HOW THE BIDEN ADMINISTRATION HAS WEAPONIZED A SLEEPY REGULATION TO ADVANCE THE "FREE COLLEGE" AGENDA

Survey Reveals Biased Implementation of BDR Rule

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EXECUTIVE SUMMARY

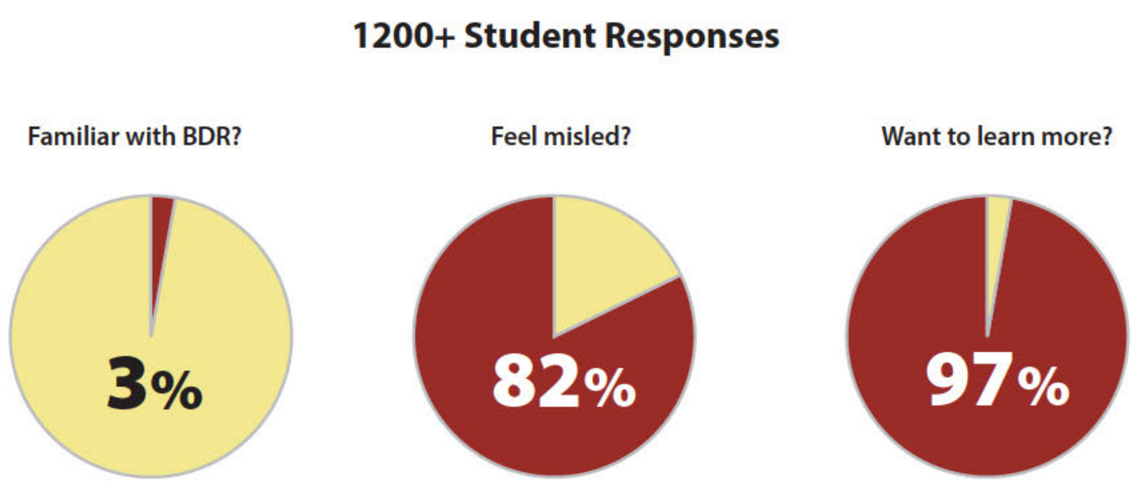
For nearly 40 years the federal government has steadily pushed private lenders out of the student loan market. Today, the U.S. Department of Education controls a monopoly over student financial aid.

Beginning with the Obama Administration and more recently resurrected by the Biden Administration, the BDR, a once benign, precautionary regulation, has been weaponized against for-profit colleges. Yet, if this rule were applied evenly across all types of colleges and universities, one would expect greater student debt relief from individuals dissatisfied with their education.

However, as a recent survey conducted for this paper and discussed in greater detail below finds, most public- and private-college students are unfamiliar with the BDR—even though many believe they were misled by their institution during admissions or their academic career. Now, progressive policymakers are seeking to create a backdoor to "free college" through the Borrower Defense to Repayment rule (BDR).

While this weaponization of the BDR may provide a channel for Democrats to circumvent the legislative process to advance the far-left's Free College agenda, its use to target for-profits schools ultimately puts nontraditional students—for whom the United States has invested significantly to provide better access to higher education—in a precarious position, and limits student choice.

This paper examines the evolution of the BDR; the political motivations behind its redevelopment; and the potential impacts on students, colleges and universities and the higher education system.



THE FEDERAL TAKEOVER OF STUDENT LOANS

Most students, particularly those at public and private colleges and universities, have never heard of the Borrower Defense to Repayment rule (BDR). Even fewer are aware of how it works. A survey conducted by Consumer Action for a Strong Economy (CASE) that found 97 percent of students at the nation's five largest (by enrollment) online public and private colleges did not know about the borrower defense to repayment program, even though 82 percent said they believe their school mislead them.[1] (More on the survey and is findings below).

So, how did this once temporary regulation, which for over two decades remained virtually unused and served as little more than a statutory placeholder, come to restructure the U.S. Department of Education and morph into a crux of the Free College Movement?

The BDR evolved out of the formation of the Federal Direct Loan Program—the federal student financial aid program administered by the Department of Education. Piloted under President George H.W. Bush and codified into law by President Clinton, the Direct Loan Program reformed the government's role in providing student financial aid. Whereas before the Department of Education served as guarantor on loans issued by private banks, the Direct Loan Program established the Department as the loan issuer. Today, all federal student loans are administered by the Department of Education.

While the Direct Loan Program was intended to reduce unforeseen costs and simplify administration relative to the prior system of loan guarantees, it gave the Department of Education more control over post-secondary education financing. In 1994, Republicans in Congress unsuccessfully sought to eliminate direct lending and, in 1997, passed a measure that prohibited the Department of Education from encouraging or requiring colleges to switch to the direct loan program, which had been phased in by the Clinton Administration.

Colleges' participation in the Federal Direct Loan Program steadily declined over the subsequent decade, which reached the lowest level of total student loan volume in 2007.[2] This trend reversed following the disruptions in credit markets in 2008. In 2010, President Obama signed a law that eliminated the Federal Family Education Loan program, which provided incentives to private lenders. All federal student loans since have been made under the Direct Loan Program.[3]

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1 You can learn more via our section titled, "CASE Survey: Public and Private Students Unaware of BDR, But Ready to File Complaints."

