fink & Zullo, *supra* note 200, at 3.

[213] *See generally Strengthening the Federal Student Loan Program for Borrowers: Hearing of the Comm. On Health, Educ., Labor, & Pensions*, 113th Cong. (2014); *Examining the Mismanagement of the Student Loan Rehabilitation Process: Hearing Before the Subcomm. On Higher Educ. & Workforce Training of the H. Comm. on Educ. & the Workforce*, 113th Cong. (2014).

[214] The compensation rate for delinquencies decreases the longer the loan is in delinquency. Fink & Zullo, *supra* note 200, at 3.

[215] *Nelnet Loan Servicing Contract* (2009), *supra* note 201, attach. A-1.

[216] Contract between U.S. Dep't of Education and Navient, LLC, *supra* note 139, at 4.

[217] *Id.* at 3–4.

[218] Preston Cooper, *Student Loan Default Rate Falls, But Don't Get Too Excited*, FORBES (Sept. 26, 2019), https://www.forbes.com/sites/prestoncooper2/2019/09/26/student-loan-default-rate-falls-but-dont-get-too-excited/./ [https://perma.cc/2TYN-Q2UW]. Without analysis

may have had, it has not been enough to remedy the problem of default rates exceeding 10%.[219]

3. The Loan Allocation Incentives Do Not Encourage Servicers to Attend to Borrowers' Rights

Like FSA's servicer compensation structure, the method for allocating new loans to servicers is also performance-based. FSA's 2009 performance metric took into account the percent of a servicer's loans that were in default, the percent of dollars in default, and the results from three surveys completed by borrowers, schools, and FSA on the servicer's performance. Servicers received scores in each of the five categories and each category had the same weight. The servicers' relative rankings determined the percent of new loan allocations they received.[220]

In 2014, FSA tweaked the allocation metrics by dropping the percent of dollars in default amount and the school survey; and adding new categories for percent of borrowers in repayment, and percent of borrowers between 90- and 270-days delinquent.[221]

FSA also changed the weights, giving the greatest weight (35%) to the borrower survey results and the second highest weight (30%) to the percent of borrowers who are not delinquent.[222]

FSA's 2014 methods for evaluating servicers have failed in at least three respects. First, the metrics do not measure how well servicers helped borrowers to exercise their rights to affordable payments and debt relief. The outcomes FSA measures neither include the outcomes that are best for individual borrowers nor do they reflect whether servicers helped borrowers identify their best options. For example, the above metrics do not reward servicers who assist borrowers to enter IDR programs or to obtain some form of discharge, even though, for most borrowers, these options are optimal compared to forbearance, which does not provide borrowers with any relief from their obligation to fully repay their loans and interest continues to accrue during borrowers' forbearance period.[223]

controlling for economic conditions and other factors, e.g. whether the people who transitioned into IDR were behind on their payments, it is impossible to know whether the changes in servicer contracts led to a reduction in delinquency rates.

[219] *Id.*

[220] *Nelnet Loan Servicing Contract* (2009), *supra* note 201, at 1–3. *See also* Fink & Zullo, *supra* note 200, at 3 (explaining "because the contractors are assessed against each other, rather than against independent standards, all the contractors could perform poorly and face no punitive consequences; slightly more new accounts would be allocated to the 'least of the worst' among the contractors."). The 2014 contract amendments contained a new clause that said FSA could, at its discretion, decline to allocate any new loans to a servicer. Contract between U.S. Dep't of Education and Navient, LLC, *supra* note 139, at 8.

[221] Contract between U.S. Dep't of Education and Navient, LLC, *supra* note 139, at 8.

[222] *Id.* at 8–9.

[223] *See supra* Section III.B.1.b.

Second, the metrics do not take into account the extent to which servicers have deviated from program requirements. As GAO has concluded, ED's

> performance metrics . . . to reward servicers did not fully align with its goals of superior service and program integrity. . . [B]ecause no performance metrics are related to compliance with program requirements, servicers with more compliance errors experience no reduction in assigned loans, even as their borrowers may experience servicing problems.[224]

Third, the "customer satisfaction" survey that FSA conducts is of questionable utility. One of the foremost authorities on student loan servicing, Deanne Loonin, rejects the use of the borrower surveys because they are not "a useful metric for how well servicers are actually keeping borrowers' loans in good standing."[225] In particular, Loonin has noted that borrowers know very little about their accounts or what constitutes valuable servicing.[226] As a result, their assessments are not instructive.[227] The best measure of servicer performance, she asserts, are data on the status of borrowers' loans.[228]

Arguably, competition could fill the gaps created by weak contract terms and lax oversight. Given that servicers compete for more allocations, one could imagine a race to the top and, as a result, we would see many borrowers moving into IDR, as well as reductions in delinquencies and defaults. This has not occurred.[229] There are potential explanations for why the loan allocation system has not provided sufficient incentives for servicers to change their practices. It could be that the benefit of any improvements in servicing would be short-lived because the loan allocation process happens every six months. It is also possible that the incentive to ramp up assistance to borrowers is not strong enough given that the other servicers will move in response. Lastly, it could be that the cost of improving servicing, e.g. more

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[224] U.S. Gov't Accountability Office, GAO-18-587R, Federal Student Loans: Further Actions Needed to Implement Recommendations on Oversight of Loan Servicers 45–6 (2018) [hereinafter GAO-18-587R].

[225] Michael Stratford, *Feds Overhaul Servicing Contracts*, Inside Higher Ed (Sept. 2, 2014), https://www.insidehighered.com/news/2014/09/02/education-department-renegotiates-contracts-student-loan-servicers [https://perma.cc/6S9C-ZB95].

[226] E-mail from Deanne Loonin, Att'y, Project on Predatory Student Lending, Harvard Law School, to Kathleen Engel, Professor of Law, Suffolk University (Mar. 8, 2021) (on file with authors).

[227] *Id.*

[228] *Id.*

[229] Another source of competition could come from the borrowers themselves; however, with the exception of loan consolidation, borrowers can neither select nor change their servicers. The inability of borrowers to choose their servicers eliminates borrower choice as a means of inducing competition. Rohit Chopra, *Written Testimony of Rohit Chopra before the Committee on the Budget*, Consumer Fin. Prot. Bureau (June 4, 2014), (https://www.consumerfinance.gov/about-us/newsroom/written-testimony-of-rohit-chopra-before-the-committee-on-the-budget/ [https://perma.cc/X627-WJNA] [hereinafter Chopra Testimony].

staff, better training, and higher standards, exceeds the value of receiving more loans to service.[230]

C. Failure of Servicer Oversight

FSA and ED could engage in greater oversight of servicers. FSA bears responsibility for ensuring that servicers perform their obligations under their contracts. Breaches of contract terms can result in termination of contracts and imposition of performance-based incentives and corrective actions.[231]

Every federal entity that has examined FSA has found extensive deficiencies in its oversight of servicers. The Congressional Research Service reported:

> FSA has experienced difficulties in its monitoring of loan servicers. Some of these difficulties seem to have stemmed from FSA providing incomplete or fragmented guidance to loan servicers, which have impeded their efforts to comply with requirements for servicing federally held loans and to assist borrowers in navigating the aid programs. . . . Such gaps in authoritative guidance to loan servicers may create a risk of inconsistent interpretations of law and procedures, which could lead to inefficiencies in federal student loan administration and could negatively affect borrowers' abilities to use the features of their loan terms and conditions. To help address these concerns, Treasury has recommended, and Congress has previously directed, FSA to publish a common loan servicing policies and procedures manual. However, it appears that FSA has not published such a manual.[232]

In 2015 testimony before Congress[233] and a 2016 report,[234] GAO documented numerous ways in which ED, through FSA, has been remiss in its oversight of student loan servicers. In 2018, members of Congress requested a follow-up report from GAO, which found that ED had put in place only two of the six recommendations GAO had made in its earlier report.[235] GAO found that ED's "guidance to loan servicers was sometimes lacking, leading to inconsistent and inefficient service to borrowers."[236] In addition, GAO documented that ED did not require that servicers be available to borrowers by

[230] Fink & Zullo, *supra* note 200, at 10.
[231] HEGJI & HOGUE, *supra* note 25, at 21.
[232] *Id.* at 43, 46–47.
[233] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-196T, FEDERAL STUDENT LOANS: KEY WEAKNESSES LIMIT EDUCATION'S MANAGEMENT OF CONTRACTORS (2015).
[234] *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-523, FEDERAL STUDENT LOANS: EDUCATION COULD IMPROVE DIRECT LOAN PROGRAM CUSTOMER SERVICE AND OVERSIGHT (2016).
[235] GAO-18-587R, *supra* note 224, at 3.
[236] *Id.* at 4.

phone at times that would enable borrowers from different regions of the country to make contact, and ED had not established a robust system for tracking complaints made to ED and to loan servicers.[237]

Similarly, in a 2019 report,[238] the ED OIG uncovered multiple deficiencies in FSA's oversight of servicers.[239] In a scathing conclusion to the report, the OIG stated:

