

5-1-2023

## Public Service Loan Forgiveness? How Improvements to a Student Debt Cancellation Program Can Help to Deliver Gideon's Promise

Jane Fox

Winston Berkman-Breen

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>



Part of the [Constitutional Law Commons](#), [Law and Society Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Jane Fox & Winston Berkman-Breen, *Public Service Loan Forgiveness? How Improvements to a Student Debt Cancellation Program Can Help to Deliver Gideon's Promise*, 31 J. L. & Pol'y 1 (2023).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol31/iss2/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.



**PUBLIC SERVICE LOAN FORGIVENESS? HOW  
IMPROVEMENTS TO A STUDENT DEBT  
CANCELLATION PROGRAM CAN HELP TO DELIVER  
GIDEON'S PROMISE**

*Jane Fox\**  
*Winston Berkman-Breen†*

*Student debt is a generational crisis facing forty-five million Americans today. Among those with the highest rates of student loan debt are attorneys and among attorneys, those working in public interest have been hit particularly hard as they carry these same high debt rates yet earn low salaries. While student debt has run roughshod over Americans seeking higher education for almost forty years, another crisis has ravaged Americans who are swept up in the criminal legal system. Mass incarceration and mass policing have sent millions to prisons and jails and separated millions of parents and children through family courts. Often the only ones standing in the way of those destructive forces have been the attorneys who work in public defense in our criminal and family courts. Carrying high rates of student debt while still receiving stagnant wages has made a public defense career unsustainable for many attorneys, particularly those working as assigned counsel attorneys in rural communities. Those rural communities are facing a crisis within a crisis, as public defense attorney shortages exacerbate legal deserts leaving our most vulnerable citizens without advocates. Public Service Loan Forgiveness (“PSLF”) was created to deliver student debt cancellation to public sector workers. While the PSLF program had a rocky start, the Department of Education (“ED”) currently implements PSLF in a way that unnecessarily excludes entire sectors of workers, including assigned*

---

\* Staff Attorney, The Legal Aid Society Criminal Defense Practice and fellow at the Student Borrower Protection Center.

† Policy Counsel and Deputy Director of Advocacy, Student Borrower Protection Center.



*counsel attorneys. ED's administration of PSLF fails to address the full breadth of the student debt crisis for public service workers, and is a missed opportunity to leverage PSLF to support access to justice through public defense attorneys. This Article proposes a modest, immediate solution to ease the crunch of the much larger structural dilemma of providing public defense to rural areas through a targeted use of the PSLF program. Here, we examine other categories of public sector workers, namely non-tenured adjunct higher education faculty and certain healthcare workers, who have been excluded from PSLF and how recent regulatory changes gave them access to this crucial debt cancellation. We recommend enacting a change to the PSLF program regulations that would allow assigned counsel attorneys to access PSLF cancellation, thereby encouraging current practitioners to continue to serve rural communities while working to discharge their student debt and attracting newer attorneys with high student debt loads to these areas where lawyers are desperately needed and current practitioners are aging out. Our proposed minor amendments to ED's PSLF regulations does not solve many of the program's other shortcomings, but would make a simple but profound contribution to both the student debt crisis and public defender shortage.*

## INTRODUCTION

Obtaining a legal education in 2023 is an exercise in debt financing. Unless you are fortunate enough to access intergenerational wealth and pay for law school outright, the path to your law degree is paved with student loans, tense applications for competitive fellowships and grants, and existential dread about the years required to pay off your debt. For young lawyers who dream of a career as a “people’s lawyer,” a “movement lawyer,” or a radical public defender,<sup>3</sup> the math of a low public sector salary and

---

<sup>3</sup> Here, we use the terms “public defense” and “public defender” to include attorneys working in the criminal and family court context and at the trial and appellate levels. While public defender has a colloquial definition that is often limited to an attorney representing clients in criminal courts at the trial level, attorneys representing children and/or parents in family courts in both juvenile delinquency matters or custody and neglect cases are very much within the public defense community both in spirit and daily practice, as are appellate counsel.



a high student loan payment is a rude awakening that makes those dreams seem impossibly out of reach. Simultaneously, the pressures of mass incarceration and mass policing of families mean vulnerable members of our communities need dedicated advocates more than ever. Attorneys who were lucky enough to finish their law degrees before higher education became astronomically expensive and avoided the current student debt crisis are aging out of the profession.<sup>4</sup> Who will replace them? While urban centers with robust public defense and legal services agencies have the funding to attract recent law graduates with livable salaries, what happens to the rural counties where legal services are very much needed, but where there is little political will to pay attorneys an adequate wage? How do we reconcile the intertwining crises of student debt and rural legal deserts?

A federal program exists that Congress intended to address scenarios like this: the Public Service Loan Forgiveness (“PSLF”) program. Unfortunately, the way the U.S. Department of Education (“ED”) has promulgated PSLF regulations and implements the program has the effect of excluding entire segments of public sector workers who should be included pursuant to PSLF’s statutory language itself. Within public interest law, those excluded include attorneys working as assigned counsel in criminal and family courts.

These same tensions exist in other industries as well, such as rural healthcare, where both government and the private sector are

---

Furthermore, while “indigent defense” is a common term in the literature, we do not use it here unless directly quoting from a source as the terminology can feel dated and pejorative to clients who are economically marginalized.

<sup>4</sup> See generally, *Historical Law School Tuition Growth (1985-2020)*, AM. BAR ASS’N, [https://www.americanbar.org/groups/young\\_lawyers/student-loans/historical-law-school-tuition-growth](https://www.americanbar.org/groups/young_lawyers/student-loans/historical-law-school-tuition-growth) (last visited Mar. 23, 2023) (stating that average law school tuition rates began to exceed the rate of inflation around 1985 and in the 1990s law school tuition rates began to outpace starting salaries at large corporate firms. Those who graduated law school in the late 1980s and early 1990s are now in their late fifties or into their sixties and approaching retirement age. Attorneys who graduated law school after the mid-1990s have taken on increasingly high amounts of student debt at rates that have not kept pace with average salaries for corporate jobs, let alone public interest positions where salaries have remained more stagnant); see also *Law School Costs*, LAW SCH. TRANSPARENCY, <https://www.lawschooltransparency.com/trends/costs/tuition> (last visited Mar. 23, 2023).



failing to meet the needs of rural communities<sup>5</sup> and where workers like doctors<sup>6</sup> and nurses<sup>7</sup> carry high student debt loads. Recent regulatory fixes modified the PSLF program to allow more workers in those sectors to qualify for cancellation,<sup>8</sup> but do not extend to all excluded workers.

The fact that assigned counsel are currently excluded is a symptom of a broader problem with ED's administration of PSLF. Currently, the federal government, through ED, is failing to exercise all of its available authorities to support borrowers working in public interest and to thereby drive more workers to these high-need fields. The proposal below would significantly improve PSLF for assigned counsel, but it only treats the symptom of this larger problem as it applies to a single sector. A more comprehensive review and amendment of the PSLF regulations is needed to ensure that all public service workers with federal student loan debt can access PSLF and do not leave public service to pursue higher salaries to repay these debts, which is Congress's clear intent for the program, as reflected in its enacting statute.<sup>9</sup>

This Article proposes a modest, immediate solution to ease the crunch of a much larger structural dilemma. Part I of this article lays

---

<sup>5</sup> Michael Ollove, *Rural America's Health Crisis Seizes States' Attention*, STATELINE (Jan. 31, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/31/rural-americas-health-crisis-seizes-states-attention>.

<sup>6</sup> Jennifer Collonia, *What's The Average Medical School Debt In 2023?*, FORBES (May 13, 2022, 7:23 AM), <https://www.forbes.com/advisor/student-loans/average-medical-school-debt/>.

<sup>7</sup> Ryan Lane, *Average Nursing Student Debt: How Much Debt Do Nurses Have?*, NERDWALLET (May 21, 2022), <https://www.nerdwallet.com/article/loans/student-loans/average-nursing-student-debt>.

<sup>8</sup> 87 Fed. Reg. 65973 (Nov. 1, 2022) (discussing the use of a credit multiplier for adjunct faculty and permitting certain privately employed doctors in Texas and California to access PSLF).

<sup>9</sup> See 20 U.S.C. § 1001 et seq. (creating PSLF program); see also H.R. Rep. No. 110-210, at 9 (2007) (discussing Congress's concern that individuals are not choosing lower-paid professions, such as public service, due to growing student loan debt, and creating PSLF as response); *Staying on track while giving back*, CONSUMER FIN. PROT. BUREAU 20 n.33 (June 2017), [https://files.consumerfinance.gov/f/documents/201706\\_cfpb\\_PSLF-midyear-report.pdf](https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf).



out the definitions and procedures of the PSLF program and how it was designed to deliver student debt cancellation to some but not all public sector workers. Part II of this article identifies a group of public sector workers, assigned counsel attorneys representing clients in criminal and family courts—a common model for providing representation, particularly in rural counties—who have been unable to access PSLF. This section also introduces the crisis in providing public defense representation and how assigned counsel attorneys fit into that landscape. Part III discusses how the shortage of public defenders and assigned counsel attorneys has an acute impact on rural communities and how the simultaneous crisis of mounting student debt acts as a barrier to staffing attorneys in these regions. This section also discusses how government is missing a unique opportunity to address both problems by excluding assigned counsel attorneys from PSLF. Part IV of this article examines other categories of public sector workers, namely non-tenured adjunct higher education faculty and certain healthcare workers, who have been excluded from PSLF and how recent regulatory changes gave them access to this crucial debt cancellation. In Part V, we recommend enacting a change to the PSLF program regulations that would allow assigned counsel attorneys to access PSLF cancellation, thereby encouraging current practitioners to continue to serve rural communities while working to discharge their student debt and attracting newer attorneys with high student debt loads to these areas where lawyers are desperately needed and current practitioners are aging out.<sup>10</sup>

## I. THE PUBLIC SERVICE LOAN FORGIVENESS PROGRAM

In 2007, a bipartisan Congress created the PSLF program to assist current government and non-profit workers struggling with student loan debt.<sup>11</sup> The program was also intended to incentivize

---

<sup>10</sup> Lisa R. Pruitt, et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018); see also Stan L. Pritzker & Taier Perlman, *Report & Recommendations of the Task Force on Rural Justice: Interventions to Ameliorate the Access to Justice in Rural New York*, N.Y. STATE BAR ASS'N (Apr. 2020), <https://nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf>.