2 https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/federal-student-loan-history/

3 https://www.govinfo.gov/content/pkg/PLAW-111publ152/pdf/PLAW-111publ152.pdf

INTRODUCING BDR: JUST FIVE CLAIMS IN THE FIRST TWENTY YEARS

Due to statutory deadlines, the Department of Education did not have time to seek public input on all facets of the Direct Loan Program when it was introduced in 1994.[4] The BDR was written as a stopgap measure to give the Secretary of Education (as the newly established loan administrator) discretion to forgive student loans based on "acts or omissions of an institution of higher education."[5] The rule was meant to be revisited and revised by a negotiated rulemaking panel, per the 1994 Notice of Proposed Rulemaking:

> **"This proposed rule relating to borrower defenses to repayment of a loan is intended to be effective for the 1995-1996 academic year only. After the publication of this proposed rule, the Secretary will work with interested parties to develop regulations for borrower defenses that would apply to both the Direct Loan Program and the FFEL [Federal Family Education Loan] Program. When published in final form, the new regulations would apply to the 1996-1997 and subsequent academic years."[6]**

In February 1995, the Department of Education published a notice of the formation of the negotiated rulemaking advisory committee,[7] which met on April 25 of the same year. The committee was initially scheduled to convene for three sessions. However, after the first meeting, the committee members unanimously recommended that, despite ambiguity in the BDR, "no changes be made to existing regulations."[8]

A Notice of Meeting Cancellation published in the Federal Register by the Department of Education after the negotiated rulemaking committee's first meeting confirmed the language would remain as written:

> **"The non-Federal negotiators on the Committee told the Department that they were satisfied that the current regulations adequately address the issue of borrower defenses and that no further regulatory action is needed… The Secretary has considered carefully the recommendation… and has decided not to make any regulatory changes on the issue of borrower defenses at this time."[9]**

Only five borrowers applied for loan forgiveness under the rule after its finalization in 1995 through 2015.[10]

Despite vast room for interpretation, the BDR remained a largely benign and obscure subsection of the Direct Loan Program for nearly two decades.

That changed with the collapse of the for-profit Corinthian Colleges in 2015, which prompted a flood of BDR applications and provided a catalyst for the nascent student loan forgiveness movement. This paper is not interested in relitigating Corinthian Colleges' demise but will note that the event elevated the BDR into a prominent tool in the Free College debate.

4 https://www.newamerica.org/education-policy/edcentral/borrower-defenses/
5 https://www.law.cornell.edu/uscode/text/20/1087e
6 https://www.govinfo.gov/content/pkg/FR-1994-08-18/html/94-19733.htm
7 https://www.govinfo.gov/content/pkg/FR-1995-02-28/pdf/95-4875.pdf
8 https://www.govinfo.gov/content/pkg/FR-1995-07-21/pdf/95-17988.pdf
9 https://www.govinfo.gov/content/pkg/FR-1995-07-21/pdf/95-17988.pdf
10 https://ticas.org/files/pub_files/what_to_know_about_bd_factsheet.pdf

THE FEDERAL GOVERNMENT'S WEAPONIZATION OF BDR

In 2014 the U.S. Department of Education temporarily shut off federal student aid money to Corinthian Colleges, which enrolled more than 100,000 students at its Everest Institute, Heald College and WyoTech campuses. Over the ensuing months, the company sold assets and finally closed its remaining campuses on April 25, 2015. Corinthian Colleges filed for Chapter 11 bankruptcy on May 4, 2015.[11]

Corinthian Colleges' collapse coincided with by then mobilized far-left political movements, which sought to pressure policymakers to provide "free college." These campaigns had taken form in the wake of the 2012 Occupy Wall Street protests with the formation of organizations like the Debt Collective, the Occupy Student Debt Campaign and the Project on Predatory Student Lending.

These campaigns' missions—namely, the elimination of student debt and "provision of free college"—had already begun to gain traction among progressive lawmakers, who targeted for-profit institutions, which, by the nature of their operating model, conflict socialized higher education. In 2013, for example, Senator Dick Durbin (D-IL) called for-profit colleges "disgraceful" during a floor speech in which he introduced the Fairness for Struggling Students Act, a bill that would allow private student loans to be discharged in bankruptcy.[12]

In June 2014, Senator Durbin, with 11 other Democrat senators, urged Education Secretary Arne Duncan to prohibit Corinthian Colleges from enrolling any new students (a move that would further exacerbate its financial troubles). Senator Durbin also asked that the Department of Education prohibit any other for-profit institution under federal or state investigation from "from purchasing or participating in teach-out processes of any Corinthian campuses."[13]

In 2015, Senator Elizabeth Warren (D-MA) joined student debt activists in calling on Secretary of Education Arne Duncan to use the BDR to clear debt for Corinthian Colleges students. To apply more pressure, the Debt Collective—a branch of the Occupy Wall Street movement[14] whose "demands" (as of 2021) include, "Cancel all student debt"[15]—organized a group of former students, self-proclaimed the "Corinthian 15," to launch a loan repayment strike.[16] Within months the effort had grown to more than 100 students.

Under pressure, then Secretary of Education Arne Duncan proposed an interpretation of the BDR that would provide greater leeway for the Department of Education to apply the rule. The final regulations, which were released only days before the 2016 presidential election, sought to allow the Department to expedite group claims and to require certain schools to provide proof of institutional financial health, among other amendments.[17]

11 https://www.nytimes.com/2015/05/05/education/for-profit-corinthian-colleges-file-for-bankruptcy.html

12 https://genprogress.org/dick-durbin-disgraceful-forprofit-industry-sucks-tax-dollars-ruins-li/

13 https://www.durbin.senate.gov/newsroom/press-releases/twelve-senators-urge-education-department-to-protect-students-while-continuing-oversight-of-corinthian-other-for-profit-schools

14 https://www.ibtimes.com/corinthian-15-student-loan-debt-strike-admirable-unrealistic-protest-against-profit-1826828

15 https://biden100.debtcollective.org/

16 https://money.cnn.com/2015/03/01/pf/college/student-loan-debt-strike/index.html

17 https://www.naspa.org/blog/what-you-need-to-know-about-borrower-defense-to-repayment

Following the closure of Corinthian Colleges, the Department of Education appointed a Special Master to oversee claims associated with Corinthian schools. In 2016, the Federal Student Aid Enforcement Office assumed management of BDR issues. A December 2017 report by the Department of Education Inspector General notes that by November 2016 the Federal Student Aid's Borrower Defense Unit was staffed with "with 10 attorneys, a director, and 19 contracted staff from 2 contractors."[18]

The Federal Student Aid Enforcement Office's first report noted that "due to the Department of Education's ongoing outreach efforts to former students of Corinthian Colleges… there has been a considerable increase in borrower defense claims." Between June 29, 2016 (the date of the final Special Master report) and October 28, 2016, the Department of Education approved 11,822 claims, constituting more than $243 million of discharged tuition.[19]