> By rarely holding servicers accountable for instances of noncompliance with Federal loan servicing requirements, FSA is not providing servicers with incentive [sic] to take actions to mitigate the risk of continued noncompliance that harms students and their families. Failure by servicers to take appropriate corrective actions could lead to borrowers not receiving the most favorable repayment terms that should have been available to them. Additionally, FSA's not holding servicers accountable could lead to servicers being paid more than they should be (the contracts with servicers allow FSA to recover amounts paid for loans not serviced in compliance with requirements). By not holding servicers accountable, FSA could give its servicers the impression that it is not concerned with servicer noncompliance with Federal loan servicing requirements, including protecting borrowers' rights.[240]

Navient is the poster child for poor servicing and poor FSA oversight.[241] As we discussed earlier, Navient steered borrowers into forbearance.[242] According to lawsuits filed by the CFPB and state attorneys general, Navient's practice caused student borrowers to incur $4 billion in additional debt.[243]

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[237] *Id*. at 45–46. In critiquing FSA, it is important to note two factors that have had an impact on FSA's performance. The first is that inadequate funding and staffing has impeded FSA's ability to engage in high quality oversight of servicers. FSA has a broad mandate, ranging from managing all federal student financial aid and student loans, including the Free Application for Federal Student Aid, to providing assistance to institutions of higher education. Oversight of servicers is particularly demanding because FSA staff have to make site visits to assess each servicer's processes to ensure they are complying with their contracts. Colleen Campbell, *The Long Path to a New Student Loan Repayment System*, Ctr. for Am. Progress (Sept. 10, 2019), https://www.americanprogress.org/issues/education-postsecondary/news/2019/09/10/474254/long-path-new-student-loan-repayment-system/ [https://perma.cc/QU9P-KZJS] [hereinafter Campbell, *The Long Path*]. The second factor is that FSA was attempting to enhance servicing up until Betsy DeVos took over ED and withdrew many Obama-era policies. *See* Jillian Berman, *Betsy DeVos Reverses Obama-era Directives Aimed at Protecting Student Loan Borrowers*, MarketWatch (Apr. 12, 2017), https://www.marketwatch.com/story/devos-reverses-obama-era-directives-aimed-at-protecting-student-loan-borrowers-2017-04-12 [https://perma.cc/TF99-P6C5]; GAO-18-587R, *supra* note 224.

[238] Federal Student Aid: Additional Actions Needed, *supra* note 123.

[239] *Id*. at 2.

[240] *Id*. at 17.

[241] *Id*. at 9–13, 15–16, 21–22.

[242] *See supra* Section V.B.2.

[243] *See, e.g.*, Brief for Consumer Financial Protection Bureau at app. A-1–A-3, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-00101-RDM (M.D. Pa. Mar. 26, 2019) [hereinafter Brief for CFPB]. A lawsuit by student borrowers similarly accused Great Lakes, one of FSA's servicers, of "advising them that they were on track to qualify for a federal loan

The lawsuits unearthed Navient documents and testimony allegedly showing that:

- Navient imposed a requirement that employees maintain an average call time of approximately seven minutes, which was adequate for forbearance but not for collecting the documents needed to enroll in IDR;[244]
- Forbearance and deferments are shown to call center employees as the only options available to borrowers who cannot make any payment, and only certain types of borrowers are shown IDR options;[245]
- An internal Navient memo stated "[o]ur battle cry remains '*forbear them, forbear them, make them relinquish the ball*;'"[246]
- Navient's steering of borrowers into forbearance was a deliberate revenue-maximizing strategy;[247]
- Phone representatives were encouraged to not use IDR as an option for delinquent borrowers;[248] and
- "[T]he head of all four of Navient's call centers stated that he had not been aware, during most or all of his tenure from 2011 to 2012, that IDR was even an option for struggling borrowers."[249]

Despite many borrower complaints against Navient, ED did not investigate Navient's practices until the CFPB filed a lawsuit against the company. At that point, ED auditors discovered that Navient had failed to inform 10% of borrowers of the option of having affordable payments under one of the IDR plans and that "many customer service representatives failed to ask questions to determine if such a plan . . . might be more beneficial to the borrower."[250] ED responded to the report by concluding that the auditors' report did not "indicate forbearances were applied inappropriately—the observations noted focused on suggested improvements regarding how best to counsel."[251] ED neither sanctioned Navient nor prescribed changes to its

forgiveness program when, in fact, they were ineligible due to the type of loan they had . . . [and] that Great Lakes incentivized its call service representatives to have short conversations with borrowers, instead of taking the time necessary to make sure that borrowers were on the most appropriate path to repayment." Josh Stein & Dan Zibel, *Consumer Advocates Battling for Student Borrowers*, AM. PROSPECT (May 31, 2020), https://prospect.org/coronavirus/unsanitized-states-consumer-advocates-battling-for-student-borrowers/ [https://perma.cc/WYQ4-AZHX]. *See also* Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908, 911 (11th Cir. 2020); Manuel Madrid, *States Take on Student Debt Abuses as the Trump Administration Defaults*, AM. PROSPECT (Oct. 2, 2017), http://prospect.org/article/states-take-student-debt-abuses-trump-administration-defaults [https://perma.cc/Q2YS-KGQD].

[244] *See* Brief for CFPB, *supra* note 243, at 9.

[245] *See id.* at 6.

[246] *Id.* at 5 (emphasis in original).

[247] *Id.*

[248] *Id.* at 6–7.

[249] Danielle Douglas-Gabrielle, *Navient Memo Raises Questions About Its Student Loan Servicing Practices*, WASH. POST (Sept. 19, 2019), https://www.washingtonpost.com/education/2019/09/19/navient-memo-raises-questions-about-its-student-loan-servicing-practices/ [https://perma.cc/6C5E-EB7Q].

[250] Sweet, *supra* note 207.

[251] *Id.*

practices. In addition, ED has refused to make the report public, claiming that it is the only entity that has jurisdiction over student loans.[252]

D. ED's Obstruction of Borrower Rights

ED's conduct goes beyond failure to prioritize borrower interests or the inability to provide meaningful assistance to borrowers. It has actively obstructed borrower rights.

Deanne Loonin and Julie Margetta Morgan amply document how ED is attuned to the interests of colleges and servicers, entities with substantial political and lobbying clout, but often treats student borrowers as having an adverse interest.[253] As an example, they describe ED's attempt to hide access to an ED handbook of prescribed practices for collection agencies, which "was also one of the few ways in which borrowers and advocates could find guidance on how FSA administered key programs, such as loan rehabilitation."[254] They write that:

> While writing a blog post, reporter Kim Clark called the Education Department to ask about updates to the handbook and according to Clark, officials there "freaked out." They told her "that if people find out that they can negotiate a debt reduction of 10 percent they will hold out for it, and all sorts of things like that," adding that the Department of Education tried to convince her not to publish information from the manual. After publishing her story, Clark said the "next thing I knew, the manual was off the site." This was over seven years ago. The government has not only failed to put the handbook back online, but also has aggressively fought various groups' efforts to get an unredacted copy of the handbook through FOIA requests and other advocacy.[255]

ED has also sided with servicers in litigation that borrowers have brought seeking relief for servicer wrongdoing. Servicers have defended borrower claims on the grounds that preemption, derivative sovereign immunity, and intergovernmental immunity doctrines apply to them because of their status as ED contractors.[256] As Kate Elengold and Jonathan Glater explain in their recent article, *The Sovereign Shield*, ED has explicitly endorsed these defenses based on servicers' "relationships with the federal Depart-

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[252] *Id.*

[253] *See* Loonin & Morgan, *supra* note 67, at 906.

[254] *Id.* at 909.

[255] *Id.* at 909–10 (citations omitted).

[256] *See generally* Statement of Interest of the United States, Student Loan Servicing Alliance v. District of Columbia, 351 F.Supp.3d 26 (D.D.C. 2018) (No. 10-0640 (PLF)) (supporting the various "sovereign shield" defenses presented by a student loan trade association seeking to preempt licensing of student loan servicers by the District of Columbia).

ment of Education."[257] ED could have stayed out of the fray, but instead has chosen to adopt a stance that undermines borrowers' rights to relief.

ED's handling of student borrower applications for a "borrower defense" discharge[258] shows both willful neglect and active obstruction of borrower rights. The Harvard Predatory Student Loan Project filed a suit against ED, alleging that the Department had refused to adjudicate borrower claims that they did not have to repay their loans because their schools had closed, leaving more than 160,000 applications for loan discharge in limbo, some for over four years.[259] ED relented in May 2020 and settled the suit with an agreement to process the applications.[260]

ED further impeded borrowers' ability to exercise the borrower defense discharge during the redesign of part of the ED website. In 2020, a whistleblower claimed that the official in charge of the website redesign killed a part of the project related to possible borrower defense claims because it provided too much information to borrowers and made it more likely that borrowers would assert their rights.[261]

During the Trump Administration, ED worked in concert with the CFPB to abridge borrowers' rights. For a time, ED had a productive working relationship with the CFPB that included sharing information on borrowers' complaints about federal student loan servicers and successfully negotiating their overlapping supervisory authority over servicers.[262] The relationship deteriorated when President Trump appointed Betsy DeVos to lead ED, at which point she began dismantling consumer protections[263] and withdrew all

[257] Kate Elengold & Jonathan Glater, *The Sovereign Shield*, 73 STAN. L. REV. (forthcoming 2021) at 35–37.

[258] LOONIN ET AL., *supra* note 21, at § 10.6.

[259] *See* Class Action Complaint Declaratory and Injunctive Relief at 2, Sweet v. DeVos, No. 19-cv-03674, 2019 WL 8754826 (N.D. Cal. June 25, 2019).