<sup>11</sup> See generally 20 U.S.C. § 1001 et seq.



future graduates to enter public service by addressing affordability concerns related to their student loans and relatively lower pay compared to the for-profit sector.<sup>12</sup> Congress's promise with the PSLF program is simple: if you work in public service and make payments on your loans for ten years, the remainder of your debt will be forgiven. In practice, however, its implementation and administration have been significantly more complicated<sup>13</sup> and weighed down by repeated industry malfeasance,<sup>14</sup> resulting in extraordinarily low program participation by eligible public service workers and even lower rates of loan discharge.<sup>15</sup>

However, even if all of the mismanagement and malfeasance were to be addressed—which the Biden Administration is working hard to do<sup>16</sup>—significant populations of public service workers with student loan debt would still be ineligible for the program. The

---

<sup>12</sup> See generally *id.*

<sup>13</sup> See generally 34 C.F.R. § 685.219 (2023) (laying out program requirements).

<sup>14</sup> See Avie Schneider & Chris Arnold, *23 Senators Demand Investigation into Mismanagement of Student Loan Program*, NPR (Oct. 29, 2019), <https://www.npr.org/2019/10/29/774395247/23-senators-demand-investigation-into-mismanagement-of-student-loan-program> (discussing student loan servicing mismanagement of PSLF program); see also Stacy Cowley, *California Will Be Fourth State to Sue Navient Over Student Loans*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/business/navient-student-loans-california.html> (discussing states suing Navient for servicing misconduct, including related to PSLF); Stacy Cowley, *New York Sues Student Loan Servicer for 'Abusive' Acts*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/03/business/student-loans-forgiveness-pheaa.html> (discussing N.Y. Attorney General suing PHEAA for abusive servicing related to PSLF).

<sup>15</sup> *Data Shows 99% of Applicants for a Student Loan Forgiveness Program Were Denied*, NPR (Sept. 21, 2018, 4:59 PM), <https://www.npr.org/2018/09/21/650508381/data-shows-99-of-applicants-for-student-loan-forgiveness-denied>.

<sup>16</sup> See, e.g., *The Limited PSLF Waiver Opportunity Ended on Oct. 31, 2022*, FED. STUDENT AID, <https://studentaid.gov/announcements-events/pslf-limited-waiver> (last visited on Mar. 23, 2023) (discussing Limited PSLF Waiver, which addressed prior misadministration of the PSLF program); *Income-Driven Repayment Account Adjustment*, FED. STUDENT AID, <https://studentaid.gov/announcements-events/idr-account-adjustment> (last visited on Mar. 23, 2023) (discussing the IDR Account Adjustment, which addresses prior misadministration of the IDR programs).



Administration must make intentional changes to align the PSLF program with its implementing statute, thereby enabling currently excluded public service workers to access debt cancellation.

*a. The PSLF Program Has Specific Eligibility Requirements*

The Higher Education Act’s (“HEA”) PSLF provision essentially creates a four-part test that a borrower must satisfy in order to discharge their loans through the PSLF program.

First, the borrower must have a Direct Loan,<sup>17</sup> which is one type of federal student loan.<sup>18</sup> Although borrowers with non-Direct Loans can convert their loan type through a process called consolidation,<sup>19</sup> they typically lose any past credit toward PSLF through that process and must restart accruing the ten years of credit from scratch.<sup>20</sup> Between 2021 and 2023, ED took several steps to temporarily allow borrowers to consolidate their loans without losing past payment and work credit toward PSLF.<sup>21</sup> It also finalized

---

<sup>17</sup> 20 U.S.C. § 1087e(m)(1)(A) (requiring 120 monthly payments on an “eligible Federal Direct Loan”).

<sup>18</sup> See 20 U.S.C. Ch. 28, Subch. IV, Pt. D (providing the “William D. Ford Federal Direct Loan Program”); *The U.S. Department of Education Offers Low-Interest Loans to Eligible Students to Help Cover the Cost of College or Career School*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized> (last visited Mar. 23, 2023).

<sup>19</sup> *Direct Consolidation Loan Application*, FED. STUDENT AID, <https://studentaid.gov/app/launchConsolidation.action> (last visited Mar. 23, 2023).

<sup>20</sup> See DEP’T OF EDUC., *Federal Student Aid, Public Service Loan Forgiveness (PSLF)*, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/questions#qualifying-employer> (last visited Mar. 23, 2023) (“If you consolidate your loans, only qualifying payments that you make on the new Direct Consolidation Loan can be counted toward the 120 payments required for PSLF. Any payments you made on the loans before you consolidated them don’t count.”).

<sup>21</sup> See *The Limited PSLF Waiver Opportunity Ended on Oct. 31, 2022*, FED. STUDENT AID, <https://studentaid.gov/announcements-events/pslf-limited-waiver> (last visited Mar. 23, 2023) (discussing ability to consolidate and retain prior PSLF credit through Limited PSLF Waiver); *Income-Driven Repayment Account Adjustment*, FED. STUDENT AID, <https://studentaid.gov/announcements-events/idr-accountadjustment> (last visited Mar. 23, 2023) (discussing ability to



revised PSLF regulations, effective July 2023, that will allow borrowers to maintain credit when they consolidate certain loan types.<sup>22</sup> Despite these changes, however, the law still limits cancellation to Direct Loan debts as part of the PSLF program.<sup>23</sup>

Second, the borrower must make qualifying payments on their loan.<sup>24</sup> Although the HEA provides borrowers with several repayment plan options, only payments made while enrolled in a subset of these plans will count toward PSLF.<sup>25</sup> Borrowers who have diligently paid pursuant to an ineligible plan have not accrued any credit toward cancellation through PSLF. This was a major contributing factor to PSLF's initial failings,<sup>26</sup> which Congress tried to address through the Temporary Expanded PSLF ("TEPSLF") program, allowing borrowers to count certain otherwise ineligible payments in certain instances.<sup>27</sup> The Biden Administration has also taken steps to address this issue by performing a one-time audit of

---

consolidate and retain prior IDR credit through IDR Account Adjustment, which can be applied to PSLF).

<sup>22</sup> 87 Fed. Reg. 66065 (Nov. 1, 2022) (to be codified at 34 C.F.R. § 685.219(c)(3)).

<sup>23</sup> See 20 U.S.C. § 1087e(m)(1)(A).

<sup>24</sup> *Id.* (enumerating payments that qualify for PSLF).

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., *Staying on Track While Giving Back*, CONSUMER FIN. PROTECTION BUREAU 33 (2017) [https://files.consumerfinance.gov/f/documents/201706\\_cfpb\\_PSLF-midyear-report.pdf](https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf) (discussing servicers misadvising borrowers about repayment plan eligibility for PSLF); see also *PUBLIC SERVICE LOAN FORGIVENESS Improving the Temporary Expanded Process Could Help Reduce Borrower Confusion*, U.S. GOV'T ACCOUNTABILITY OFF. (2019), <https://www.gao.gov/assets/gao-19-595.pdf>.

<sup>27</sup> Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 315, 132 Stat. 348, 752-753 (2018); Department of Defense, Labor, Health and Human Services, and Education Appropriations Act of 2019 and Continuing Appropriations Act of 2019, Pub. L. No. 115-245, § 313, 132 Stat. 2981, 3107 (2018); see *If Some or All of Your Payments Were Not Made on a Qualifying Repayment Plan for PSLF, You May Be Able to Receive Loan Forgiveness Under a Temporary Opportunity*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/temporary-expanded-public-service-loan-forgiveness> (last visited Mar. 23, 2023).



borrowers' accounts and treating any prior time in repayment as though the borrower had been enrolled in a PSLF-qualifying plan.<sup>28</sup>

Third, borrowers must be employed in public service.<sup>29</sup> This seemingly straightforward requirement, as implemented by ED, has effectively barred millions of public service workers from cancellation through PSLF and is the focus of this article. Specifically, the statute requires workers to be employed in a "public service job," which is defined as a "full-time" job in a number of enumerated sectors.<sup>30</sup> In practice, ED shifted the emphasis away from *jobs* and the individual and to the *employer* itself, changing the employment element from what a borrower does to who they work for.<sup>31</sup> This implementation decision is the reason why many public service workers are excluded by PSLF: they perform a public function for a for-profit employer. This is the core of this article's critique of the current PSLF framework, as a lost opportunity to support the breadth of public service work, discussed in greater detail below. ED's implementation of the "full-time" requirement also functions to exclude public service workers. The statute does not define "full-time." ED initially defined it by regulation as the greater of an average of thirty hours per week or whatever a worker's employer considered to be full-time employment.<sup>32</sup> This had the effect of creating an uneven playing field for workers who work similar hours for different employers, and who may be classified differently by their employers. It also left employers with substantial discretion in calculating the hours that would be used to make this determination, often to the exclusion of any unrecognized hours worked. For these reasons, ED's implementation of the PSLF program's employment requirement has been fraught.