Among the changes proposed by the Obama Administration to the BDR, the regulation would establish automatic triggers requiring a school to put up a letter of credit equal to 10 percent of annual revenue from federal student aid every time a lawsuit was filed against. Public institutions would be exempt from the requirement because they are backed with the "full faith and credit" of the state.[20]

For-profit and Historically Black Colleges and Universities (HBCUs) raised issues with Secretary Duncan's rulemaking. "Although HBCUs provide excellent academic opportunities for their students, they do not have the monetary security other colleges and universities enjoy," Julianne Malveaux, former president of Bennett College, wrote in a July 12, 2016, op-ed. "The revised [borrower defense to repayment] rule would greatly expand the criteria for students to sue their educators, with a far lower burden of proof on the student. … if this rule is implemented in its current form, opportunities for black students to receive the education they need to compete in the 21st century could decline. HBCUs would be forced to funnel their already limited monetary resources into unnecessary legal counsel instead of into the classrooms where they belong."[21]

"The revised [borrower defense to repayment] rule would greatly expand the criteria for students to sue their educators, with a far lower burden of proof on the student."

Julianne Malveaux, former president of Bennett College

The regulations "are likely to disrupt and may indeed destroy schools and colleges based on mere inadvertent mistakes, unproven allegations and regulatory errors that simply do not fairly indicate a lack of financial responsibility," Steve Gunderson, president and CEO of the Career Education Colleges and Universities (CECU), wrote in an August 1, 2016 public comment letter.[22] Mr. Gunderson noted that the Department's cost analysis ranged from $646 million to $41.3 billion. "The high estimate is

18 https://www2.ed.gov/about/offices/list/oig/auditreports/fy2018/i04r0003.pdf

19 https://www2.ed.gov/documents/press-releases/borrower-defense-report.pdf

20 https://www.newamerica.org/education-policy/edcentral/ins-and-outs-borrower-defense-rule/

21 https://www.insidehighered.com/views/2016/07/12/proposed-education-department-rule-could-negatively-impact-hbcus-essay

22 http://www.career.org/uploads/7/8/1/1/78110552/cecu_borrower_defense_comments_final_8-1-16.pdf

sixty-five times higher than the low, an admission that we really have no meaningful idea what the impact of this new rule will be."

These concerns rightly identified what the BDR was being formed into—a tool to target for-profit colleges and create a backdoor to free college. The proposed amendments would allow the Department of Education to apply the BDR with less cause, which could destabilize institutions (especially for-profit schools, about nine in 10 of which receive more than half of their revenues from Title IV funding[23]), thereby creating a self-fulfilling prophecy. ITT Technical Institute, for example, shut down only 12 days after losing access to Title IV funding in 2016.[24]

"Mind you, the Obama administration did all of this without the consent of Congress," Preston Cooper, a research scholar at the American Enterprise Institute, wrote in 2016. "President Obama has set the stage for future presidents to use Title IV programs as a political tool."[25]

23 https://www.forbes.com/sites/prestoncooper2/2016/10/17/how-to-wean-colleges-off-title-iv-funding/?sh=dcc51fce5675

24 https://www.forbes.com/sites/prestoncooper2/2016/09/07/education-department-shuts-down-itt-tech/?sh=721f4382267a

25 https://www.nationalreview.com/2016/11/obama-pressures-colleges-cancel-student-debts/

CURBING BDR TO ALIGN WITH ITS ORIGINAL PURPOSE

In June 2017, following the turnover in administrations, the Department of Education announced that it would suspend implementation of the Obama Administration's revisions to the BDR until July 2018[26] and, later, halted the rules until July 2019 or "a future July 1"—indefinitely halting the rules to take effect.[27] A spokesperson for the Department of Education called the Obama Administration's interpretation of the BDR "unfair to students and schools, and puts taxpayers on the hook for significant costs."[28]

From January through July 2017, no BDR applications were approved.[29] A July 17, 2017, letter from Acting Undersecretary James Manning to Senator Durbin in response to a request for information noted that 65,169 BDR claims were pending review, decision or adjudication—45,092 of which were from Corinthian Colleges and 7,186 from ITT Technical Institute students..[30]

In July 2017, nineteen Democrat state attorney generals sued the Secretary of Education, claiming that the Department had violated law by postponing implementation of the prior Administration's changes to the BDR.[31] Massachusetts Attorney General Maura Healey, one of the filers of the lawsuit, accused the Secretary of siding "with for-profit school executives against students and families." In September 2018, a district court judge sided with the plaintiffs.[32]

On July 25, 2018, the Department of Education announced it would issue a notice of proposed rulemaking to amend the BDR and rescind parts of the Obama Administration's regulations.[33] The NPRM was posted to the Federal Register on July 31. The notice states:

> **"The goal of the Department is to enable students to make informed decisions on the front end of college enrollment, rather than to grant them financial remedies after-the-fact when lost time cannot be recouped and new educational opportunities may be sparse…**
>
> **[The] Department is concerned that a process that allows for borrowers to submit affirmative claims, where there are minimal consequences for submitting an unjustified claim, could potentially create improper incentives for borrowers with unsubstantiated allegations against schools to seek loan discharges. For example, a borrower may attempt to seek loan forgiveness**

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26 https://www.insidehighered.com/news/2017/06/15/education-department-hit-pause-two-primary-obama-regulations-aimed-profits

27 https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-22850.pdf?utm_campaign=pi%20subscription%20mailing%20list&utm_source=federalregister.gov&utm_medium=email

28 https://www.marketwatch.com/story/5-ways-the-trump-administration-is-undoing-obamas-student-loan-legacy-2017-07-12

29 https://www.washingtonpost.com/news/grade-point/wp/2017/07/27/trump-administration-is-sitting-on-tens-of-thousands-of-student-debt-forgiveness-claims/