[260] *Information for* Sweet v. Cardona *Class Members*, THE PROJECT ON PREDATORY STUDENT LENDING, https://predatorystudentlending.org/sweet-v-devos-class-members/#i-got-an-email/ [https://perma.cc/8FWX-VPES] (describing terms of settlement).

[261] *See* Minksy, *supra* note 145. ED was also sued in 2020 for continued wage garnishment of student loan borrowers in violation of the CARES Act protections during the COVID-19 crisis. *See* Danielle Douglas-Gabriel, *Why the Trump Administration Is Still Garnishing Wages During the Pandemic*, WASH. POST (June 5, 2020), https://www.washingtonpost.com/education/2020/06/05/why-trump-administration-is-still-garnishing-wages-during-pandemic/ [https://perma.cc/L5H3-ZDY2].

[262] The CFPB has supervisory authority over large student loan servicers under its authority to supervise larger participants in markets for consumer financial products. *See* 12 U.S.C. § 5514(a)(1)(B), (a)(2); *see also* CONSUMER FIN. PROT. BUREAU, DEFINING LARGER PARTICIPANTS OF THE STUDENT LOAN SERVICING MARKET (2013), https://files.consumerfinance.gov/f/201312_cfpb_student-servicing-rule.pdf [https://perma.cc/N27A-V2JX].

[263] Shortly after her appointment, DeVos began undermining efforts to reign in servicer misconduct by "rescind[ing] Obama-era directives aimed at holding student loan servicers . . . accountable for working in borrowers' best interests." In so doing, she abandoned the FSA principle that servicers' eligibility for contracts should be based, in part, on how well they serve borrowers. Berman, *supra* note 237.

agreements to cooperate with the CFPB.[264] ED's position was that the CFPB had no authority over the servicing of federal loans.[265]

When President Trump appointed Kathleen Kraninger to lead the CFPB, the situation for borrowers worsened as the CFPB dramatically reduced its consumer protection initiatives. Ultimately, the CFPB and ED together elected to decimate the CFPB's power by agreeing that ED would no longer share borrower complaint information with the CFPB.[266] While the curtailment of the CFPB's power could be short-term, it reflects ED's continued adoption of policies designed to limit borrower protections. The former Deputy Secretary of the Treasury, Sarah Bloom Raskin, put a fine point on the situation, positing that DeVos's "move probably [had] more to do with protecting its contracted loan servicers from new costs than with helping student debtors."[267]

Kraninger further supported ED's limitations on borrower protections by, first, dramatically restricting the scope of the CFPB Student Loan Ombudsman's oversight solely to private student loans, which excluded federal loans from the Ombudsman's purview, and then by appointing Robert Cameron to the position of Ombudsman.[268] Cameron previously worked on the management team of one of the largest servicers, PHEAA, which at the time was the defendant in multiple lawsuits brought by student loan borrowers and was the subject of several state investigations into its servicing practices.[269]

From the design of its creditor-rights oriented servicing system, to its flawed contracting and inadequate oversight to protect borrower rights, and to its own actions to impede borrowers' exercise of their rights, ED has impeded borrowers' ability to take advantage of their federal entitlement to affordable payments and debt relief.

The following Part examines how we arrived at this state of affairs and the futility of relying on ED to reform this system.

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[264] *See* Sara Garcia, *Filling the Void: New CFPB Collection Could Help Protect Student Loan Borrowers*, CTR. FOR AM. PROGRESS (Apr. 26, 2017), https://www.americanprogress.org/issues/education-postsecondary/news/2017/04/26/431327/filling-void-new-cfpb-collection-help-protect-student-loan-borrowers/ [https://perma.cc/6QKP-DLJX].

[265] Letter from Richard Cordray, Director, Consumer Fin. Prot. Bureau, to Betsy DeVos, U.S. Sec'y of Educ., U.S. Dep't of Educ. (Sept. 7, 2017) (available at https://www.scribd.com/document/445755224/2017-Response-Letter-from-the-Consumer-Financial-Protection-Bureau-CFPB-to-the-U-S-Department-of-Education-ED-on-the-Recision-of-Information-Shar [https://perma.cc/3QM7-URSX]).

[266] *See* Andrew Kreighbaum, *Education Dept. Ends Partnership with CFPB*, INSIDE HIGHER ED (Sept. 5, 2017), https://www.insidehighered.com/news/2017/09/05/education-dept-rebukes-cfpb-overreach-kills-information-sharing-agreement [https://perma.cc/7A55-3WU7].

[267] Cordray, *supra* note 265.

[268] *See* Danielle Douglas-Gabriel, *Consumer Watchdog Signals Hands-Off Approach on Federal Student Loans*, WASH. POST (Aug. 19, 2019), https://www.washingtonpost.com/education/2019/08/17/consumer-watchdog-signals-hands-off-approach-federal-student-loans/ [https://perma.cc/SQ2E-HBZW].

[269] *Id.*

VI. The Education Department Lacks the Culture, Expertise, and Commitment to Reform Student Loan Repayment

This Part describes ED's system for managing student loan repayment over time. Section A looks at the growth and transformation of FSA. Section B explores how the mission of ED treats student loan repayment as an institutional orphan. Finally, Section C shows how FSA and ED together have engaged in chaotic and ineffective efforts to reform student loan repayment. Entrenched in a business culture with deep conflicts and alliances, ED and FSA are not equipped to transform themselves to embrace a borrower-centered approach to student loan repayment.

A. FSA's Mission Developed Without Attention to Borrower Rights

In 1998, in response to widespread ED operational failings, and fraud and abuse that resulted in billions of dollars of losses, Congress relocated financial aid functions from ED to a new semi-autonomous unit, which it named FSA.[270]

FSA has a unique structure. During the Clinton administration, Vice President Al Gore and others explored incorporating features of private corporations into federal agencies to create "performance-based organizations" ("PBO"). FSA was the administration's first foray into this new model.[271] The enabling statute reflected concepts from private-sector corporations: "[T]he PBO shall exercise independent control of its budget allocations and expenditures, personnel decisions and processes, procurements, and other administrative and management functions."[272]

In most respects, FSA functions separately from ED with FSA primarily forming and running operational and administrative programs related to student grants and loans. Unlike other federal agencies, the Chief Operating Officer ("COO"), who leads FSA, and other top FSA executives are eligible for bonuses if they meet annual performance objectives.[273] The hope was that by incorporating market principles into FSA's structure, FSA would provide better customer service and more efficient delivery of its services.[274]

In the 1998 legislation creating FSA, Congress set forth seven purposes for FSA.[275] Six of these seven purposes express operational concerns, such as cost reduction and integration of information systems. The one purpose related to borrower rights is that FSA should "improve service to students

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[270] 20 U.S.C. § 1018; *see also* Hegji & Hogue, *supra* note 25, at 7 n.53; Miller & Delisle, *supra* note 164, at 5–6.

[271] Miller & Delisle, *supra* note 164, at 8.

[272] 20 U.S.C. § 1018(b)(4).

[273] Hegji & Hogue, *supra* note 25, at 1.

[274] *Id.* at 7.

[275] 1998 Amendments to the Higher Education Act of 1965, Pub. L. No. 105-244, § 141(a)(2), 112 Stat. 1581, 1605 (1998).

and other participants in the student financial assistance programs authorized under Title IV, including making those programs more understandable to students and their parents."[276] The statute also contains a detailed set of FSA responsibilities that include only operational items.[277] Nothing in the legislation creating FSA requires it, either directly or through contractors, to ensure that student loan borrowers are provided meaningful assistance in exercising their rights.

There are several explanations why, at the time, Congress did not focus more on making sure borrowers could exercise their rights. First, and most importantly, the big concern in 1998 was not borrower rights, but how to resolve multiple operational issues at ED.[278] The PBO structure was well-suited for the management tasks FSA had to perform at the time and the consensus is that FSA met Congress's 1998 goals.[279] FSA has not demonstrated similar aptitude when it comes to ensuring that servicers help borrowers to understand and exercise their federally created rights to affordable payments and relief from their student loan debt.

Second, at the time Congress created FSA, no one could have predicted that ED, through FSA, would eventually become one of the largest lending institutions in the country with responsibility for delivering a complex set of rights to student borrowers. In fact, borrowers had very few rights when Congress created FSA.

FSA began with a relatively small number of loans in its portfolio because students were opting for FFELs over Direct Loans and FSA had not yet begun buying FFELs from lenders.[280] As Figure 4 reflects, between FSA's creation in 1998 and mid-2020, the dollar value of federally-owned loans grew almost thirty-fold—from $48 billion to $1.372 trillion.[281] Dramatic growth began when Congress ended the FFEL program, leaving ED with responsibility for issuing and managing almost all federal student loans.[282]

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[276] *Id.*

[277] *Id.* § 141(b)(2).

[278] *See* sources cited *supra* note 270.

[279] Miller & Delisle, *supra* note 164, at 23.

[280] *See supra* Section II.A.1.