Finally, borrowers must accrue 120 months, or ten years' worth, of these qualifying payments: payments made on a Direct Loan,

---

<sup>28</sup> *Income-Driven Repayment Account Adjustment*, *supra* note 16.

<sup>29</sup> 20 U.S.C. § 1087e(m)(1)(B) (requiring a "public service job" at the time that qualifying payments were made and at the time of forgiveness).

<sup>30</sup> *Id.*; see also 20 U.S.C. § 1087e(m)(3)(B) (defining "public service job").

<sup>31</sup> Compare 20 U.S.C. § 1087e(m)(1)(B) (requiring a "public service job") with 34 C.F.R. § 685.219(c)(1)(ii) (2022) (effective until July 1, 2023) (requiring borrowers to be "employed full-time by a public service organization").

<sup>32</sup> 34 C.F.R. § 685.219(b)(1) (2022) (effective until July 1, 2023).



pursuant to a PSLF-eligible payment plan, and while employed full time by a public service employer.<sup>33</sup> These qualifying payments do not need to be consecutive, and borrowers who cease to satisfy one of the elements for a period of time—e.g., they exit a qualifying payment plan or no longer have a public service employer—can resume their progress where they left off upon again satisfying all three other elements.

To demonstrate that they have satisfied these elements, a borrower must submit employment certification to ED. This is done using the PSLF and TEPSLF Certification and Application, or “PSLF Form.” The two-page form requires a borrower’s employer to confirm the employee’s dates of employment, whether they were full-time or parttime, the hours they worked, the employer’s organizational type—i.e., government, non-profit that is tax exempt under section 501(c)(3) of the Internal Revenue Code, or non-profit that is not tax exempt under section 501(c)(3) of the Internal Revenue Code—and must be signed by the employer.<sup>34</sup> The borrower must then submit the signed PSLF Form to ED via a student loan servicer that is assigned to administer PSLF, which will review the form for completion and assess the borrower’s eligibility based on the four elements above.<sup>35</sup> If the borrower has a qualifying loan type, their loan account will be transferred to the servicer and reviewed for qualifying payments.<sup>36</sup> If the borrower has accrued 120 qualifying payments that correspond with the timeframe of their certified public service, their loans will be canceled.<sup>37</sup> If they have accrued fewer than the 120 qualifying payments needed, their account will be updated to reflect their current count.<sup>38</sup> The

---

<sup>33</sup> See 20 U.S.C. § 1087e(m)(1).

<sup>34</sup> DEP’T OF EDUC., WILLIAM D. FORD FED. DIRECT LOAN (DIRECT LOAN) PROGRAM, OMB NO. 1845-0110, PUBLIC SERVICE LOAN FORGIVENESS (PSLF) & TEMPORARY EXPANDED PSLF (TEPSLF) CERTIFICATION & APPLICATION, <https://studentaid.gov/sites/default/files/public-service-application-for-forgiveness.pdf> (expiration date Aug. 31, 2023).

<sup>35</sup> *Id.* at 4–5; see *Federal Student Aid, Public Service Loan Forgiveness (PSLF)*, *supra* note 20.

<sup>36</sup> See *Federal Student Aid, Public Service Loan Forgiveness (PSLF)*, *supra* note 20 (discussing transfer of loan account upon review for PSLF).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*



borrower can then continue to make payments, work, and certify their new work until they have reached the required 120 qualifying payments.<sup>39</sup>

PSLF's eligibility criteria and procedure have both acted as gatekeepers throughout the program's history. Student loan servicers have repeatedly provided borrowers with misinformation about their status and steps they could take toward accessing PSLF.<sup>40</sup> Additionally, the mechanics of applying and tracking qualifying payments has often been a Kafkaesque nightmare.<sup>41</sup> Although ED is taking steps to address some of these impediments, the program's core requirements still pose a barrier to too many borrowers. This is particularly true of ED's interpretation of the public service employment requirement.

*b. The Employer Definitions Under PSLF Have the Effect of Narrowing Program Eligibility*

As discussed above, in order to qualify for cancellation through PSLF, the HEA requires borrowers to work in a "public service job."<sup>42</sup> In the HEA, Congress defined "public service job" to include work in a broad swath of industries, ranging from emergency management to healthcare support occupations to school-based

---

<sup>39</sup> See *id.* Borrowers are not required to submit this form prior to having accrued 120 qualifying payments, but are permitted and encouraged to file it annually. As program rules change, borrowers can certify past employment using new rules as necessary. Thus, unless they have been in repayment and qualifying employment for more than ten years, a borrower is never "late" to begin certifying their employment and accruing credit toward student loan debt cancellation through PSLF.

<sup>40</sup> See Cowley, *supra* note 14.

<sup>41</sup> See e.g., Stacy Cowley, *The Student Loan Appeal Process the Government Doesn't Tell You About*, N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/business/federal-student-loan-appeals.html?emc=rss&partner=rss> (discussing an unpublicized appeals process); STUDENT BORROWER PROT. CTR., *Broken Promises: How the Department of Education's Failures and Industry's Abuses Deny FFEL Borrowers Public Service Loan Forgiveness* (Dec. 2020), [https://protectborrowers.org/wp-content/uploads/2020/12/BrokenPromises\\_FFEL.pdf](https://protectborrowers.org/wp-content/uploads/2020/12/BrokenPromises_FFEL.pdf) (providing overview of various administrative hurdles and mismanagement of PSLF by ED).

<sup>42</sup> 20 U.S.C. § 1087e(m)(1)(B)(i).



library sciences.<sup>43</sup> In theory, anyone working in those sectors should have a qualifying job. In its regulations, however, ED both substantially broadened and unnecessarily and harmfully narrowed this definition by shifting the emphasis on public service “jobs” to employment by a “public service organization,” which ED defined to include governments, 501(c)(3) nonprofits, and certain other types of nonprofits, and to exclude for-profit businesses, labor unions, and partisan organizations.<sup>44</sup> This changes the criteria for PSLF from favoring the type of work someone does to centering the type of employer for which they work.

Although this change seems subtle, it carries significant implications for borrowers: to qualify for cancellation under PSLF, a borrower must be directly employed by a public service organization, which requires being hired and paid via Form W-2, thereby excluding contract and temporary workers.<sup>45</sup> It also categorically excludes public service workers who do not work for public service organizations, i.e., for-profit firms, even if those firms offer the services enumerated by Congress in the HEA’s PSLF provisions as qualifying *jobs*.<sup>46</sup> This shift is particularly concerning given the trend toward outsourcing labor, especially in government, and the fact that workers who fill those outsourced roles are often low-paid.<sup>47</sup>

There is no statutory reason for this narrow focus on employers, nor does it reflect today’s realities of public service employment for many borrowers. ED has the authority to revise its regulations to

---

<sup>43</sup> *Id.* at § 1087e(m)(3)(B)(i).

<sup>44</sup> *Compare* 20 U.S.C. § 1087e(m)(3)(B)(i) with 34 C.F.R. § 685.219(b)–(c).

<sup>45</sup> *Public Service Loan Forgiveness FAQ*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/questions#qualifying-employer> (last visited Mar. 23, 2023).

<sup>46</sup> *See Qualifying Employer*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#qualifying-employer> (last visited Mar. 23, 2023) (explaining that labor unions, partisan political organizations, and for-profit organizations, including for-profit government contractors, categorically do not qualify as qualifying employers for PSLF).

<sup>47</sup> Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America’s Workers*, NAT’L EMP. LAW PROJECT & NAT’L STAFFING WORKERS ALLIANCE, <https://s27147.pcdn.co/wp-content/uploads/2015/02/Temped-Out.pdf> (last visited Mar. 23, 2023).



implement Congress's intent—that borrowers working in public service should receive loan forgiveness—more accurately, rather than punishing borrowers for their employer's tax status. Doing so would simply amount to ED recognizing that the economy and labor markets have evolved since the time of PSLF's passage,<sup>48</sup> and would better align the program with the actual statutory provisions passed by Congress.

## II. THE ASSIGNED COUNSEL CRISIS AND IMPACT ON ACCESS TO JUSTICE

A major group of public sector workers left out of PSLF are those attorneys who represent clients in an assigned counsel capacity in criminal and family courts. These attorneys perform public service work as assigned counsel and carry the same rates of student debt as their colleagues working at institutional public defense agencies, and yet, due to PSLF regulations, they are unable to access debt cancellation based on their work. Their exclusion from PSLF is a direct result of ED's decision to tie public service work to one's employer—more specifically, to the employer's tax status and to whether that employment is subject to a Form W-2—rather than to the substance of the work itself. Conceptually, PSLF was meant both to offer relief to borrowers currently working in public service and to encourage students to pursue public sector work without the worry of paying their student loan debt in full. Much like the Peace Corps<sup>49</sup> or AmeriCorps,<sup>50</sup> PSLF was intended to increase the public sector workforce.<sup>51</sup> And yet, ED has failed to use the full potential of PSLF to address the nationwide staffing

---

<sup>48</sup> See e.g., Kate Bahn, *Research Finds the Domestic Outsourcing of Jobs Leads to Declining U.S. Job Quality and Lower Wages*, WASH. CTR. FOR EQUITABLE GROWTH (Aug. 21, 2019) <https://equitablegrowth.org/research-finds-the-domestic-outsourcing-of-jobs-leads-to-declining-u-s-job-quality-and-lower-wages/>.

<sup>49</sup> *History*, PEACE CORPS, <https://www.peacecorps.gov/about/history/> (last visited Mar. 23, 2023).

<sup>50</sup> *What We Do*, AMERICORPS, <https://www.americorps.gov/about/what-we-do> (last visited Mar. 23, 2023).