30 https://www.durbin.senate.gov/imo/media/doc/17-010570%20Durbin%20Outgoing.pdf

31 https://thehill.com/homenews/administration/340818-19-dem-attorneys-general-file-lawsuit-against-devos-over-student-loan?rl=1

32 https://www.npr.org/2018/09/13/647367937/student-borrowers-and-advocates-win-court-case-against-devos

33 https://abcnews.go.com/Politics/betsy-devos-department-education-curb-college-loan-forgiveness/story?id=56838833

simply because he or she is dissatisfied with the education received or with his or her ability to get a particular job, rather than as a result of a misrepresentation by the institution."[34]

The Department's changes required that borrowers show that an institution made "false, misleading or deceptive" misrepresentations with "reckless disregard for the truth." It also required that claimants transfer credits and find another institution to attend if their college closed and encouraged students to "seek remedies directly from institutions that have committed acts or omissions that constitute misrepresentation."[35]

"The Obama Administration went too far in rewriting [the BDR] by setting overly broad and vague standards and as a result, put taxpayers on the hook for too many loans."

Senator Lamar Alexander (R-TN)

Senator Lamar Alexander (R-TN), former Secretary of Education to President George H.W. Bush and then-chairman of the Senate Health, Education, Labor and Pensions Committee, applauded the Department's proposed amendments. "The Obama Administration went too far in rewriting [the BDR] by setting overly broad and vague standards and as a result, put taxpayers on the hook for too many loans," the Senator said in a press statement.[36] "The Obama regulation was too broad, vague, and confusing and led to the Department forgiving the loans of students without determining whether they were harmed by the college."

After negotiated rulemaking sessions failed to reach a consensus on the proposed changes to the BDR, the Department of Education released a draft of Institutional Accountability regulations in September 2019, which include BDR claims, pre-dispute arbitration agreements and institutional financial responsibility standards. The regulation became effective on July 1, 2020.[37]

The Institutional Accountability regulations implemented many of the Department's proposed revisions to the BDR.[38] "They also eliminated the inclusion of lawsuits as a trigger to require a school to provide a letter of credit "until those lawsuits are settled or adjudicated and a monetary value can be accurately assigned to them." The regulations note, "In particular, the Department seeks to avoid a repeat of prior instances in which the Department sought a letter of credit from an institution that it triggered a precipitous closure." [39]

34 https://www.govinfo.gov/content/pkg/FR-2018-07-31/pdf/2018-15823.pdf

35 https://www.govinfo.gov/content/pkg/FR-2018-07-31/pdf/2018-15823.pdf

36 https://www.help.senate.gov/chair/newsroom/press/alexander-secretary-devos-right-to-propose-new-safeguards-for-students-taxpayers

37 https://www.nasfaa.org/news-item/19395/Breaking_Down_Borrower_Defense_Regs_ED_Introduces_Another_Borrower_Defense_Framework

38 https://www.nasfaa.org/news-item/19395/Breaking_Down_Borrower_Defense_Regs_ED_Introduces_Another_Borrower_Defense_Framework

39 https://www2.ed.gov/policy/highered/reg/hearulemaking/2017/borrower-defense-final-rule.pdf

WHAT'S OLD IS NEW: BIDEN ACCELERATES OBAMA-ERA BDR USE TO FURTHER THE FREE COLLEGE AGENDA

By the 2020 election cycle, most Democrat presidential candidates had "gotten behind the idea of some form of tuition-free or debt-free college," *Politico* reported. The February 2020 analysis noted that at least six candidates then still in the race supported forms of free college.[40] "[Senator] Sanders' proposal would wipe out tuition for all public colleges and universities… Sen. Elizabeth Warren, meanwhile, has said her proposed 'ultra-millionaire tax' would cover the cost of four years of tuition for all to attend public colleges and universities."

An *U.S. News & World Report* analysis noted that the Democrat candidates' free college plans harkened back to President Obama, who, in his 2015 State of the Union address, called on Congress to lower the cost of community colleges to zero.[41] "I want to spread that idea all across America, so that two years of college becomes as free and universal in America as high school is today," President Obama said in the speech.[42]

In October 2020, then-presidential candidate Joe Biden released a higher education plan, which included forgiving all undergraduate tuition-related federal student debt from two- and four-year public schools for debt holders earning up to $125,000, with a phase-out for those earning more than $125,000 and an immediate minimum cancellation of $10,000 for borrowers dealing with the COVID-19 pandemic.[43] On his first day in office, President Biden extended a pause on federal student loan payments through September 2021.[44]

Following the election, pressure continued to mount. In February, Senator Schumer, Senator Warren, Representative Ayanna Pressley (D-MA7), Representative Maxine Waters (D-CA43) and other House Democrats reintroduced a resolution that called on President Biden to forgive $50,000 in student debt for all borrowers by executive action.[45] "You don't need Congress," Senator Schumer said. "All you need is the flick of a pen."[46]

Despite President Biden saying in February that he would not use executive power to allow borrowers to write of $50,000 in student loans, White House Press Secretary Jen Psaki later said the Administration had not ruled out the option. On April 1, 2021, President Biden's Chief of Staff announced that the President had directed the Secretary of Education to prepare a report on the legal authority to cancel up to $50,000 in student debt by executive order, the findings of which were not made public.[47]

Amid the calls from progressives in Congress, President Biden's Department of Education announced in March measures to streamline BDR claims. A press release noted that Secretary of Education Cardona would rescind the formula for calculating partial relief and adopt a streamlined approach for granting

40 https://www.politico.com/2020-election/candidates-views-on-the-issues/education-reform/free-college/
41 https://www.usnews.com/elections/student-debt-free-college-2020
42 https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015
43 https://www.nasfaa.org/news-item/21503/With_Sanders_Out_Biden_Unveils_New_Student_Debt_Relief_Plan
44 https://www.cnbc.com/2021/01/20/biden-plans-to-extend-pause-on-student-loan-payments-until-october.html
45 https://www.cnbc.com/2021/02/04/biggest-winners-in-democrats-plan-to-forgive-50000-of-student-debt-.html
46 https://www.cnbc.com/2021/04/13/pressure-mounts-for-biden-to-forgive-student-debt-.html
47 https://www.cnbc.com/2021/04/13/pressure-mounts-for-biden-to-forgive-student-debt-.html

full relief for BDR claims approved to date. (A partial relief policy based on a methodology that compared a borrower's earnings to the typical earnings of graduates from similar programs at other institutions had been adopted by the prior Administration.) The statement added that the Department would pursue "additional actions, including re-regulation, in the future."[48]

On May 24, the Department of Education published a notice of intent to establish negotiated rulemaking committees to review the BDR regulations. Hearings for public comment were held June 21 through June 24.[49]

In July, the Department of Education announced the approval of over 1,800 BDR claims related to the Court Reporting Institute, Marinello Schools of Beauty and Westwood College, all for-profit institutions, which totaled more than $55 million.