[281] *See Portfolio by Loan Status*, *supra* note 62; Sue Kirchoff, *Student Loan Program May Break the Bank*, CQ News (Feb. 7, 1998), https://www.cnn.com/ALLPOLITICS/1998/02/13/cq/education.html [https://perma.cc/BP9L-BGN8]; *see also Federal Student Aid: Performance-Based Organization Review: Joint Hearing Before the Subcomm. on Gov't Operations of the H. Comm. on Oversight and Gov't Reform and the Subcomm. on Higher Educ. on Workforce Training of the H. Comm. on Educ. and the Workforce*, 114th Cong. (2015) (statement of Rep. Mark Meadows, Chairman, Subcomm. on Gov't Operations) (describing the massive growth in FSA's responsibilities since 1998).

[282] *See supra* Section II.A.; Betsy Devos, U.S. Sec'y of Educ., U.S. Dep't of Educ., Keynote Address at Federal Student Aid's Training Conference (Dec. 3, 2019) (transcript available at https://www.ed.gov/news/speeches/prepared-remarks-secretary-devos-federal-student-aids-training-conference [https://perma.cc/X5UW-YGJQ]) [hereinafter DeVos Keynote Address].

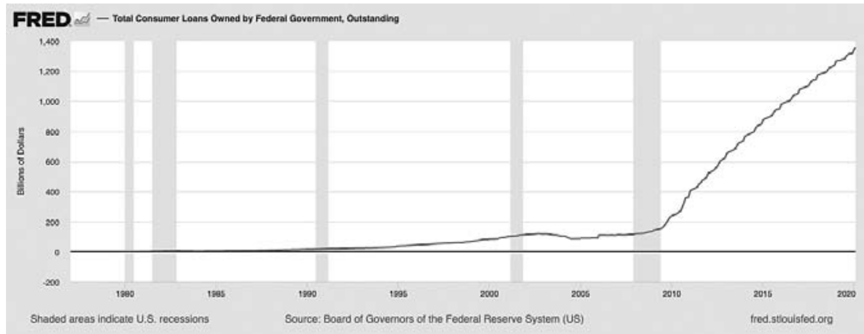

FIGURE 4. OUTSTANDING DIRECT STUDENT LOANS ($)[283]

Third, Congress granted FSA a level of autonomy unseen in most other agencies, but neglected to articulate clear goals for FSA or the COO, which has made it difficult for the COO to gauge FSA's performance and for ED to determine whether there is cause to terminate the COO.[284]

Congress did establish processes designed to ensure accountability. The value of the processes is contested. ED bears responsibility for working with FSA to set strategic goals and oversee FSA. The Secretary of ED and the COO are required to develop five-year performance plans, and FSA must submit an annual report to Congress through the Secretary of ED showing progress toward the plan's goals. Again, the five-year plans are primarily focused on operations.[285] People within and outside ED have reported that "the Department has never fully leveraged the tools in the performance contract or strategic plan when working with FSA."[286] For example, ED does not carefully scrutinize FSA's performance plans and annual reports, and there is insufficient collaboration between ED and FSA.[287] Experts who have long studied ED, Ben Miller and Jason DeLisle, describe ED's lax oversight of FSA as follows:

> In theory, [the goals for FSA and the COO] are enforced through the contracts and strategic plans that FSA leadership develops with the Education Department. In recent years, policymakers have treated these goals—which are intended to provide accountability

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[283] Bd. of Governors of the Fed. Rsrv. Sys., *Total Consumer Loans Owned by Federal Government, Outstanding*, FRED (Mar. 5, 2021), https://fred.stlouisfed.org/series/TOTALGOV [https://perma.cc/DB24-QD3H].

[284] MILLER & DELISLE, *supra* note 164, at 24–25.

[285] The plan must include goals, and steps to achieve those goals, in five areas: (1) improving service; (2) reducing costs; (3) improving and integrating support systems; (4) developing integrated delivery and information systems; and (5) any other areas the Secretary of ED identifies. HEGJI & HOGUE, *supra* note 25, at 34.

[286] MILLER & DELISLE, *supra* note 164, at 24–25. *See also* Loonin & Morgan, *supra* note 67, at 908 (describing a lack of accountability at FSA).

[287] MILLER & DELISLE, *supra* note 164, at 24–25.

and offset the independence and flexibilities they granted the PBO—as an afterthought.[288]

B. ED Treats Student Lending as Outside Its Core Mission

When Congress passed the law establishing the ED in 1979, it set forth seven purposes, but made no mention of student loans when laying out ED's mandate.[289]

This is not surprising. At that time, the only federal student loans were FFEL for financially needy students, which Congress created in the Higher Education Act ("HEA") of 1965. ED had only a tangential role in the FFEL program. Banks made the loans and state and federal governments guaranteed their repayment.[290]

Despite ED's constantly expanding responsibilities related to student loans, its mission omits any reference to student lending. On its landing webpage, ED states that its "mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."[291]

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[288] *Id.* at 24.

[289] Department of Education Organization Act, Pub. L. No. 96-88, § 102, 93 Stat. 668, 670 (1979). The seven purposes were:

> (1) to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual; (2) to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education; (3) to encourage the increased involvement of the public, parents, and students in Federal education programs; (4) to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information; (5) to improve the coordination of Federal education programs; (6) to improve the management and efficiency of Federal education activities, especially with respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and (7) to increase the accountability of Federal education programs to the President, the Congress, and the public.

Id.

[290] Higher Education Act of 1965, Pub. L. No. 89–329, §§ 412–35, 79 Stat. 1219, 1232–36; TG Rsch. and Analytical Servs., Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later 24 (2005), https://files.eric.ed.gov/fulltext/ED542500.pdf [https://perma.cc/FN4Y-636L]. Prior to passage of the HEA, only veterans and students studying in specific areas, e.g., science and math, had access to federal loans. The federal government made these loans directly to the students. TG Rsch. and Analytical Servs. *supra*, at 24.

[291] *About ED*, U.S. Dep't of Educ., https://www2.ed.gov/about/landing.jhtml [https://perma.cc/K3WQ-XZVZ]. In a more detailed mission statement, ED stated: "The U.S. Department of Education works with states, communities, teachers, education institutions and others to promote student achievement, from preschool through higher education, and to help ensure that all students have access to a high-quality education so they can reach their full potential. This is critical for our national competitiveness – if all Americans have the opportunity to live up to their full potential, our economy will thrive, and our citizens can secure sustainable

In a December 2019 speech during her term as Secretary of ED, DeVos took the position that student loan repayment was outside the core mission of ED, stating: "Congress never set up the U.S. Department of Education to be a bank, nor did it define the Secretary of Education as the Nation's 'top banker.' But that's effectively what Congress expects based on its policies."[292] She went on to state that FSA functions should be transferred to a "standalone government corporation" that would provide better customer service to students and families.[293] Although there was little public reaction to DeVos's proposal, the idea emerged three months later in one sentence in the 2021 budget for ED, which said, "[T]he President's Budget proposes the evaluation of FSA as a separate organization, with reformed governance."[294]

In principle, we agree with Secretary DeVos. There is, however, one critical area in which we part company. DeVos has made clear that any new agency that inherits FSA's functions should not "look like another CFPB."[295] We disagree and in Part VII describe why the CFPB should serve as a template for the new agency we propose.

C. ED Contractors Oppose All Reforms Unless the Reforms Are Deregulatory

While DeVos wants ED to divorce FSA, the servicers and debt collectors with whom FSA contracts want to maintain the status quo. ED is planning a major reform to its servicing platform, which is called NextGen Financial Services Environment ("NextGen"). NextGen will require contractors to transform their loan processing systems, which will be expensive for contractors to implement with no guarantee that FSA will award them lucrative new servicing and collections contracts.[296] The contractors have slowed down the NextGen implementation process for six years by filing

careers that lead to productive lives." *Fact Sheet: Budget 2017*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/budget/budget17/budget-factsheet.pdf [https://perma.cc/D3JQ-EQH5].

[292] DeVos Keynote Address, *supra* note 282.

[293] Michael Stratford, *DeVos Proposes Spinning Off Federal Student Loans from Education Department into Independent Agency*, POLITICO (Dec. 3, 2019), https://www.politico.com/news/2019/12/03/devos-federal-student-loans-independent-agency-074948 [https://perma.cc/ECS4-W7UJ]; DeVos Keynote Address, *supra* note 282. DeVos blamed Congress for the problems at FSA, claiming that Congress "set in motion an untamed beast," with its "ever-changing political whims" that led to new payment plans, loan forgiveness options, and complex rules. DeVos Keynote Address, *supra* note 282.

[294] U.S. DEP'T OF EDUC., FISCAL YEAR 2021 BUDGET SUMMARY 32 (2020).

[295] DeVos Keynote Address, *supra* note 282.

[296] Each collection agency and servicer contract is worth hundreds of millions of dollars. Stephanie Eidelman, *Federal Student Aid Cancels Second of Three NextGen Solicitations, Makes Awards in One*, INSIDEARM (July 15, 2020), https://www.insidearm.com/news/00046493-fsa-cancels-second-three-nextgen-solicita/ [https://perma.cc/2P7L-URN4] [hereinafter Eidelman, *Federal Student Aid*].