<sup>51</sup> Alexandra Hegji, CONG. RSCH. SERV., R45389, *The Public Service Loan Forgiveness Program: Selected Issues* (2018).



crisis within the public defense world. Given that public defenders provide constitutionally or statutorily mandated legal services, it is unacceptable that the government is not using every tool at its disposal to encourage attorneys to take these jobs and provide robust representation to all Americans regardless of wealth. PSLF is one such tool.

*a. Assigned Counsel Attorneys: Their Role Within Public Defense*

In its landmark 1963 ruling in *Gideon v. Wainwright*, the Supreme Court held that states must provide attorneys to all those who are accused of crimes and who are unable to pay for them on their own. Similarly, under federal law, lawyers must be provided to children in abuse and neglect cases.<sup>52</sup> In many states, attorneys are also provided to parents in some family court proceedings.<sup>53</sup> Over sixty years after *Gideon*, the landscape of how states provide legal services in criminal and family courts to the economically marginalized is still a mottled patchwork that has a serious impact on the ability of our criminal legal system to deliver justice to all, regardless of wealth. The failure to adequately fund public and family defense, the roots of that failure, and the myriad solutions to repair the damage are topics of enormous academic research that go far beyond the scope of this article.<sup>54</sup> Chronic underfunding of public defense is a problem rooted in systemic racism<sup>55</sup> and one that has yet to be solved.

For the most part, states use a hybrid model across their own county-level jurisdictions to provide criminal and family defense. There are three methods states have used to provide public defense.

---

<sup>52</sup> See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii)

<sup>53</sup> See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, CLEARINGHOUSE REV. J. OF POVERTY L. AND POL'Y 245–46 (2006).

<sup>54</sup> See generally Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. (forthcoming 2023).

<sup>55</sup> See Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994).



First is the public defense agency model: larger, denser jurisdictions may rely on state or non-profit public defender agencies with full-time salaried employees to provide the bulk of necessary representation.<sup>56</sup> Second is the assigned counsel model: smaller or more rural jurisdictions assign public defense clients to local private attorneys with their own practices. Assigned counsel attorneys are able to bill the hours spent working on these cases to the county or local jurisdiction at a set hourly rate for in-court appearances and another rate for out-of-court work, often with a cap on total expenditures for each case.<sup>57</sup> Administration of assigned counsel panels is typically delegated to local bar associations and local court administrators.<sup>58</sup> Lastly, the most common method of providing public defense is the contract counsel model:<sup>59</sup> a local jurisdiction contracts with a private attorney to provide some or all of the public defense cases for a flat fee, which covers all expenses including court appearances, investigation, expert consultations, and office overhead.<sup>60</sup>

There are competing financial tensions at play between the assigned counsel and contract counsel models which impact the quality of representation clients receive. Under the assigned counsel model, attorneys are compensated for court appearances and *some* of their work outside of court appearances and can apply for additional funds to pay for experts as needed in a given case.<sup>61</sup> To a moderate degree, the fee structure of the assigned counsel better

---

<sup>56</sup> See *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, NAT'L ASS'N OF CRIM. DEF. L. (Mar. 2013), <https://static.prisonpolicy.org/scans/Rationing-Justice.pdf> (however, similar statistics for assigned counsel rates in family court are not as widely available, research is ongoing).

<sup>57</sup> *Id.*

<sup>58</sup> See N.Y. COUNTY LAW § 722-b.

<sup>59</sup> See Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, BRENNAN CTR. FOR JUST., 6 (Sept. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/fair-fight>.

<sup>60</sup> *Id.*

<sup>61</sup> See generally GUIDE TO JUDICIARY POL'Y § 230 (JUD. CONF. OF THE U.S. 2009). For example, N.Y.'s 18-b law provides attorneys be paid "per hour for time expended in court or before a magistrate, judge or justice, and . . . per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred . . ."; see also N.Y. COUNTY LAW § 722-b.



incentivizes competent representation than the contract counsel model, though it is still far from the gold-standard of a well-funded institutional provider or legal aid society. Under the assigned counsel model, attorneys have assurances that *some* aspects of their case preparation outside of mere court appearances will be compensated, thereby encouraging attorneys to engage with the full scope of responsibilities of zealous representation such as investigation, mitigation, legal research, and client contact. In contrast, contract counsel are paid a flat fee regardless of how many hours they devote to one client;<sup>62</sup> thus, there exists a financial disincentive to spend any additional time outside of court appearances on any one case. While the contract counsel model is the most common method of providing public defense, it has been widely criticized by many including the American Bar Association, as it encourages quick, assembly-line representation and disfavors the type of holistic defense that reduces mass incarceration and provides better outcomes for clients.<sup>63</sup>

*b. Gideon at Sixty: Public Defense Remains Understaffed and Underfunded*

*Gideon* created an unfunded federal mandate that has never been fulfilled in sixty years. While the funding and structure of prosecutor's offices has remained consistent across the country and has only increased as mass incarceration has risen exponentially since the 1960s, there has been no corresponding attention paid to increasing the access to justice for those ensnared in our criminal and family courts who need quality counsel to assert their rights.

The majority—as high as eighty percent—of those accused of a felony qualify for a public defender.<sup>64</sup> In an ideal world, the model of a fully-funded state or non-profit public defender agency with trained social workers, investigators, and paralegals would be the

---

<sup>62</sup> Primus, *supra* note 54, at 2–3, and 7–18.

<sup>63</sup> Furst, *supra* note 59, at 6; *see also* “Abolishing Flat Fee Contracts for Public Defense Services—ABA Principle 8, SIXTH AMEND. CTR., <https://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/abolishing-flat-fee-contracts-for-public-defense-services-aba-principle-8/> (last visited Mar. 23, 2023).

<sup>64</sup> *Gideon at 50*, *supra* note 56, at 18.



norm in every jurisdiction in the country. Yet, at this moment there remains a dire need to attract and retain talented, dedicated attorneys to the jurisdictions where assigned counsel is the current method for providing representation. As of a 2007 survey, only twenty-two states relied on state-wide public defender offices to provide criminal court representation, while the remaining twenty-seven states and the District of Columbia relied upon a mix of county-level agencies and assigned counsel or contract counsel attorneys to meet their obligations.<sup>65</sup> In addition, even in the twenty-two states with state-level defender systems, unless there is a conflict bureau within the defender agency, assigned counsel attorneys or contract attorneys from the local bar provide representation whenever there is a conflict of interest, such as in multi-defendant prosecutions or where other conflicts of interest arise for the primary defender agency on a case.<sup>66</sup> As a result, assigned counsel attorneys operate in some capacity in all fifty states.<sup>67</sup>

*c. Geographic Impact of Assigned Counsel Models on Rural Communities*

While assigned counsel attorneys play a role in a variety of jurisdictions, rural jurisdictions rely on assigned counsel much more so than urban or suburban districts where population density makes it more likely that a county or state based institutional defender

---

<sup>65</sup> See Donald J. Farole, Jr. & Lynn Langton, *County-based and Local Public Defender Offices*, 2007, DEP'T OF JUST. 1 (Sept. 2010), <https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf>. As of 2007 Maine had no public defender offices. *See id.*

<sup>66</sup> See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2020); *see also* Primus, *supra* note 54, at 51 (“Even in states that have institutional public defender offices, assigned counsel or contract attorneys still handle large numbers of cases. These states resort to assigned-counsel or contract attorney systems whenever a case involves codefendants, because the public defender office faces a conflict of interest if it tries to represent two or more defendants who might have adverse interests. Most states do not have conflict defender offices. According to the ABA, more than [twenty-five percent] of all cases in some jurisdictions are sent to private counsel due to conflicts of interest”) (footnote omitted).

<sup>67</sup> Farole, Jr. & Langton, *supra* note 65, at 5.



office is the main provider of legal services for the poor.<sup>68</sup> Many of these rural jurisdictions are either already facing a staffing crisis or are heading precipitously towards a crisis within the next decade, as long-serving solo practitioners representing clients in criminal and family court as assigned counsel retire with no younger generation available to take up their caseloads.<sup>69</sup>

In 2022, New York Focus looked into the rural family defender crisis in upstate New York and found that

[t]here are more lawyers registered in New York state than in any other, but less than [four] percent of them practice in a rural area. Manhattan has 50.2 attorneys for every 1,000 residents; but no rural county has more than 3.6. The seven North Country counties have an average of 1.7 lawyers for every 1,000 residents. Data from eight rural counties . . . shows that the number of lawyers serving on Attorneys for the Children panels have diminished dramatically in recent years. In six of the eight counties, panels have lost more than half their attorneys over the last ten years. Hamilton County's panel has lost three-quarters of its attorneys.<sup>70</sup>

With a population of approximately 5,107, Hamilton County, New York is the least densely-populated county east of the Mississippi; since 2018, the number of attorneys in the county on the assigned counsel panel handling family and criminal court cases has gone from twenty-five to five or six.<sup>71</sup> Likewise, "a 2018 survey of rural New York lawyers found that more than half were age [fifty-

---

<sup>68</sup> Hannah Haksgaard, *Court-Appointment Compensation and Rural Access to Justice*, 14 U. ST. THOMAS J. L. & PUB. POL'Y 88, 89 (2020).

<sup>69</sup> See Pruitt, *supra* note 10, at 121 (multi-state survey of rural attorney staffing crisis); see also *Report & Recommendations of the Task Force on Rural Justice*, N.Y. STATE BAR ASS'N 1, 7–11 (Apr. 2020), <https://nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf> (New York State statistics of rural attorney staffing crisis).