"This is the first time the Department has announced approved borrower defense claims for students who attended institutions besides Corinthian Colleges, ITT Technical Institute, and American Career Institute since 2017… This brings total loan cancellation based on borrower defense by the Biden Administration to over $1.5 billion for nearly 92,000 borrowers," the Department's press release stated.[50]

The Department announced in August that it would provide $1.1 billion in in closed-school discharges available to an additional 115,000 borrowers who attended ITT Technical Institute.[51] In December 2020, CNN reported that in total only about 61,000 former students had received student debt relief valued at $563 million since 2016,[52] most of which were initiated under the Obama Administration.

In October, an unnamed official told *The Hill* that "in the coming months" the Administration "will unveil similar regulatory improvements" to the BDR and closed-school discharges. "These steps take time, but we are working to deliver a better and fairer student loan system for borrowers," the official said.[53]

President Biden's appointments to the Department of Education suggest the Administration is likely to continue to expand its use of the BDR. In May, the President named Richard Cordray, former director of the Consumer Financial Protection Bureau, to serve as chief operating officer of Federal Student Aid.[54] *Axios* reported that the appointment "was cheered by progressives pushing for the federal government to cancel student debt" and that "Cordray has close ties to Sen. Elizabeth Warren."[55]

Politico reported that in his previous role as head of the Consumer Financial Protection Bureau under President Obama, Mr. Cordray "brought a slew of legal actions against for-profit education companies over their lending practices." Mr. Cordray also said he had a "close working relationship" with Rohit

48 https://www.ed.gov/news/press-releases/department-education-announces-action-streamline-borrower-defense-relief-process

49 https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

50 https://content.govdelivery.com/accounts/USED/bulletins/2e76ca8

51 https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness

52 https://www.cnn.com/2020/12/19/politics/student-loan-relief-devos-trump-biden/index.html

53 https://thehill.com/policy/finance/577006-democrats-step-up-pressure-on-biden-on-student-loan-forgiveness

54 https://www.ed.gov/news/press-releases/us-department-education-announces-richard-cordray-chief-operating-officer-federal-student-aid

55 https://www.axios.com/biden-taps-former-cfpb-chief-cordray-student-loans-197760a3-9cc0-4a55-ab33-8cdd988400d8.html

Chopra, President Biden's nominee to lead the Consumer Financial Protection Bureau who served as the agency's top student loan official under President Obama.[56]

On October 8, the Department of Education reestablished the Office of Enforcement within the Federal Student Aid department, which had been "deprioritized" under the prior administration.[57] The office—headed by Kristen Donoghue, who previously served as enforcement director of the Consumer Financial Protection Bureau—would be "modeled after the aggressive approach the CFPB has taken to student loan servicers," *The Hill* reported.[58]

In February, President Biden appointed Tariq Habash, who helped launch the Student Borrower Protection Center, as special assistant in the Department of Education's Office of Planning, Evaluation, and Policy Development; Joanna Darcus, a former member of the Student Loan Borrower Assistance Project, as senior counsel in the Office of General Counsel; and Julie Margetta Morgan, who served as senior domestic policy advisor for Warren for President, as senior advisor in the Office of the Under Secretary.[59]

President Biden in July appointed Toby Merrill, founder and former director of the Project on Predatory Student Lending, as a deputy general counsel at the Department of Education.[60] Ms. Merrill co-authored a letter that argued Congress had granted the Secretary of Education authority to cancel or modify federal student loans up to $50,000, which was cited by Senator Warren during her presidential campaign.[61] The letter argues that the Obama Administration's amendments to the BDR state "that the Secretary may compromise a debt *in any amount*, without prescribing any procedures or considerations for the exercise of that discretion."

To be sure, the President's appointees have allies in Congress to expand the Administration's application of the BDR. In a July 1 letter, 23 Democrat lawmakers urged the Secretary of Education to implement "regulatory enhancements" to "close donut holes in forgiveness programs… Borrowers should not be subject to onerous burdens of proof or provide documentation when the Department and government agencies can already provide evidence of misrepresentation."[62]

56 https://www.politico.com/news/2021/05/03/biden-picks-richard-cordray-student-loans-485231

57 https://www.ed.gov/news/press-releases/us-department-education-establish-enforcement-office-within-federal-student-aid

58 https://thehill.com/policy/finance/577006-democrats-step-up-pressure-on-biden-on-student-loan-forgiveness

59 https://www.ed.gov/news/press-releases/department-education-announces-more-biden-harris-appointees

60 https://www.ed.gov/news/press-releases/us-department-education-announces-more-biden-harris-appointees-2

61 https://fortune.com/education/static/9af9ebeca9bd57ad4c30aab3863a8750/student-debt-letter-2.pdf

62 https://www.help.senate.gov/imo/media/doc/Senate%20Dem%20Student%20Debt%20Relief%20Comment%20Letter%20to%20ED%201-July-2021.pdf