"countless protests" with GAO.[297] They have also filed more than a dozen lawsuits against FSA.[298]

The servicers and debt collectors have teams of lobbyists who work to protect their clients from increased regulation at all levels of government. When states, in response to ED's and FSA's neglect of borrowers, have attempted to protect student borrowers from inept and harmful servicing, lobbyists for servicers have stepped in. For example, in Maine, the Senate was considering a student loan bill of rights, which was sent back to committee when lobbyists from Navient pressured legislators to reject the bill.[299]

Two industry groups have lobbied ED to prohibit state regulators from overseeing student loan servicers and have campaigned for ED to preempt any state laws governing student loan servicing.[300] It is not clear that ED has the power to limit state oversight, but, as we have discussed, under Secretary DeVos, ED sided with servicers in multiple fora.[301]

On the federal level, the student loan industry spends millions of dollars every year attempting to influence members of Congress. In 2018, industry campaign donations exceeded $4.4 million.[302] Connecticut State Senator Matt Lesser has attributed the problems with student loan oversight to servicers: "Part of the reason the system got as broken as it is, is that these powerful forces have worked to carve out loopholes and weaker regulation for themselves."[303]

D. Recent Reform Failures

ED has recognized the need to reform student loan repayment management; however, it has not been able to implement any meaningful changes to its programs.

The problems and controversies that have plagued ED's student loan administration have spanned both Democratic and Republican administra-

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[297] Campbell, *The Long Path*, *supra* note 237.

[298] *Id.*

[299] Madrid, *supra* note 243.

[300] Ashlee Lieler, *25 States Urge Betsy DeVos to Not Let Student Loan Companies Sidestep the Law*, Consumerist (Oct. 24, 2017), https://consumerist.com/2017/10/24/25-states-urge-betsy-devos-to-not-let-student-loan-companies-sidestep-the-law/ [https://perma.cc/7MN8-75FE].

[301] *See* Elengold & Glater, *supra* note 257, at 17–18 (describing how ED has supported servicer sovereign shield defenses by filing statements of interest with the courts, issuing guidance, and through informal mechanisms); Andy Kroll, *The Government's Trillion-Dollar Student Loan Office Is a Train Wreck*, Rolling Stone (Feb. 22, 2019), https://www.rollingstone.com/politics/politics-features/betsy-devos-student-loans-798756/ [https://perma.cc/4SSW-87V3].

[302] Erin Arvedlund & Bob Fernandez, *Your Student Loan Servicers—Navient, Nelnet, and FedLoan—Pay Big Bucks to CEOs and Lobbyists,* Phila. Inquirer (July 1, 2019), https://www.inquirer.com/business/student-loans-navient-fedloan-great-lakes-nelnet-mohela-slsa-scott-buchanan-doe-20190805.html [https://perma.cc/UT4K-AV9N].

[303] Madrid, *supra* note 243.

tions.[304] The Obama Administration made some efforts toward substantial reform. In 2015, it issued a Student Aid Bill of Rights directing ED to work with other agencies to improve student lending[305] and to develop a complaint system for student borrowers.[306] In response, ED, the Department of the Treasury, and the CFPB issued "Joint Principles on Student Loan Servicing" ("Joint Principles") as a framework "to improve student loan servicing practices, promote borrower success and minimize defaults."[307] The principles were aimed at increasing transparency and accuracy of information.[308] The Obama-led ED followed up the Joint Principles with a proposal for a single portal website for loan servicing,[309] a set of standards for customer service across all servicers that would reduce loan transfers and impose greater oversight of servicers,[310] and a mandate that FSA implement "policy directives to strengthen student loan servicing during the ongoing [servicer] procurement process."[311]

While these initiatives were robust, they were too little, too late. They were too little because they were simply statements of policy, not actual regulations, and too late because they came at the end of Obama's presidency, and the Trump Administration promptly overturned most of them.[312] One of the first decisions made by Trump's Secretary DeVos was to withdraw an April 2016 policy directive making a servicer's past performance a factor in awarding future servicing contracts.[313] Worse yet, ED, through FSA, eliminated some customer services as well as "services for vulnerable

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[304] HEGJI & HOGUE, *supra* note 25, at 9–10.

[305] Press Release, The White House, Office of the Press Secretary, FACT SHEET: A Student Aid Bill of Rights: Taking Action to Ensure Strong Consumer Protections for Student Loan Borrowers (Mar. 10, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/10/fact-sheet-student-aid-bill-rights-taking-action-ensure-strong-consumer [https://perma.cc/8DYW-QNPG].

[306] In 2016, FSA started a complaint system called the FSA Feedback System. John L. Culhane, Jr., *Dept. of Education Announces Federal Student Loan Policy Direction*, CFPB MONITOR (July 25, 2016), https://www.consumerfinancemonitor.com/2016/07/25/dept-of-education-announces-federal-student-loan-policy-direction/ [https://perma.cc/H7UC-MF7H].

[307] Joint Statement of Principles on Student Loan Servicing, 80 Fed. Reg. 67389 (Nov. 2, 2015).

[308] *Id.*

[309] Ted Mitchell, *A New Vision for Serving Student Loan Borrowers*, HOMEROOM (Apr. 4, 2016), https://blog.ed.gov/2016/04/a-new-vision-for-serving-student-loan-borrowers/ [https://perma.cc/VG8Y-4SFZ].

[310] *Id.*

[311] Memorandum from Ted Mitchell, Under Sec'y, U.S. Dep't of Educ. to James Runcie, Chief Operating Officer, Fed. Student Aid (July 20, 2016), https://www2.ed.gov/documents/press-releases/loan-servicing-policy-memo.pdf [https://perma.cc/88LG-S6RK]; Press Release, U.S. Dep't of Educ., Education Department to Implement Improved Customer Service and Enhanced Protections for Student Loan Borrowers (July 20, 2016), https://www.ed.gov/news/press-releases/education-department-implement-improved-customer-service-and-enhanced-protections-student-loan-borrowers [https://perma.cc/L2EV-ESGZ].

[312] Madrid, *supra* note 243.

[313] *Id.*

borrowers—features that were intended to increase automation and reduce delinquency rates."[314]

ED's relationships with servicers and debt collectors under DeVos were tumultuous. ED repeatedly cancelled servicer contracts and revoked solicitations for servicing.[315] In response, servicers brought lawsuits contesting ED's actions; the servicers usually prevailed.[316] In DeVos's own words, the process of contracting with servicers was "subjected to a myriad of moving deadlines, changing requirements and a lack of consistent objectives."[317] Similarly, after ED awarded collection contracts, it became embroiled in lawsuits over the awards and ultimately selected two collectors, only to later rescind the contracts.[318]

E. ED has Demonstrated it is Unable and Unwilling to Ensure that Borrowers Can Exercise their Rights

Throughout this article, we have chronicled numerous ways in which ED has failed borrowers, has overtly expressed disinterest in their rights, and has actively obstructed borrowers' exercise of their rights. Although Congress and other institutions share blame for the student loan repayment dysfunction, ED and FSA are responsible for failing to correct the problems in the student loan program that have persisted over several decades and across numerous administrations.

The history of federal student loans reflects that ED's mission has neither been to manage student loans nor to effectively implement borrowers' repayment rights. Secretary DeVos repeatedly stated that she wanted Congress to take student loans off ED's plate.[319] The culture at FSA is all about operations.[320] This culture, while valuable and effective for some purposes, fails to acknowledge and incorporate the fact that FSA should be protecting borrowers' rights. ED's choice to adopt a creditor-rights repayment model, FSA's structure as a PBO, ED's contracts with servicers that do not contain effective or meaningful incentives to encourage assisting bor-

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[314] Colleen Campbell, *5 Facts About the Proposed Student Loan Repayment System*, CTR. FOR AM. PROG. (Apr. 10, 2018), https://www.americanprogress.org/issues/education-postsecondary/reports/2018/04/10/449332/5-facts-proposed-student-loan-repayment-system/ [https://perma.cc/SHL4-NQQF].

[315] *See* Campbell, *The Long Path*, *supra* note 237; Stephanie Eidelman, *Chapter 5 Officially Begins in Department of ED Private Debt Collection Saga*, INSIDEARM (Oct. 11, 2018), https://www.insidearm.com/news/00044407-chapter-5-officially-begins-department-ed/ [https://perma.cc/23SV-FSWD] [hereinafter Eidelman, *Chapter 5*].

[316] *See* Campbell, *The Long Path*, *supra* note 237.

[317] Danielle Douglas-Gabriel, *DeVos Dials Back Consumer Protections for Student Loan Borrowers*, WASH. POST (Apr. 11, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/04/11/devos-dials-back-consumer-protections-for-student-loan-borrowers/ [https://perma.cc/VYU4-QMK7].

[318] *See supra* Section VI.C.; Douglas-Gabriel, *supra* note 317.

[319] Stratford, *supra* note 293.

[320] *See supra* Section VI.A.

rowers, and the well-documented lack of servicer oversight by FSA reflect that ED and FSA do not have the capacity or desire to assist borrowers in exercising their rights.[321] In fact, some of the decisions ED has made, such as siding with servicers to limit borrowers' rights, and not telling borrowers in PSLF that they needed additional documentation to maintain their status,[322] beg the question: which side are you on?