<sup>70</sup> Tracy Tullis, *Rural Counties See Dramatic Declines in Family Lawyers, Costing Poor Parents their Kids*, N.Y. FOCUS (Feb. 28, 2023), <https://www.nysfocus.com/2022/02/28/family-lawyer-rural-shortage/>.

<sup>71</sup> *Id.*



five] or older, and [without state intervention] there won't be enough younger attorneys to replace them."<sup>72</sup>

Without attorneys to represent them in family or criminal court, rural New Yorkers will suffer cascading consequences from sitting in pre-trial detention unable to win release through a bail hearing, to having their child removed to foster care or even permanently removed from their home. Representation at initial court appearances often sets the tone and tenor for the entire duration of a case.<sup>73</sup> Representation that is routine and guaranteed in an urban county with an institutional provider such as The Legal Aid Society is becoming further and further out of reach for those living in New York's rural areas, despite their having the same legal rights. The playing field is far from level because district attorneys and family court prosecutors have a fully funded infrastructure provided by the state and local governments that is not reliant on private attorneys providing assistance to local courts.<sup>74</sup> Criminal prosecutions and removal of children from their homes will continue unabated whether or not those accused have adequate representation to assert their rights, even though those rights are enshrined in Constitutional,

---

<sup>72</sup> *Id.*

<sup>73</sup> See generally, NEW YORK CIVIL LIBERTIES UNION, STATE OF INJUSTICE: HOW NEW YORK STATE TURNS ITS BACK ON THE RIGHT TO COUNSEL FOR THE POOR 10–12 (Jennifer Carnig et al. 2014). Being assigned an attorney at arraignment, within twenty-four hours of arrest, is a critical step in ensuring zealous representation. When an attorney is assigned quickly in a criminal case, that attorney is able to investigate facts, collect critical information about a client's community ties for a bail application, and ensure that a client is properly advised about a whole host of potential legal decisions such as whether or not to testify before the Grand Jury, how to understand an order of protection, if one is issued by the judge, and the simple logistics of when and how to return to court. Early assignment also ensures that an attorney and their client begin their relationship from a place of trust and respect.

<sup>74</sup> See Oliver Roeder, *Just Facts: A Different Kind of Defense Spending*, BRENNAN CTR. FOR JUST. (July 25, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-different-kind-defense-spending> ("Nationwide, \$2.2 billion was spent by states on indigent defense in FY 2012 — the lowest amount in the past five years. By comparison, the total budget of all state prosecutors offices is roughly \$6 billion a year (this figure is from 2007, the most recent available from BJS).").



federal, and state law.<sup>75</sup> Attracting skilled, committed defense attorneys to these areas is the best and most immediate way to address the systemic legal problems that result from “legal deserts.”<sup>76</sup>

### III. HOW STUDENT DEBT EXACERBATES THE RURAL PUBLIC DEFENSE CRISIS

Despite growing need, recruiting competent attorneys to underserved areas is a reform that has gotten short shrift by state and local governments. The time has come to be as creative as possible in our thinking to address this crisis. At least two forces are at play that intensify legal deserts; the decades-long failure of almost every state to adjust pay rates for assigned counsel attorneys to keep pace with the cost of living or inflation and the exponential increase in student debt rates amongst new attorneys. Jurisdictions that chronically pay little for public defense work cannot hope to attract younger lawyers who have enormous amounts of educational debt upon graduation.

#### *a. Assigned Counsel Pay Rates Are Mostly Stagnant, Disincentivizing Retention and Recruitment*

For too long pay rates for assigned counsel attorneys have remained frozen and inadequate. A 2013 survey by the *National Association of Criminal Defense Lawyers* found that the average rate of compensation for felony cases in the [thirty] states that have established a statewide

---

<sup>75</sup> See generally U.S. CONST. AMEND. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Application of Gault*, 387 U.S. 1 (1967) (regarding juvenile defendants’ due process rights).

<sup>76</sup> See generally *Legal Deserts Threaten Justice For All in Rural America*, AM. BAR ASS’N (Aug. 3, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/08/legal-deserts-threaten-justice/> (“‘Nearly every state in the nation has large stretches of rural areas and counties with few lawyers in them – or no lawyers at all,’ [American Bar Association President Judy Perry] Martinez said. ‘In fact, rural residents are disproportionately poor, and many are forced to travel long distances to find lawyers to handle routine matters that affect their everyday lives, such as wills, divorces and minor criminal and civil cases.’”).



compensation rate is \$65 an hour, with some states paying as little as \$40 an hour. That rate of compensation does not take into account the various overhead costs associated with the practice of law, which include the costs of reference materials, office equipment, rent, travel, malpractice insurance and, for most young attorneys, *student loans*.<sup>77</sup>

As we have seen, just as there is no consistent national model for providing counsel for the poor in criminal and family courts, there is also no consistent national model for *funding* public criminal and family defense across states. Funding is as much of a patchwork system as representation is. Some states fund public defense on a state level, while many others rely on county funding or inconsistent revenue streams such as traffic fines or assessing court fees on defendants themselves.<sup>78</sup> While funding for public defense steadily improved across the country from the mid-1980s to the mid-2000s, recent surveys have shown that funding has largely stagnated since 2005.<sup>79</sup> Multiple states that use an hourly rate structure have failed to increase their rates in decades.<sup>80</sup> As of 2013, Wisconsin's rate had only increased by \$5 in thirty-five years,<sup>81</sup> while Alaska's rate has remained the same since 1986; Vermont, West Virginia, and South Carolina have not increased their rates since the early 1990s.<sup>82</sup>

In New York, rates for assigned counsel in family and criminal court have remained the same for so long that bar associations have turned to litigation to force the state's hand. New York attorneys working in family court as assigned counsel are paid at most \$75 per hour with fees capped at \$4,400 per case, a rate that has not been increased since 2004.<sup>83</sup> As Monica Kenny-Keff, a family law practitioner in Greene County, emphasized, "I probably lose money on [assigned counsel] cases. I'm probably a little crazy."<sup>84</sup> In

---

<sup>77</sup> *Gideon at 50*, *supra* note 56, at 8 (emphasis added).

<sup>78</sup> Statistics refer exclusively to criminal cases and do not include family court cases. Furst, *supra* note 59, at 6–7.

<sup>79</sup> *Id.* at 7, table 1.

<sup>80</sup> *Id.* at 5–7.

<sup>81</sup> *Gideon at 50*, *supra* note 56, at 13.

<sup>82</sup> *Id.*

<sup>83</sup> Tullis, *supra* note 70.

<sup>84</sup> *Id.*



response to the state's failure to raise rates, ten New York City bar associations filed a lawsuit in 2021 to raise the hourly rate to \$150.<sup>85</sup> New York Supreme Court Justice Lisa Headley issued a preliminary injunction in July of 2022, effectively raising the rates for assigned counsel attorneys in New York City to \$158 per hour. However, practitioners outside of New York City were not included.<sup>86</sup> Building on that momentum, the New York State Bar Association filed a similar suit in 2022 seeking to raise rates across the state to aid rural and upstate practitioners.<sup>87</sup> As these lawsuits illustrate, even in a Democratic state with multiple robust urban and suburban institutional defenders, only the pressure of litigation has proved sufficient to force the issue of raising assigned counsel rates enough to sustain attorneys in rural areas.

Simultaneously, rising rates of student loan debt carried by younger attorneys steer them away from assigned counsel jobs in rural communities. With pay rates too low to make assigned counsel representation financially possible when facing a huge monthly student loan payment, young lawyers are effectively shut out of this area of public sector work. Debt dictates not only how new lawyers work, but also where they work.

In 2021, the American Bar Association conducted a survey of 1,300 members aged thirty-six and under and licensed in the previous ten years to unpack the impact of student debt on their legal careers.<sup>88</sup> The survey found over ninety percent of participants had student debt, averaging \$108,000 for their J.D. and \$130,000 across all loans at graduation.<sup>89</sup> It is telling that over forty percent of

---

<sup>85</sup> Amended Complaint at 34, *N.Y. Cnty. Lawyers Assoc. v. State of N.Y.* (No. 156916) (2021), *available at* [https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=BrQ6TPzy\\_PL\\_US\\_F7kXY78rU5vPA==](https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=BrQ6TPzy_PL_US_F7kXY78rU5vPA==).

<sup>86</sup> See Susan DeSantis, *New York State Bar Association Commences Lawsuit to Raise 18-B Rates*, NYSBA (Nov. 30, 2022), <https://nysba.org/new-york-state-bar-association-sues-to-ensure-people-who-cannot-afford-counsel-have-constitutionally-mandated-representation>.

<sup>87</sup> *Id.*

<sup>88</sup> Tiffane Cochran et al., *Student Debt: The Holistic Impact on Today's Young Lawyer*, A.B.A., 11 (2021), [https://www.americanbar.org/content/dam/aba/administrative/young\\_lawyers/2021-student-loan-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf).

<sup>89</sup> *Id.* at 4.



respondents reported that they had been unable to reduce their debt balance since graduating and fifteen percent reported their debt balance was the same, despite being employed.<sup>90</sup> This was felt most acutely by Black borrowers, the majority of whom reported having static or rising debt balances. Of those in the whole group, 38.6% reported that they were underwater on their debt due to a lack of growth in salary or income.<sup>91</sup>

Being unable to make progress on paying down their student debt had a tremendous impact on career trajectories for young lawyers. Of those surveyed, 32.6% reported that while they entered law school with the intention to work in public service, they ultimately ended up in the private sector because of their law school debt and concurrent inability to afford loan payments while drawing down a lower public interest salary.<sup>92</sup> Ultimately, debt burdens steered borrowers with a dream of public service away from their desired careers.