A VEHICLE FOR UNIVERSAL LOAN FORGIVENESS, SOCIALIZED HIGHER EDUCATION

The federal government's monopolistic control of student financial aid has vested immense power in the Department of Education, namely, the Secretary of Education—an unelected political nominee with little accountability or oversight. As Preston Cooper wrote in 2016, "Nominally, many of America's colleges and universities are private. But the federal government has an effective monopoly over college finance. As a result, institutions must obey the demands of the Department of Education — an unelected bureaucracy with a penchant for aggressive regulations."[63]

Beginning under the Obama Administration and now continued under President Biden, the Secretary of Education has sought to expand the scope and application of the BDR. This rule, which for two decades was virtually unused, has become a focal tool of progressive policymakers to advance loan forgiveness, which legislation like the College for All Act (sponsored by Senator Sanders and Representative Pramila Jayapal (D-WA7)) indicates is a step in the movement towards socialized higher education.[64]

This politicization of the BDR has been compelled by some Democrats in Congress, who recognize it as a way to achieve student loan forgiveness that likely would not succeed through the appropriate channels of legislation. As recently as July of this year, for example, House Speaker Nancy Pelosi—who said previously, "I am never bringing a bill to the floor that doesn't have the votes"—expressed what *The Hill* reported as "doubts about both Biden's power to wipe out student loans on his own and the political wisdom of doing so."[65]

"Suppose your ... child just decided they at this time did not want to go to college, but you're paying taxes to forgive somebody else's obligations," Speaker Pelosi said in July. "You may not be happy about that."[65]

Speaker of the House Nancy Pelosi (D-CA)

Yet, support among progressive lawmakers continues to mount. On October 14, 2021, Senate Majority Leader Chuck Schumer (D-NY) tweeted: "Today would be a great day for President Biden and Vice President Harris to #CancelStudentDebt."[67] The same day, Representative Jayapal, chairwoman of the Congressional Progressive Caucus, tweeted: "@POTUS can and must lift the burden of student debt for 43 million Americans."[68] In July, *Politico* reported that Senator Schumer said the White House's concerns about the legality of forgiving student loan debt had largely gone away. "We don't hear much of that anymore."[69]

63 https://www.nationalreview.com/2016/11/obama-pressures-colleges-cancel-student-debts/

64 https://www.sanders.senate.gov/wp-content/uploads/AEG21437-2.pdf

65 https://thehill.com/policy/finance/577006-democrats-step-up-pressure-on-biden-on-student-loan-forgiveness

66 https://www.insidehighered.com/digital-learning/article/2019/12/17/colleges-and-universities-most-online-students-2018

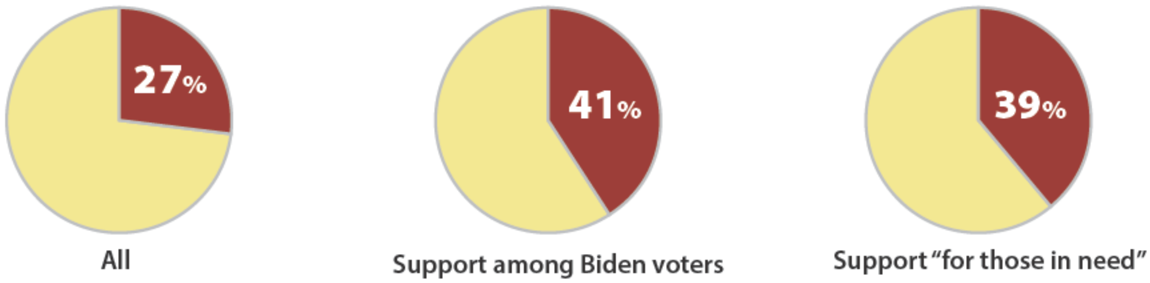
67 https://www.ed.gov/news/press-releases/department-education-approves-borrower-defense-claims-related-three-additional-institutions

68 https://www2.ed.gov/documents/press-releases/borrower-defense-report.pdf

69 Politico

Perhaps another reason some Democrats have latched onto the BDR as the lever to advancing student loan forgiveness rather than legislation is that most Americans don't support it. A poll by Grinnell College in March found only 27 percent of respondents support forgiving student loans for all borrowers, including just 41 percent of those who voted for President Biden. Even when limited to forgiveness "for those in need," only 39 percent of respondents were supportive.[70]

Limited Support For Giving Student Loans for All Borrowers



It's not surprising that progressive Democrats have exclusively targeted for-profit colleges with the BDR. They do not believe in for-profit institutions' right to exist. As this paper amply demonstrates, through word and action Democrat politicians have long taken the stance that for-profit colleges have no place in higher education and have attempted to utilize every tool at their disposal to regulate them out of business. And because these schools do not conform to the traditional higher education model, they present a challenge to efforts to socialize education.

Only six schools have been approved for BDR claims since 2017, all of which were for-profit institutions—American Career Institute, Corinthian Colleges, the Court Reporting Institute, ITT Technical Institute, Marinello Schools of Beauty, and Westwood College.[71]

This targeting began during the Obama Administration, when the BDR was first leveraged to punish for-profit colleges. Corinthian Colleges was the only institution to be named in the Department of Education's October 2016 "Report on Borrower Defense."[72]

The Department of Education's Federal Student Aid Enforcement Office reported that about $73 million in loans were associated with BDR claims approved prior to July 1, 2016. About $376 million in BDR claims were approved between July 1, 2016, and January 20, 2017.[73] The Obama Administration approved 27,986 claims, more than 57% of which (about 16,000) were approved between January 1 and January 17, 2017.[74] As noted previously in this paper, only five BDR claims were submitted from 1995 to 2015.