Even when ED attempted to help borrowers by developing the NextGen platform, its efforts devolved into a mess of changing goals and erratic procurement decisions. NextGen was supposed to create a single platform that all servicers and borrowers could use.[323] The initiative began in 2014, but did not gain traction until April 2016, when ED announced the creation of a single, user-friendly servicing platform.[324] The anticipation of NextGen soon dimmed. ED changed the details of the NextGen procurement solicitations, cancelled solicitations, and repeatedly failed to meet its own deadlines, all of which spawned protests and lawsuits from debt collectors and servicers.[325] In 2019, FSA contracted with Accenture Federal Services to manage the NextGen web portal and related services and later entered into contracts with five companies "to provide enhanced customer support."[326] In April 2020, FSA cancelled the NextGen solicitation for Optimal Processing Solution and, in June 2020, cancelled the Enhanced Processing Solution solicitation.[327] FSA does not expect to launch NextGen anytime soon.[328] In fact,

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[321] *See supra* Parts IV and V.

[322] *See supra* Sections III.B.2.a and V.D.

[323] Campbell, *The Long Path*, *supra* note 237. Currently, each servicer has its own, unique website where borrowers have access to information about their loans and can contact their servicers. *See id.* The servicers use different software, different standards for interacting with borrowers, and different communication strategies. *See id.* The lack of uniformity causes a multitude of problems for borrowers. For example, if for some reason borrowers switch servicers, the new servicer has to manually enter most of the information from the old servicer, which leads to transcription errors. *See id.* Borrowers have to master a new website, which can be confusing. *See id.* The problems are not just across servicers. When borrowers default on their loans, their accounts are transferred to a default management company and then a private collection agency, each of which has their own, unique web interface. *See id.* By having all the servicers' data within a single platform, FSA could more easily oversee servicers and impose sanctions for servicers who did not perform adequately. It would be easy to transfer accounts between servicers, and it would also make it simpler for borrowers to make contact with servicers, default management companies, and debt collectors because they would all be using the same system.

[324] Sophie Nguyen, *Next Gen is Now—But Is The Department Ready?*, NEW AM. (Dec. 16, 2019), https://www.newamerica.org/education-policy/edcentral/next-gen-is-now/ [https://perma.cc/T5UJ-LTBZ].

[325] *See* Eidelman, *Chapter 5*, *supra* note 315; Stephanie Eidelman, *NextGen Deadline Postponed Again, and ED Considers Selling Defaulted Loans*, INSIDEARM (May 2, 2019), https://www.insidearm.com/news/00045002-nextgen-deadline-postponed-again-and-ed-c/ [https://perma.cc/HAV6-7Z44].

[326] Press Release, U.S. Dep't. of Educ., U.S. Department of Education's Office of Federal Student Aid Announces New Contracts with Five Companies to Improve Customer Service, Increase Accountability (June 24, 2020), https://www.ed.gov/news/press-releases/us-department-educations-office-federal-student-aid-announces-new-contracts-five-companies-improve-customer-service-increase-accountability [https://perma.cc/KL9F-7GA6].

[327] Eidelman, *Federal Student Aid*, *supra* note 296.

FSA extended for one year all the amended 2009 contracts that were set to expire in December 2020.[329] ED's one major effort to help borrowers, so far, has been a failure.

As this article goes to press, there is a Democratic administration in the White House and Democrats hold a bare majority in the House and the Senate. Under President Biden's leadership, Congress is certain to address the problem of student loan defaults; however, the experience of past administrations indicates that merely tinkering with the student loan program is likely to fail. And any substantive changes will result in litigation by servicers and debt collectors. Quite simply, student loans are a bad match for ED. Even the most recent leader of ED, Betsy DeVos, has acknowledged that ED is ready to shed its student loan responsibilities.[330] We concur, but have a sharply different vision for a new federal agency.

VII. The Student Borrower Protection Agency

Having identified all the ways in which ED has failed to serve borrowers, in this Part we argue for the creation of the SBPA—a new, stand-alone agency that would assume the student loan repayment function currently performed by ED and FSA.[331] We envision the SBPA mission as follows: (1) to deliver to student loan borrowers their rights under federal law; and (2) to improve outcomes for student loan borrowers through research and policy development related to student loans and higher education financing.

In Section A, we look at the formation of the CFPB as an analogue for design of the SBPA. In Section B, we examine different approaches to providing student borrowers with assistance and make arguments for why it is proper to provide a much higher level of service. Finally, in Section C, we imagine a research and policy mission for the SBPA that would support an evolution to more fair and efficient student loan repayment polices and processes.

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[328] *Id.*

[329] *Id.*

[330] DeVos Keynote Address, *supra* note 282.

[331] Numerous public officials, scholars, and commentators have argued for forgiving existing student loan obligations and moving away from debt-financed higher education. Until that day, however, it is time for a new federal agency with a mission of implementing loan repayment focused on the rights of borrowers rather than a loan servicing model from private credit markets driven by maximizing profitability. *See, e.g.*, Anthony Stokes & Sarah Wright, *What Are the Alternatives to Student Loans in Higher Education Funding?*, 3 Contemp. Issues in Educ. Rsch. 19 (2010); Emily Cochrane, *Bernie Sanders Unveils Education Plan to Eliminate Student Loan Debt*, N.Y. Times (June 24, 2019), https://www.nytimes.com/2019/06/24/us/politics/bernie-sanders-student-debt.html [https://perma.cc/E5QB-RSCT]; *Elizabeth Warren's Higher Education Plan*, Comm. for a Responsible Fed. Budget (Sept. 17, 2019), http://www.crfb.org/blogs/elizabeth-warrens-higher-education-plan [https://perma.cc/ZP3W-TS8S].

A. *The CFPB Analogy for Design of the SBPA*[332]

The fundamental rationales for creating the SBPA are: (1) ED treats student borrowers as if they are participants in a market for student loans instead of what they actually are: beneficiaries of a government program; and (2) ED is unlikely to change in ways that would consistently provide borrowers with the rights to which they are entitled.

The situation with student loans echoes the consumer protection concerns during the financial crisis that led to the creation of the CFPB. Congress granted the CFPB primary authority for consumer protection in financial markets because existing regulators were not interested in or capable of performing that function. As Oren Bar-Gill and Elizabeth Warren stated in their seminal article arguing for the creation of what would become the CFPB:

> Effective regulation requires both authority and motivation. Yet none of the many regulators in the consumer credit field satisfies these basic requirements. Federal banking regulators have the authority but not the motivation. For each federal banking agency, consumer protection is not first (or even second) on its priority list. By contrast, the FTC makes consumer protection a priority, but it enjoys only limited authority over consumer credit markets.[333]

So it is with student loans. The mission of ED, including FSA, does not include protecting borrowers' rights. Former Secretary DeVos agrees that ED was not designed for the task of administering the student loan program and supports the creation of a new agency.[334] One option would be to shift the authority to reshape student loan repayment administration to the CFPB.[335] For two reasons, we do not support the CFPB option. First, directly administering a giant loan program is not within the expertise of the CFPB. The

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[332] We recognize that creating a new agency is a costly enterprise. However, we need to curtail student loan defaults and that cannot be done without drastic change. If there is insufficient political will to create the SBPA, a second-best alternative would be to transform the leadership and the mission of ED and FSA to reflect the goals and values we have described. Changing culture could be harder than building a new agency, especially because ED has not expressed any interest in changing its orientation to attend to borrower rights.

[333] Bar-Gill & Warren, *supra* note 57, at 85–86. *See also* Adam J. Levitin, *The Consumer Financial Protection Bureau*, 32 REV. BANKING & FIN. L. 321, 330 (2013) (describing consumer protection as "an orphan mission" for banking regulators and describing the lack of Federal Trade Commission authority in financial regulation); Mark F. Budnitz, *The Development of Consumer Protection Law, The Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1160 n.87, 1161 (discussing the Federal Reserve's reluctance to serve as the primary consumer protection authority—an authority it was unable to avoid).

[334] *See supra* Section VI.B.

[335] Other researchers and advocates have recommended eliminating servicers and debt collectors and tying borrower payments to tax filings, or having a federal agency, such as FSA, Treasury, or IRS service student loans in-house. *See, e.g.*, Loonin, *Overhauling*, *supra* note 127; Fink & Zullo, *supra* note 200.

CFPB is a market regulator; the SBPA's primary purpose would be delivery of a government benefit. And, we would not want the burden of launching and managing a giant loan program to detract the CFPB from its key role of protecting consumers. Second, if the CFPB were to take on student lending, it would be the sole entity supervising its own subcontractors—student loan servicers, which, with a CFPB Director focused on deregulation, could mean no oversight of servicers at all. If, however, Congress adopted the independent agency we propose, the CFPB could provide independent supervision of, and enforcement actions against, entities involved with student loans.

Another aspect of the CFPB makes it a good analogue for SBPA. The CFPB combines its rulemaking, supervisory, and enforcement authority with market and policy research, and consumer education and outreach.[336] In Section C, we describe the value of adopting a similar orientation at the SBPA.

B. Repayment Assistance Mission of the SBPA

While we contend that administration of student loan repayment should not parallel market-based servicing, there is no obvious other model to employ. In subpart 1, we develop a hierarchy of possible standards for administering student loans. In subpart 2, we make an argument for dramatically improving the level of service provided to student loan borrowers.

1. Possible Levels of Service to Student Borrowers

Federal entities have a duty to comply with the law under which they operate, but they can usually exceed any minimum requirements so long as they do not exceed their authority.[337] In considering the level of care the SBPA should provide student borrowers, we begin by identifying borrowers' needs and then consider the impact of different levels of care in each area of need. The areas of need are: (1) assistance with decision-making; (2) providing documentation; and (3) outreach to borrowers.