The rising cost of law school tuition<sup>93</sup> and the rising debt burdens of recent graduates<sup>94</sup> intersect with stagnant pay rates for assigned counsel work and intensify the present and looming rural defender crisis.<sup>95</sup> In 2019, Albany Law School's Government Law Center published a report, *Rural Practice in New York*, that included interviews with rural practitioners who spoke to the "greying" of the

---

<sup>90</sup> *Id.* at 6.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.* at 8.

<sup>93</sup> Melanie Hanson, *Average Cost of Law School*, EDUC. DATA INITIATIVE, <https://educationdata.org/average-cost-of-law-school#:~:text=The%20price%20of%20law%20school,%2468%2C210%2C%20or%20%2422%2C740%20per%20year> (last updated Nov. 14, 2022) (stating that the average cost of tuition is increasing at a rate of \$1,070 per year).

<sup>94</sup> Francis Boustany, *Analysis: 1st-Generation Law Grads Have More Debt, Survey Finds*, BLOOMBERG LAW (Feb. 7, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-1st-generation-law-grads-have-more-debt-survey-finds>.

<sup>95</sup> TASK FORCE ON RURAL JUSTICE, Report & Recommendations, *Interventions to Ameliorate the Access-to-Justice Crisis in Rural New York* (Apr. 2020), <https://nysba.org/app/uploads/2020/03/Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf>.



rural bar and the impact student debt has on the ability of younger lawyers to practice in those areas.<sup>96</sup>

It is really rewarding to intimately know the people you serve. I wish there was a way to get law students interested in general practice in a small town, because it is a wonderful quality of life. The problem is that the financial reward is not sufficient for individuals with heavy student debt . . . . It can be great fun practicing law in the country. However, too few young attorneys can consider this choice given the crappy pay and student loan debt. I think that the State should consider loan forgiveness options for private practitioners who devote most or all of their time to providing necessary legal services to the poor of our communities.<sup>97</sup>

Younger attorneys who may desire to serve rural communities through modest solo practices and assigned counsel work are in an impossible situation if they carry tremendous amounts of student debt.

*b. Unlike Their Institutional Defender Colleagues,  
Assigned Counsel Cannot Access PSLF*

With the advent of PSLF in 2007, law graduates pursuing public interest law had a new metric to evaluate the worth of a potential job: whether it met the definition of “public service” for PSLF purposes and could therefore offer a path to debt cancellation. As evidenced by the ABA’s survey on young lawyers and student debt, of the respondents who said they were pursuing PSLF, eighty percent agreed they were pursuing government or non-profit work *specifically* because of PSLF.<sup>98</sup>

---

<sup>96</sup> Taier Perlman, *Rural Law Practice in New York State*, ALBANY L. SCH. GOV. L. CTR., 13 (Apr. 2019), <https://www.albanylaw.edu/sites/default/files/centers/government-law-center/the-rural-law-initiative/Documents/rural-law-practice-in-new-york-state.pdf>.

<sup>97</sup> *Id.*

<sup>98</sup> Tiffane Cochran et al., *Student Debt: The Holistic Impact on Today’s Young Lawyer*, A.B.A., 11 (2021),



Attorneys who work for institutional defender offices representing the same client populations as assigned counsel attorneys and doing the same kind of legal work are almost always able to qualify their employment for PSLF. Public defenders working at government agencies or non-profit legal service providers have little difficulty qualifying their employment under ED's current "public service organization" regulations<sup>99</sup> because those attorneys are salaried and receive a Form W-2 and their employers are either government agencies or tax-exempt 501(c)(3) non-profit organizations. However, assigned counsel attorneys are almost universally barred from PSLF, even if they dedicate the equivalent of thirty hours of full-time work per week to representing public defense clients, because the vast majority work as contractors with local governments and do not have an employment relationship that relies on a Form W-2. The hurdle to qualifying assigned counsel work for PSLF is a bureaucratic one and is not necessarily linked to the quality or quantity of the hours dedicated to providing critical legal services for vulnerable communities.<sup>100</sup>

This exclusion has practical effects. The results of the American Bar Association survey bear out how young lawyers weigh their options when deciding between public service jobs: 25.9% of respondents reported that "qualifying for loan forgiveness factored more heavily in my job selection than [they] anticipated when [they] began law school."<sup>101</sup> These young lawyers are declining to take critical public sector jobs if those jobs do not qualify for loan forgiveness, whether that forgiveness is offered through a law

---

[https://www.americanbar.org/content/dam/aba/administrative/young\\_lawyers/2021-student-loan-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/2021-student-loan-survey.pdf) (see fig. 17).

<sup>99</sup> *Federal Student Aid, Public Service Loan Forgiveness (PSLF)*, *supra* note 20; *see also* WILLIAM D. FORD FED. DIRECT LOAN (DIRECT LOAN) PROGRAM, *supra* note 34.

<sup>100</sup> Here, our recommendation focuses on those working under the assigned counsel model. Our recommendation does not cover how a regulatory change could also cover the work of contract counsel attorneys. While the ultimate goal is to one day see the state or non-profit defender offices be the norm in all fifty states, we recognize that communities that are served by assigned counsel attorneys need immediate, pragmatic solutions that broaden their access to justice. They simply cannot wait for the legislative and funding fights to establish institutional defender agencies to be won.

<sup>101</sup> Cochran, *supra* note 88, at 10 (see fig. 3).



school based Loan Repayment Assistance Program (“LRAP”) or through PSLF.<sup>102</sup>

Assigned counsel cannot discharge their debt through PSLF cancellation on the basis of their assigned counsel work, and simultaneously their expected pay for assigned counsel cases is not high enough as a sole source of income to cover their monthly student loan payments along with the other costs of practicing law, not to mention standard costs of living.<sup>103</sup> There are few suitable substitutes for PSLF that would benefit this population. Although assigned counsel attorneys may choose to offset their monthly federal student loan payments by enrolling in an Income Driven Repayment (“IDR”) plan, the promise of cancellation through IDR takes twenty-five years as opposed to the promise of cancellation after ten years through PSLF.<sup>104</sup> IDR plans allow borrowers to repay their federal student loans at a rate based not on their total debt plus interest, but based on a formula calculating a percentage of their discretionary income.<sup>105</sup> Borrowers enrolled in an IDR plan typically qualify for payments that do not completely cover the monthly interest on their loans and often never pay down the principal balance, as a result borrowers in an IDR plan experience a negative amortization of their debt.<sup>106</sup> However, the implicit trade off of an IDR plan is that after a term of twenty or twenty-five years

---

<sup>102</sup> See *Federal Student Aid, Public Service Loan Forgiveness (PSLF)*, *supra* note 20; see also WILLIAM D. FORD FED. DIRECT LOAN (DIRECT LOAN) PROGRAM, *supra* note 34. While the survey question was not specific to PSLF and may capture responses including law-school or state-based LRAP programs, PSLF remains the broadest loan forgiveness program nationally available.

<sup>103</sup> Stephan Weiler & Tessa Conroy, *Analysis: Cost of Living May Be Rising Faster for Rural Americans*, PBS NEWS HOUR (Jan. 29, 2023, 9:00 AM), <https://www.pbs.org/newshour/economy/analysis-cost-of-living-may-be-rising-faster-for-rural-americans>.

<sup>104</sup> *If Your Federal Student Loan Payments Are High Compared to Your Income, You May Want to Repay Your Loans Under an Income-Driven Repayment Plan*, U.S. DEP’T OF EDUC., <https://studentaid.gov/manage-loans/repayment/plans/income-driven> (last visited Mar. 23, 2023).

<sup>105</sup> *Id.*

<sup>106</sup> Mark Huelsman, *IDR Aimed to Make Federal Student Loans Affordable. It Made Them Even More of a Debt Trap*, STUDENT BORROWER PROTECTION CTR. (Sept. 16, 2021), <https://protectborrowers.org/idr-aimed-to-make-federal-student-loans-affordable-it-made-them-even-more-of-a-debt-trap/>.



the entire balance plus interest is forgiven.<sup>107</sup> Very few young lawyers would feel enticed to take a job where they must carry their student loan burden for twenty-five years and put off critical life choices such as marriage, having children, owning a home, or saving for retirement.<sup>108</sup>

Low pay rates and a lack of access to student debt cancellation have an even greater impact on attorneys who come from those poor, rural communities and wish to return home to practice. Without the generational wealth to offset these economic stressors, it is unlikely they could afford to return to poorer counties to practice law. Therefore, the people who live in rural communities are denied not just access to justice, but the opportunity to be represented by an attorney who may share some of their lived experiences as a fellow resident of the area.

*c. PSLF Represents a Missed Opportunity for Government to Incentivize Assigned Counsel Work*

While the work to increase pay rates for assigned counsel attorneys is on-going, it would be a mistake to not simultaneously move to open PSLF cancellation to assigned counsel attorneys. Attorneys who take on assigned public defense cases in family and criminal courts are not a uniform group, and there is no one-size fits all solution for a community that is spread across all fifty states working under a tremendous variety of conditions. However, there

---

<sup>107</sup> Cory Turner, *Exclusive: How The Most Affordable Student Loan Program Failed Low-Income Borrowers*, NPR (Apr. 1, 2022, 9:28 AM), <https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation> (documenting some of the numerous issues with the administration of IDR programs); see *Payment Count Adjustments Toward Income-Driven Repayment and Public Service Loan Forgiveness Programs*, U.S. DEP'T OF EDUC., <https://studentaid.gov/announcements-events/idr-account-adjustment> (last visited, Mar. 23, 2023) (April 2022 announcement by Department of Education that it would perform a one-time adjustment of borrower accounts to correct past mistakes).