President Biden's Department of Education has resumed the Obama Administration's liberal application of the BDR. In July, the Department of Education approved 1,800 BDR claims bringing the total since the start of the year to nearly 92,000 borrowers with a valuation of over $1.5 billion.[75] <u>All claims were related to for-profit institutions.</u>

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70 https://www.grinnell.edu/sites/default/files/docs/2021-03/GCNP%20Methodology%2003-31-21_1.pdf

71 https://www.ed.gov/news/press-releases/department-education-approves-borrower-defense-claims-related-three-additional-institutions

72 https://www2.ed.gov/documents/press-releases/borrower-defense-report.pdf

73 U S. Department of Education Office of Inspector General

74 U S. Department of Education Office of Inspector General

75 DOE approved

A CYCLE OF ACCUSATION AND FINANCIAL STRANGULATION

The BDR provides an effective tool in progressive policymakers' campaign against for-profit colleges in part because it is something of a self-fulfilling mechanism. The rule allows the Department of Education to withhold federal aid from a college, which creates a snowball effect. The withheld funding can cause a school to become financially insolvent, and, likewise, the heightened attention can deter prospective students. Those factors can cause a school to fail, which, in turn, generates loan forgiveness claims from students affected.

The efficacy of the BDR is made clear by the example of ITT Technical Institute, which operated over 130 schools serving 45,000 students. In 2016, the Department of Education halted the organization's access to Title IV funds. It took only 12 days for the college to shut down permanently.[76]

This cycle not only punishes for-profit colleges, it also puts students in a poor position. As Preston Cooper noted of the ITT Technical Institute case, students could choose to remain enrolled with the hopes that the school would fail and they would become eligible for closed school discharge. Or they could withdraw but potentially give up the opportunity for loan forgiveness if they transferred credits or withdrew more than 120 days before the school closed.[77]

In 2014 the Colorado Attorney General accused CollegeAmerica of deceptive advertising for promoting average national income gains realized by college graduates. An opinion summary notes a television ad that stated, "The right college degree can lead to a higher paying job. And with the right degree from CollegeAmerica you could get a better job."[78]

After a 2017 trial, the presiding judge took three years to issue a ruling, during which time he received a private reprimand from the Colorado Commission on Judicial Discipline. Because the case dragged on for more than six years, CollegeAmerica faced debilitating financial restrictions from accreditors and the Department of Education. The parent company eventually closed campuses weeks before an appeals court reversed the earlier decision.[79]

The damage was done by the accusation, despite ultimately proving baseless. Without access to federal student aid, CollegeAmerica was forced to close, despite the trigger having been rooted in a politicized, overturned decision. CollegeAmerica's opponents may have lost the legal battle but achieved their true objective: starving the school's leadership, faculty and students of the financing necessary to remain solvent. Consequently, thousands of CollegeAmerica students' educations were disrupted.

The Obama Administration's amendments to the BDR regulations further upped the financial leverage of the rule on for-profit colleges. As noted previously in this paper, the regulations exclusively required for-profit schools to provide a letter of credit equal to 10 percent of the amount of federal student aid they received, which was automatically triggered by a lawsuit. Public

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76 https://www.forbes.com/sites/prestoncooper2/2016/09/07/education-department-shuts-down-itt-tech/?sh=4ed16f4267ad

77 https://www.forbes.com/sites/prestoncooper2/2016/09/07/education-department-shuts-down-itt-tech/?sh=4ed16f4267ad

78 https://www.courts.state.co.us/Courts/Court_of_Appeals/Opinion/2021/20CA1692-PD.pdf

79 https://www.coloradopolitics.com/courts/appeals-court-wipes-away-3-million-judgment-against-for-profit-college-orders-new-trial/article_9672e694-0691-11ec-a0c1-972b23182c2b.html

institutions, by contrast, were backed by the "full faith and credit" of the government. More simply, only for-profit schools were required to come up with significant funding when accused, even if those claims were dismissed.

In effect, the Obama Administration's amendments to the BDR, which the Biden Administration may be working to reinstate, allow the Department of Education to target for-profit colleges with burdensome financial requirements, which often can precipitate the school's financial insolvency.

CASE SURVEY: PUBLIC AND PRIVATE STUDENTS UNAWARE OF BDR, BUT READY TO FILE COMPLAINTS

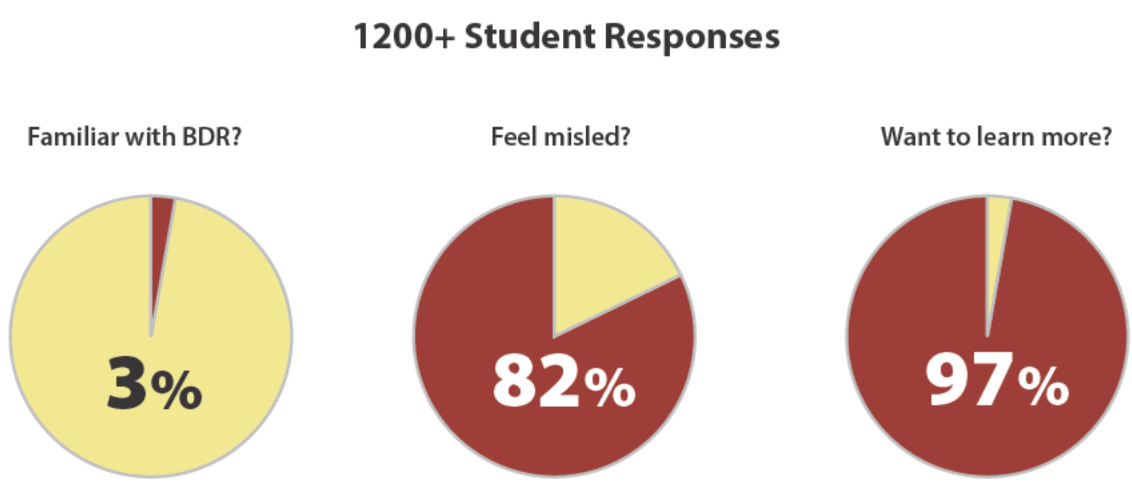
If the BDR were truly applied evenly, students from public and private universities would be expected to be represented more uniformly in debt forgiveness claims. However, evidence confirms that virtually all BDR applications since 2015 have involved for-profit institutions. What's more, new data finds that most public and private online college students are unfamiliar with the BDR, which suggests the rule has been promoted narrowly among students in for-profit schools.