Decision-making. At the start of loan repayment, every student borrower defaults into the standard plan or decides to enroll in IDR or one of the other repayment options. It is not unusual for borrowers to face the same decision later in the repayment cycle if their situations change or they became better informed of their options. The same holds true for borrowers who may have the right to partial or total discharge of their loans. Student loan borrowers are typically young and enter into student loans without un-

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[336] Levitin, *supra* note 333, at 322.

[337] *See, e.g.*, Acevedo v. New York State Dept. of Motor Vehicles, 77 N.E.3d 331, 343 (N.Y. 2017) ("[A]n agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose.").

derstanding their future obligations or options.[338] A study by FSA found that over 50% of the participants knew very little or nothing about loans when they started college, and among delinquent borrowers and those in default, the percent with very little or no knowledge of loans rose to over 70%.[339] Student loan borrowers need assistance understanding their repayment options and the impact of their choices on their financial well-being. Some may not know whether they qualify for repayment programs or whether they might qualify for a debt discharge based on changes at their schools or in their own lives. Each of these decisions and many others necessitate counseling and guidance from skilled advisors.

Documentation. Borrowers electing IDR, as well as those seeking debt relief, have substantial and often on-going documentation needs. Borrowers need to know how to apply for repayment and relief programs and what documents they need to gather or actions they need to take to qualify. While this may seem like a simple process, many of the worst student loan servicing abuses have arisen at the documentation stage.[340] ED's near total failure to effectuate the PSLF program shows the importance of understanding the complex rules and assisting borrowers in carefully documenting their eligibility over a period of years.[341]

Outreach. A third way to assure that borrowers are able to exercise their rights is for the government to affirmatively identify and aid borrowers who are not using benefits to which they are or may be entitled. Income and credit reporting data could enable the SBPA to identify borrowers in financial distress who could benefit from IDR.[342] Government agencies and nonprofits could provide the SBPA with lists of employees who might be eligible for PSLF. An agency that is dedicated to helping borrowers repay or discharge their loans will find ways to proactively assist student borrowers.[343]

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[338] *See* Anthony Cilluffo, *5 Facts About Student Loans*, PEW RSCH. CTR. (Aug. 13, 2019), https://www.pewresearch.org/fact-tank/2019/08/13/facts-about-student-loans/ [https://perma.cc/V8MH-QUU2]; Rebecca Safier, *Survey: Majority of Student Loan Borrowers Don't Know How Interest or Forgiveness Works*, STUDENT LOAN HERO (May 15, 2018), https://studentloanhero.com/featured/survey-majority-student-loan-borrowers-know-interest-forgiveness-works/ [https://perma.cc/85YG-JD3H].

[339] Allison Bidwell, *FSA Student Survey Shows Limited Knowledge of Loans*, NAT'L ASS'N OF STUDENT FIN. AID ADM'RS. (Nov. 30, 2018), https://www.nasfaa.org/news-item/16887/FSA_Student_Survey_Shows_Limited_Knowledge_of_Loans [https://perma.cc/4UV4-UTU3].

[340] *See supra* Section III.B.2. A similar problem befell the TEACH program when ED stopped issuing grants to students who agreed to teach STEM subjects in schools serving low-income students and instead adopted a loan forgiveness program. *See* Turner & Arnold, *supra* note 146.

[341] *See supra* Section III.B.2.

[342] *See, e.g.*, Alvaro Mezza & Kamila Sommer, *A Trillion Dollar Question: What Predicts Student Loan Delinquencies?*, 46 J. STUDENT FIN. AID 16, 35 (2016) (concluding that early analysis of credit score information could help identify student borrowers who could benefit from IDR enrollment).

[343] An obvious concern with any outreach function is that the SBPA would have to comply with all data privacy laws. ED can acquire necessary information with student borrowers' con-

Figure 5 below suggests a hierarchy of options for service to borrowers in each of the below three areas, going from the greatest assistance to the least assistance.

DECISION-MAKING	DOCUMENTATION	OUTREACH
Best Interests: Advise borrowers about actions that are in their best interest based on their circumstances	*Auto-Document*: Devise information systems that maximize the use of existing data to reduce documentation burdens to the minimum necessary	*Automatic Enrollment*: Identify individuals who definitely qualify for a benefit and automatically enroll them
Suitability: Direct borrowers to a suitable set of options given their circumstances	*Problem Identification*: Identify borrowers who have attempted to exercise rights and proactively communicate with them about needed actions	*Individualized Nudges*: Identify individuals likely to benefit from a program and recommend that they consider enrolling and provide direction on applying
Option Generator: Provide a public website that generates options for borrowers based on information they enter and has general information about the consequences of each option	*Problem Assistance*: Assist borrowers in resolving issues with documentation, e.g., guidance on completing forms, list the required documents, and when and where to file	*Targeted Notice*: Identify groups of borrowers for whom a benefit is likely to be available and target that group with a notice about their rights
Disclosure and General Commercial Obligations: Provide information on available options and avoid bad faith, unfair dealing, fraud or other general prohibitions that apply to market misconduct	*Describe Process*: Make available forms and methods for the submission of documents, and provide a method for resolving problems	*Public Availability of Information*: Make a plain language description of all student loan benefits and procedures on website and in publications

FIGURE 5. HIERARCHY OF POSSIBLE SERVICE LEVELS TO STUDENT LOAN BORROWERS

sent, by cross-agency agreements (e.g., with the IRS), and, when needed, by proposing legislation to allow data access when appropriate. Again, the CFPB provides a model for assisting consumers within the constraints of data privacy regulation. *Privacy Policy*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/privacy/privacy-policy/ [https://perma.cc/7QDG-625T].

The ED's commitment generally is the lowest level of service, although it has occasionally aspired to reach the second level of service, such as with decision-making assistance under the stalled NextGen project.[344] There are isolated examples of ED actually engaging in a higher level of service, most often in response to political pressure and public outrage. For example, the Trump Administration forced ED to identify and discharge student loans held by veterans who qualified for disability discharges based on service-related injuries.[345]

2. *An Argument for High Levels of Service to Borrowers*

In this subpart, we provide justifications for applying one of the two highest levels of service to the SBPA's mission. The starting point is that Congress passed a law that gave ED responsibility for implementing the HEA and related legislation to enable student loan borrowers to meaningfully exercise their congressionally mandated rights.

Four features and consequences of student loans warrant higher levels of service to borrowers. First, the repayment and discharge benefits are complex and hard to navigate. As Professor Edward Afield has observed, the "repayment programs potentially create a sea of confusion that inhibits their efficiency and utilization."[346] A qualitative study using focus groups of student borrowers found that participants "did not understand many details about . . . potential loan repayment options," or many other aspects of their student loans.[347]

Second, while student loans are loans, they are a unique kind of credit that exists within a statutory framework that creates a structure of incentives and rights distinct from those in credit markets. Given that federal law bars student borrowers from ready access to bankruptcy,[348] the government has an obligation to ensure ready access to the compensating repayment and discharge rights.

Third, the characteristics of student loan borrowers, and particularly the characteristics of borrowers most likely to default, support a higher level of

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[344] Press Release, U.S. Dep't of Educ., Secretary DeVos Announces Intent to Enhance FSA's Next Generation Processing and Servicing Environment (Aug. 1, 2017), https://www.ed.gov/news/press-releases/secretary-devos-announces-intent-enhance-fsas-next-generation-processing-and-servicing-environment [https://perma.cc/6F3A-X75K].

[345] *See supra* Section III.B.1.a.

[346] W. Edward Afield, *Compromising Student Loans*, 69 S.C. L. REV. 81, 89 (2017). Professor John Brooks describes IDR programs as "quite complicated, and vary[ing] in significant, though fine-print, ways." Brooks, *The Case for More Debt*, *supra* note 34, at 848.

[347] Carrie L. Johnson et. al., *What Are Student Loan Borrowers Thinking? Insights from Focus Groups on College Selection and Student Loan Decision Making*, 27 J. FIN. COUNSELING & PLAN. 184, 193 (2016); *see also* JASON DELISLE & ALEXANDER HOLT, NEW AM., WHY STUDENT LOANS ARE DIFFERENT: FINDINGS FROM SIX FOCUS GROUPS OF STUDENT LOAN BORROWERS 19 (2016) (recounting that students in a qualitative study "were very confused by the plan, asked a lot more questions, and then still were confused").

[348] *See supra* Section II.B.3.

service. As described earlier, borrowers who default have much less wealth, come from poorer families and communities, are more likely to be first generation college students, and have other characteristics that correlate with fewer social and economic resources to afford advice related to their loans and to handle financial set-backs.[349] It also matters that student loans are disproportionately given to borrowers who are younger than borrowers in other credit markets.[350] As Adam Levitin put it, "We don't let 18 year-olds get credit cards unless they have independent means of repayment or a co-signor, but we'll let them get $26,000 or more into debt without any meaningful counseling."[351]

Fourth, the well-documented negative social and economic impacts of student loan defaults justify improving service to help lower defaults; this includes ameliorating the extraordinary level of disparity in default by race.[352] Defaults have dragged down housing markets, slowed business formation, and led to an array of other negative economic consequences.[353]

In arguing for providing student loan borrowers with excellent service, we are not suggesting that the SBPA should have limitless funds.[354] Nothing in this proposal suggests that the SBPA should not collect student loan debts that borrowers owe. Nor should services be provided to student borrowers without regard to costs. Yet common-sense debt collection and cost awareness coexist with the opportunity to provide dramatically improved service to borrowers. A new agency would be able to balance these aims while delivering the rights promised to borrowers in the HEA.[355]

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[349] *See supra* Section III.A.1.