<sup>108</sup> Cochran, *supra* note 88, at 14–20; see also, Pruitt, *supra* note 10, at 59 (describing the experience of a 2017 UC Davis Law graduate who returned to rural Northern California to practice; while enrollment in IDR allowed her to afford a monthly mortgage payment, she was unable to secure a mortgage due to the hesitancy of banks to lend to someone with her level of student loan debt).



exist three potential groups within the assigned counsel community who could greatly benefit from gaining access to PSLF, and for whom the same policy changes would grant eligibility.

First, there are current practitioners with student debt who work in areas where they devote a significant portion of their legal practice to public defense clients and would otherwise meet PSLF's full-time requirement, but have no access to PSLF because they cannot meet the employment requirement as a contractor. Allowing this group to access PSLF would ensure they can continue to provide vigorous representation to public defense clients in their jurisdictions and will face less temptation to close their practices to these cases.

Second, there are current practitioners who have a passion for public defense assignments, but due to low pay rates and concerns about how to afford their monthly student loan payments and other expenses, often restrict the number of assignments they take on in any given month. If there were a financial incentive, such as gaining credit towards PSLF and eventual debt cancellation, some attorneys in this group would potentially be encouraged to take on more assignments thereby lessening the number of clients who wait months for an attorney to be assigned to them.

Third, if PSLF regulations were modified to give assigned counsel attorneys clear guidelines for how to certify their employment and their time, new law graduates with student debt who want to pursue public defense work in rural communities would have an added incentive to start their careers in these high-need areas. While broadening PSLF will not solve every aspect of the defender crisis, our hope is that it can offer some relief in the short-term while long-term fights over funding continue and it would be a mistake for ED to not broaden access to this necessary corps of public sector workers who hold student debt.

#### IV. OTHER EXCLUDED PUBLIC SERVICE WORKERS' EXPERIENCES OFFER BLUEPRINTS FOR INCLUSION IN PSLF

Unfortunately, assigned counsel are not alone in their treatment by ED in the PSLF program. Although the HEA's PSLF provisions provide enough guidance and flexibility to allow all public service workers access to federal student debt cancellation, ED's



implementation has narrowed those provisions in ways that fail to capture certain specific, but common working arrangements. The result is that certain types of public service workers are rendered ineligible for cancellation through PSLF.

Two such excluded groups, however, have found ways to overcome certain barriers to inclusion: adjunct faculty in higher education and healthcare providers who are prohibited from being directly employed by a PSLF-eligible employer. Each has found ways to address unique obstacles to accessing PSLF, including moving ED to adjust its rules to accommodate their circumstances.

#### *a. Adjunct Faculty*

Non-tenured, adjunct faculty who work for public and non-profit institutions of higher education have historically been effectively, although not expressly, excluded from the PSLF program. Here, rather than employer type, the barrier to accessing PSLF is generally a matter of meeting the regulation's "full-time" definition. Using individual employer collective bargaining and state legislative advocacy, this population of public service workers has moved ED to revise its PSLF regulations to better reflect their working experience and to give them access to PSLF.

##### *i. Adjunct Faculty Struggle to Meet ED's Definition of "Full-Time" Employment*

Adjunct faculty traditionally teach courses term by term pursuant to separate employment contracts, which reflect the corresponding credit hours for those courses.<sup>109</sup> Work done to prepare for lecture, to meet with students, and to grade assignments is generally not reflected in these credit hours or their

---

<sup>109</sup> See generally, *An Army of Temps: AFT Adjunct Faculty Quality of Work/Life Report*, AM. FED'N OF TCHRS. (Feb. 2022), [https://www.aft.org/sites/default/files/media/2022/qualitylifereport\\_feb2022.pdf](https://www.aft.org/sites/default/files/media/2022/qualitylifereport_feb2022.pdf) [hereinafter *AFT Report*] (discussing experiences of adjunct professors); see also *Resources on Contingent Positions*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/issues/contingent-faculty-positions/resources-contingent-positions> (last visited Mar. 23, 2023) (providing resources related to adjunct faculties' employment and compensation challenges).



compensation.<sup>110</sup> For this reason, adjunct faculty regularly have difficulty documenting with their school employers that they work the minimum number of hours required to access PSLF.<sup>111</sup> This is true of both the PSLF requirement of at least an average of thirty hours per week, since no faculty teach thirty credit hours, and the potentially higher threshold of their employer's definition of "full-time"—given the distinction between tenure-track and adjunct faculty, both in terms of perceived prestige and employment benefits eligibility, colleges and universities are generally unwilling to designate an adjunct faculty member as "full-time," even for the limited purpose of affording them PSLF access.

Adjunct faculty often teach at multiple schools in order to make ends meet; some adjunct faculty have been able to access PSLF by combining their hours worked across several schools, which is permitted under federal regulations.<sup>112</sup> However, even with multiple

---

<sup>110</sup> See, e.g., *AFT Report*, *supra* note 109, at 9 (44.1% of survey respondents report not being compensated for office hours); *Affordable Care Act and Part-Time Faculty*, AM. ASS'N OF UNIV. PROFESSORS (Apr. 2, 2013), <https://www.aaup.org/news/affordable-care-act-and-part-time-faculty#.ZAEbTHbMK3A> (discussing need for recognition of out-of-classroom work for purposes of healthcare coverage under the Affordable Care Act); *The Just-In-Time Professor: A Staff Report Summarizing eForum Responses on the Working Conditions of Contingent Faculty in Higher Education*, HOUSE COMM. ON EDUC. AND THE WORKFORCE DEMOCRATIC STAFF 5 (Jan. 2014), <https://democrats-edworkforce.house.gov/imo/media/doc/1.24.14-AdjunctEforumReport.pdf> (discussing adjunct compensation as "piece work" and "fixed . . . regardless of how much time it takes to produce").

<sup>111</sup> See *Issue Paper #5: Public Service Loan Forgiveness (PSLF) Eligibility*, U.S. DEPT OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/5pslfeeligibility.pdf> (last updated Sept. 29, 2021) (Department of Education highlighting this challenge during rulemaking); see also Ayelet Sheffey, *Adjunct Professors Should be Eligible for Relief From the 'Crushing Burden' of Student Debt, Democrats Say in New Bill*, BUSINESS INSIDER (July 22, 2021, 2:51 PM), <https://www.businessinsider.com/student-debt-public-service-loan-forgiveness-adjunct-professors-durbin-booker-2021-7>.

<sup>112</sup> 34 C.F.R. § 685.219(b) (2023) (defining "full-time," in part, as the greater of "an annual average of at least [thirty] hours per week" or "unless the qualifying employment is with two or more employers, the number of hours the employer considers full-time" reflecting that the standard is thirty hours only when hours are combined across multiple employers) (emphasis added).



employers, the fact that each employer may only reflect the contracted credit hours taught still presents a barrier to most adjunct faculty. Although adjunct faculty regularly work hours that meet the PSLF threshold, and that may even exceed their tenured colleagues, their employers tend to certify only the number of credit hours taught, which means they struggle to document out-of-classroom hours in a way that will comply with the PSLF program and grant them access.

The fact that the PSLF program, as currently implemented, creates insurmountable barriers of entry for most adjunct faculty is particularly concerning given both the low pay that these faculty generally receive and the growing trend in higher education of relying more on adjunct faculty and tenure-track faculty.<sup>113</sup> Taken together, these factors create an untenable situation in which an entire population of educators, who by virtue of their profession are likely to have advanced degrees and associated student loan debt, and who work in low-paying public service jobs, are barred from the government's primary relief program for public service workers.

## ii. Successful Advocacy and Changes to the PSLF Regulations for Adjunct Faculty

For years, teachers' unions have worked through collective bargaining agreements and state legislatures to expand access to PSLF to their adjunct faculty members. To do so, they targeted these workers' main barrier to entry: establishing that they work at least an average of thirty hours per week, even when their contracts reflect far fewer credit hours. To do this, the unions advocate for a method by which each hour of classroom time is credited with additional time to reflect work done outside the classroom for PSLF

---

<sup>113</sup> See *AFT Report*, *supra* note 109, at 1; *The Annual Report on the Economic Status of the Profession, 2021–22*, AM. ASS'N OF UNIV. PROFESSORS (June 2022), [https://www.aaup.org/file/AAUP\\_ARES\\_2021%E2%80%932022.pdf](https://www.aaup.org/file/AAUP_ARES_2021%E2%80%932022.pdf); see generally Anemona Hartocollis, *Help Wanted: Adjunct Professor, Must Have Doctorate. Salary: \$0.*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/2022/04/06/us/ucla-adjunct-professor-salary.html>; *The Rise of Adjunct Faculty*, INSIDESCHOLAR, <https://blog.insidescholar.org/the-rise-of-adjunct-faculty/> (last visited Mar. 23, 2023).



purposes specifically.<sup>114</sup> For example, each hour of classroom time shall be counted as 3.35 hours of work when completing the PSLF Form. This so-called “credit multiplier” allows for adjunct faculty teaching at least three three-credit courses during a term to document an average of 30.15 hours of work for that term, which is sufficient to meet the threshold needed for PSLF.