In October 2021, Consumer Action for a Strong Economy (CASE) conducted a survey of more than 1,000 current and former students from the five public and private universities with the most online students, according to 2018 data from the Department of Education (Western Governors University, Southern New Hampshire University, Liberty University, University of Maryland Global Campus, and the University of Central Florida).

Students were notified of the survey through sponsored digital ads on Facebook and LinkedIn. Respondents were directed to school-specific websites, which provided a short survey that included a series of yes-or-no questions, including:

- Had the respondent received federal student financial aid while attending school;
- Has the respondent heard about Borrower Defense to Loan Repayment;
- Has the respondent completed a Borrower Defense to Loan Repayment application;
- Does the respondent believe his or her school misled them during admissions or active academic years; and
- Is the respondent interested in learning more about student loan relief?

Of the participants who received federal financial aid (95 percent), 90 percent did not know about the BDR. A remarkable 82 percent said they believe their school misled them, and 97 percent indicated they are interested in learning more about student loan forgiveness.[80]



80 https://www.insidehighered.com/digital-learning/article/2019/12/17/colleges-and-universities-most-online-students-2018

Extrapolating the results, 227,740 current and graduated students of Western Governors University (the largest online program) could be expected to seek student loan forgiveness through the BDR, if they knew more about the rule.[81] That number would equal nearly 2.5 times the number of BDR claims approved by the Biden Administration from just one private, not-for-profit college.[82]

Nearly 70 public or private nonprofit colleges have closed or announced plans to since 2016, according to an analysis by *Higher Ed Dive* in July of this year. A report by *Inside Higher Ed* in August found "more public and private two-year and four-year colleges closed or merged between 2019-20 and 2020-21 than was true for for-profit institutions." Yet, the only BDR claims approved by the Department of Education have involved for-profit colleges.[83] [84]

The Obama Administration and now the Biden Administration, along with progressive allies in Congress, have often cited post-graduation income data to criticize for-public colleges for deceiving students. In 2014, for example, Secretary of Education Arne Duncan claimed 72 percent of for-profit institutions "produce graduates who on average earned less than high school dropouts." However, as a *Washington Post* fact-check—which gave the statement a "Two Pinocchio" rating—notes:

> **"Buried in the regulation — and not advertised by the department — is that graduates of 32 percent of community college programs earn less than high school dropouts… [G]raduates of 57 percent of private institutions — a list that includes Harvard's Dental School but also child-care training programs — earn less than high school dropouts… Imagine taking the same approach to evaluate different departments at an elite college. Three years after graduation, how would the philosophy department fare, on average?"[85]**

These realities point to the bias with which the BDR has been applied, which owes chiefly to the Obama Administration's interpretation and amendments to the rule—which the Biden Administration is working to reinstate. As the CASE survey data shows, most public and private college students are unaware of the BDR, however, many believe they have been misled by their institution and might consider student loan forgiveness through the BDR if they had full information.

81 119,618 current + 167,154 graduates (Wikipedia) x [.82 x .97] = 227,740

82 https://www.ed.gov/news/press-releases/department-education-approves-borrower-defense-claims-related-three-additional-institutions

83 https://www.highereddive.com/news/how-many-colleges-and-universities-have-closed-since-2016/539379/

84 https://www.insidehighered.com/news/2021/08/02/number-colleges-shrinks-again-including-publics-and-private-nonprofits

85 https://www.washingtonpost.com/news/fact-checker/wp/2014/04/11/the-obama-administrations-claim-that-72-percent-of-for-profits-programs-have-graduates-making-less-than-high-school-dropouts/

A SYSTEM WORKING AGAINST ITSELF

The United States has made significant investments to provide nontraditional students greater access to higher education. In fact, the United States is among the most generous countries in the world when it comes to offering people a path to earn a college degree. The federal government provided $30 billion in Pell Grants in 2020, for example.[86]

Career colleges are essential to our nation's economic and innovative growth and sustainability because these schools cater to nontraditional students that are otherwise not well served by the higher education model. While it might be easy for politicians and activists to cherry-pick data to lob claims against these institutions, the reality is nontraditional students are more likely to face worse post-graduation outcomes than other demographics—which is more likely a function of socioeconomic backgrounds rather than the quality of education offered.

While targeting for-profit schools with the BDR may provide a backdoor to achieve "free college," these efforts smack of a condescension by political elites toward those who build, create, and make our nation work. And ultimately it disadvantages minority, low-income, single-parent and other student groups, for which for-profit schools offer a path towards a quality education.

86 https://urldefense.com/v3/__https:/www.statista.com/statistics/235374/expenditure-on-federal-pell-grants-in-the-us/__;!!E4Cpno6LK8EYUw!cyGpAAGZKOS1Sq0n09viD7PxWirDtzdpzlSa_tRGuItOBzxU3CpzVoaUCHAWumuq$

CONCLUSION:

Initially written as a temporary, precautionary regulation, the Borrower Defense to Repayment rule has been co-opted by progressive Democrats as a tool to target and disrupt for-profit colleges. The rule allows the Secretary of Education—an unelected, politically appointed position—to precipitously stop student aid to an institution, which can compromise its financial solvency. This is particularly damaging for for-profit schools, which disproportionately rely on federal aid.

This target-and-punish cycle narrowly affects for-profit colleges, which, unlike public institutions, do not enjoy the benefits "of full faith and credit" of state governments. Ultimately, nontraditional students are the losers in this biased application of the BDR, because it limits students choice and creates uncertainty for attendees of affected institutions.

That all approved BDR claims are associated with for-profit schools, coupled with the fact that most students at public and private colleges are unaware of the rule even though many believe they were misled by their school, further confirms that the BDR has been targeted narrowly at for-profit colleges. If the rule were applied evenly across all types of school, one would expect that many more student who are equally dissatisfied with their education would come forward.

There are appropriate channels for debating the concept of "Free College". Democrats have skirted those, perhaps because most voters are opposed. Instead, they have opted to misappropriate a once obscure, back-page regulation into a tool to advance their ideology outside the legislative process. This approach is a short-sighted play that will ultimately hurt American students, the U.S. higher education system and the United States' competitiveness.