[350] *See generally* Wei Li & Laurie Goodman, Urb. Inst., Americans' Debt Styles by Age and Over Time (2015), https://www.urban.org/sites/default/files/publication/72976/2000514-Americans-Debt-Styles-by-Age-and-over-Time.pdf [https://perma.cc/FT5J-TWJA].

[351] Adam Levitin, *Student Loan Borrowing is Different*, Credit Slips (Apr. 23, 2019), https://www.creditslips.org/creditslips/2019/04/student-loan-borrowing-is-different.html [https://perma.cc/4HSN-MTYL]. In addition, the borrowers most likely to be in IDR have higher loan balances than those not in IDR, which suggests they have had more education and, thus, were more likely to have had access to valuable advice as they navigated their student loan repayment options. Tara Siegel Bernard, *The Should-Be Solution to the Student-Debt Problem*, N.Y. Times (Oct. 13, 2019), https://www.nytimes.com/2019/10/13/your-money/student-loans-income-repayment.html [https://perma.cc/CM5Z-C3UF].

[352] *See supra* Section III.A.2.

[353] *See supra* Section III.A.3.

[354] We recognize that the level of servicing we are advocating could be more costly; however, it is unclear whether focusing on borrower needs would actually constitute net loss of government revenue. For example, dramatically lowering default rates would also lower the amount spent on third-party debt collection. *Cf.* Sara Goldrick-Rab & Marshall Steinbaum, *What Is the Problem With Student Debt?*, 39 J. Pol'y Analysis & Mgmt. 534, 534 (2020) (taking the position that education is a public good and the state should thus bear the costs).

[355] *See supra* Section VII.B.2.

C. Research and Policy Mission of the SBPA

An agency with a commitment to borrowers and to harnessing talent will explore the reasons for student borrower distress and the options for delivering services to relieve that distress. The SBPA needs a strong research component to support this work. It also needs a policy development capacity. In subpart 1, we discuss the importance of the research mission in delivering the core reforms needed in student loan repayment. In subpart 2, we identify legislative changes that would complement the creation of the SBPA.

1. The Need for Better Understanding Student Borrowers' Experiences

There is a paucity of data on student loans and student loan borrowers.[356] As a result, policy makers and others have been making recommendations and passing laws without complete and accurate information. As a recent Pew report stated:

> Research on the pathways borrowers take through the repayment process, the decisions they make, and the barriers they encounter is limited, making it difficult for policymakers to develop evidence-based, cost-effective solutions to these and other challenges. For example, without more nuanced data, federal leaders cannot fully understand why and how borrowers struggle in repayment, the full impact of default and delinquency on people's financial security, and why policies currently in place might not be working as intended for the borrowers who need them most.[357]

When the CFPB began as a new federal agency, it embraced evidence-based regulation, which has meant studying credit-market institutions, including collecting and analyzing data on their practices and performance, and the consequences for consumers.[358] The CFPB also focuses on borrowers, the assets they have, the debt they carry, the decisions they make, and their credit-market outcomes.[359] The CFPB uses this evidence to evaluate whether regulation is necessary in a particular area and, if so, how to best address the

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[356] *See* Chopra Testimony, *supra* note 229; STUDENT LOAN SERVICING, *supra* note 25, at 3, 5; Loonin & Morgan, *supra* note 67.

[357] THE PEW CHARITABLE TRS., STUDENT LOAN SYSTEM PRESENTS REPAYMENT CHALLENGES 1 (2019), https://www.pewtrusts.org/-/media/assets/2019/11/psbs_report.pdf [https://perma.cc/FL2Y-W7CZ].

[358] *See* Leonard J. Kennedy, Patricia A. McCoy and Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-first Century*, 97 CORNELL L. REV. 1141, 1155–58 (2012).

[359] *See generally Data and Research*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/ [https://perma.cc/9PRZ-YEV6].

risk of harm to consumers without unduly restricting credit markets and borrowers' options for credit.[360]

The CFPB model should inform the SBPA. The SBPA would need to look at borrowers' knowledge of credit, their ability to evaluate financial options, and their behavioral biases, e.g. the extent to which, at origination, borrowers misjudge their ability to afford their future loan payments. Other areas of research should include assessing the costs and benefits of defaulting borrowers into IDR; the most effective ways to communicate with borrowers, especially those in default; what type of assistance borrowers find most beneficial; what methods best help borrowers move from default to repayment; and how to build student borrowers' trust in the government's commitment to helping them afford their loans. Based on the results of this type of rigorous research, the SBPA could develop the tools needed to ensure that borrowers understand their rights and know how to exercise them effectively.

Another important benefit of careful research is that it would provide the SBPA with the knowledge base necessary to adopt truly borrower-centered reforms and regulations. The research would also inform proposals for congressional amendments to the HEA that would complement the SBPA's efforts.

Congress should require ED to transfer all its analyses and its raw data on borrowers and loan performance to the SBPA so the new agency could conduct longitudinal analyses on topics such as the payment and default patterns of borrowers in different IDR plans. Ideally, SBPA could augment its data with data from credit reporting companies, schools, and other entities to analyze trends, identify borrowers at risk of default, and supervise the entities with which it contracts. It is critical for the SBPA to function in a data-rich environment that will result in informed policies and meaningful oversight of contractors.

2. *The Promise of Simplification and Automation*

The array of payment and debt relief options that borrowers confront would overwhelm even financially savvy people. As we set forth in our hierarchy of service levels, simplification and automation are key to providing the highest level of assistance to borrowers.[361] This subpart notes several policies that could be enacted ancillary to the creation of the SBPA that would support its mission and give it the tools to succeed. The first step in this direction is to have a single website that borrowers, SBPA, and any

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[360] This is not a comprehensive list of CFPB's extensive research activity.

[361] As we discussed previously, the complexity of repayment options and discharge and forgiveness rights is not the fault of ED or FSA. *See supra* Section III.B.2.b.

contract entities use to enter information, get access to information, and file and respond to complaints.[362]

The second step is to advance legislation that places all borrowers in a single IDR program when they enter repayment, including giving borrowers the right to opt out.[363] Borrowers' payments would be based on their prior year's income as reported to the IRS. The use of IRS data could also ease the burden on borrowers of having to annually submit evidence of their income to recertify their eligibility to participate in loan forgiveness programs like PSLF.[364]

The third step is to broadly authorize SBPA access to government data that will help identify and serve student borrowers. Congress has already taken an important move in this direction with passage of the FUTURE Act, which permits ED to have access to borrowers' "tax return information to determine eligibility for recertifications for income-contingent or income-based repayments of student loans, [and] discharges of loans based on total and permanent disability."[365] Likewise, data sharing between SBPA, the Social Security Administration, and the Veterans Administration could help to automate disability discharges.

Even with increased automation and simplification, there will still be people who need personal assistance. Those in loan forgiveness programs must submit certification that their employment qualifies for forgiveness.[366] Until there is a simple fix for automating that process, borrowers may find they have questions about or issues with their documentation. Borrowers who encounter sudden emergencies that affect their ability to make payments, those at risk of default, and those already in default will need individualized help from people who have deep knowledge of borrowers' options, access to borrowers' information, and a dedication to helping borrowers exercise their rights. The people who perform these advising functions should be skilled, not call center employees following a script. Ramping up the qualifications of service providers should result in better borrower decision-making, affordable loan payments, and a decrease in default rates. The costs of having professional student loan officers would be offset by the savings generated by automation.

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[362] *See* discussion of NextGen, *supra* Section VI.C.

[363] John Brooks makes compelling arguments for eliminating loan forgiveness programs in favor of IDR. *See* Brooks, C*uring the Costs*, *supra* note 188, at 21.

[364] Deanne Loonin has proposed that the student loan repayment system should funnel through the IRS, which would determine student borrowers' payments based on their prior year's income and would also collect the payments. *See* Deanne Loonin, *Overhauling Federal Student Loan Repayment: Part II*, MEDIUM (June 15, 2017), https://medium.com/@db.loonin/overhauling-federal-student-loan-repayment-part-two-ee0359d11718 [https://perma.cc/6VYW-FDQF].

[365] CONG. RSCH. SERV., *H.R. 5363 (116th): FUTURE Act*, GOVTRACK (Dec. 20, 2019), https://www.govtrack.us/congress/bills/116/hr5363/summary [https://perma.cc/938M-UZ7M].

[366] *See supra* Section III.B.2.b.

VIII. Conclusion

Student loan repayment distress affects millions of Americans, exacerbates racial and economic inequities, and acts as a drag on our economy. For borrowers, ED's and FSA's errors and policies have cost them billions of dollars that they should not have had to pay.[367] It does not have to be this way. Unlike the heavy lift of enacting market regulations, the consumer protections needed to address the problems with student loan servicing already exist in the law.

What we need is a new agency—the SBPA—that abandons ED's creditor-rights approach and orients itself to the needs of borrowers. Like the CFPB did for consumer credit, the SBPA would focus on helping student borrowers know of, understand, and exercise their repayment and debt relief rights.

[367] *See supra* Section VI.C.