For years, these credit multipliers were used privately between schools and adjunct faculty and were also imposed by law in a handful of states,<sup>115</sup> without any issue from ED. In general, ED’s policy with respect to certifying employment is to accept a PSLF Form without scrutiny if it is signed by the borrower and their employer, which allows for this credit multiplier arrangement. Although some adjunct faculty still faced other barriers to accessing PSLF, such as working for for-profit schools or for a school that adopts a higher hourly threshold than thirty hours per week for “full-time” employment,<sup>116</sup> or simply not teaching enough hours, the credit multiplier has been an effective policy intervention. However, the intervention was not uniform across academia, requiring both

---

<sup>114</sup> See *With Union’s Help, Crippling Student Loan Debt Can Be Forgiven*, L.A. COLL. FAC. GUILD (Jul. 12, 2022), [http://www.aft1521.org/?zone=/unionactive/view\\_article.cfm&HomeID=875605](http://www.aft1521.org/?zone=/unionactive/view_article.cfm&HomeID=875605); *CSCU Agrees to Help Adjuncts With PSLF*, CONN. ST. UNIV. AM. ASS’N OF UNIV. PROFESSORS (Oct. 6, 2022), <https://www.csuaaup.org/newsroom/2022/10/06/cscu-agrees-to-help-adjuncts-with-pslf/>.

<sup>115</sup> See, e.g., CAL. EDUC. CODE § 87489 (2021); OR. REV. STAT. ANN. § 329.756 (2022); WASH. REV. CODE ANN. § 41.04.055 (2022); N.Y. LAB. LAW § 1001 (2022).

<sup>116</sup> But see Institutional Eligibility Under the Higher Education Act of 1965, as Amended; Student Assistance General Provisions; Federal Perkins Loan Program; Federal Family Education Loan Program; and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 65904, 66064 (Nov. 1, 2022) (to be codified at 34 C.F.R. §§ 600, 668, 674, 682, 685), available at <https://www.federalregister.gov/documents/2022/11/01/2022-23447/institutional-eligibility-under-the-higher-education-act-of-1965-as-amended-student-assistance>. Note that pursuant to final PSLF rules published on November 1, 2022, and effective July 1, 2023, ED is simplifying its definition of “full time” to, *inter alia*, establish a threshold of an average of thirty hours per week for all employers, eliminating employers’ discretion to impose a higher limit. With this change, one more barrier has been eliminated for adjunct faculty whom their employer refused to designate as “full time.”



collective bargaining and lobbying state legislatures to extend its benefits to additional faculty.<sup>117</sup> Still, as the practice grew, as is often the case with policies that originate in the states, adjunct and advocate calls increased for it to be adopted at the federal level.

In 2021, ED commenced a rulemaking procedure to amend, among other things, its implementing regulations for the PSLF program.<sup>118</sup> The HEA provides for a unique rulemaking procedure, pursuant to which topics that are noticed for rulemaking are first “negotiated” by a variety of stakeholder representatives during a process called negotiated rulemaking, which generally includes multiple multi-day sessions.<sup>119</sup> After negotiations, draft regulations are then published to the Federal Register for comment, and the Administrative Procedure Act’s (“APA”) general notice and comment process is followed.<sup>120</sup> This unusual two-step rulemaking process gives topics, such as PSLF, more opportunities for full-throated advocacy and debate than the APA’s process.

In advance of the first negotiation, ED published its proposed changes, which included replacing PSLF’s “full-time” definition, allowing for employer discretion, with a uniform standard of an average of thirty hours per week.<sup>121</sup> ED also proposed incorporating a credit multiplier into the PSLF regulations, but suggested a multiplier of only 2.5 hours for each classroom hour taught.<sup>122</sup> During the first session, negotiators—which included a teachers’

---

<sup>117</sup> See, e.g., Assemb. B. 463 (Cal., 2019); H.B. 3255, 81st Legis. Assemb., 2021 Reg. Sess. (Or. 2021); S.B. 5847, 67<sup>th</sup> Leg., 2022 Reg. Sess. (Wash. 2022); S.B. 8389C, 2021-2022 Legis. Sess. (N.Y. 2022).

<sup>118</sup> *Negotiated Rulemaking for Higher Education 2021-22*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html> (last modified Jan. 10, 2023).

<sup>119</sup> *The Negotiated Rulemaking Process for Title IV Regulations - Frequently Asked Questions*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/hea08/neg-reg-faq.html> (last modified May 25, 2021).

<sup>120</sup> *Id.*

<sup>121</sup> *Proposed Regulatory Text for Issue Papers #4 and 5: Public Service Loan Forgiveness Session Three: December 6-10, 2021*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/pslfpregtext4and5.pdf> (last visited Mar. 23, 2023).

<sup>122</sup> *Id.*



union representative<sup>123</sup>—raised the issue of the low credit multiplier and argued that 2.5 failed to capture the work that adjunct faculty do outside the classroom, noting that states have adopted a higher factor of 3.35.<sup>124</sup> In advance of the second session, ED published draft regulations that maintained the 2.5 credit multiplier, but explicitly sought input on the justification for a 3.35 hour credit multiplier.<sup>125</sup> Prior to the final session, and after additional conversations between ED and negotiators, ED adopted the 3.35 factor in its proposed amendments.<sup>126</sup> The revised rule was published to the Federal Register on November 1, 2022, to take effect on July 1, 2023.<sup>127</sup>

The new PSLF definition of “full-time” officially endorses and adopts the credit multiplier. Although it does not require that employers use it, more so than before, it signals to employers that such a tool is permitted. Now, faculty who teach a minimum average of nine hours per week, regardless of how those hours are broken down across courses or even across different schools, can claim 30.15 hours of qualifying work and can access PSLF.

The experience of adjunct faculty is relevant to assigned counsel in two ways. First, it represents a targeted solution to a specific problem, rather than a dramatic reframing of the entire PSLF program and regulations. Reflecting these workers’ hours was a major barrier under the existing federal regulations and definition of “full-time,” but advocates developed a solution that worked within those existing regulations. Second, it is a useful example of states serving as laboratories of democracy. During the rulemaking

---

<sup>123</sup> 2021 *Negotiated Rulemaking Affordability and Student Loan Committee*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/revcommmlistdec.pdf> (last updated Dec. 2021) (listing Jeri O’Bryan-Losee from United University Professions as Primary Student Loan Borrower representative).

<sup>124</sup> See U.S. DEP’T OF EDUC., *Affordability and Student Loans Committee, Negotiated Rulemaking Session 1, Day 4, Morning 48* (Oct. 7, 2021), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/107am.pdf>.

<sup>125</sup> *Proposed Regulatory Text for Issue Papers #4 and 5: Public Service Loan Forgiveness Session Two: November 1-5, 2021*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/public-service-loan-forgiveness.pdf> (last updated Oct. 25, 2021).

<sup>126</sup> *Id.*

<sup>127</sup> Institutional Eligibility Under the Higher Education Act of 1965, as Amended, *supra* note 116.



process, ED was particularly persuaded by the fact that states had already adopted laws mandating employers use credit multipliers for adjunct faculties' PSLF forms.<sup>128</sup> These policy interventions may start at the local level, but they can eventually be adopted.

*b. Healthcare workers*

Another population of public service workers who are regularly excluded from PSLF are healthcare workers with for-profit employers. Here, rather than the “full time” requirement, workers are disqualified based on their employer type. Although there is still much work to do to ensure these workers can access PSLF—and it is important to note that “healthcare workers” is an extremely broad and diverse population with unique sets of challenges—one subset recently accomplished policy change with ED that should allow them to access PSLF.

- i. With the Growth in Outsourcing and Privatization of Healthcare, Fewer Healthcare Workers are Employed by “Public Service Organizations”

ED's shift from public service *job* to public service *organization* excludes those workers with for-profit employers, such as home health care aides, eldercare workers, urgent care staff, and nurses, although these are “health care practitioner occupations and health care support occupations” explicitly listed as “public service job[s]” in the HEA's PSLF provisions.<sup>129</sup> They may still work in a hospital, clinic, urgent care, or doctor's office and see patients throughout the day, but since their employer is not considered a public service organization, they are ineligible for PSLF.

This exclusion is particularly concerning given the increase in outsourcing of healthcare services, including by the federal

---

<sup>128</sup> See, e.g., *Proposed Regulatory Text for Issue Papers #4 and 5: Public Service Loan Forgiveness Session Two*, *supra* note 125 (proposing a multiplier of 2.25 and asking how states arrived at a higher multiplier, before increasing the multiplier to 3.35).

<sup>129</sup> 20 U.S.C. § 1087e(m)(3)(B)(i); 34 C.F.R. § 685.219 (2021).



government.<sup>130</sup> Public service workers who are technically employed by a for-profit company tend to be lower paid and are disproportionately workers of color.<sup>131</sup> Research on the demographics of America's healthcare workforce shows vast racial and gender disparities across professions.<sup>132</sup> Healthcare jobs, in particular, are heavily reliant on workforces that are disproportionately Black, Brown, and/or female.<sup>133</sup> As a result, ED's definition of qualifying employment for PSLF contributes to the growing racial wealth gap among student loan borrowers and does so in a way that is contrary to the statute itself.

Additionally, in some jurisdictions, such as California and Texas, certain healthcare practitioners are prohibited under state laws from being directly employed by hospitals.<sup>134</sup> As a result, these practitioners are formally employed by private, for-profit practice groups, but spend their entire workday treating patients pursuant to

---

<sup>130</sup> CHRIS SCHWARTZ & LAURA PADIN, *TEMPING OUT THE FEDERAL GOVERNMENT* 2 (2019), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdf>; SARA PARTRIDGE, *PUBLIC SERVICE LOAN FORGIVENESS AND THE CARE ECONOMY: EXPANDING ELIGIBILITY FOR GENDER AND RACIAL EQUITY* 5–6 (2021), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/paynecenterpslforgiveness.pdf>.

<sup>131</sup> Janet Nguyen, *The U.S. Government is Becoming More Dependent on Contract Workers*, MARKETPLACE, <https://www.marketplace.org/2019/01/17/rise-federal-contractors/> (Jan. 17, 2019); *see also* IN THE PUB. INT., *RACE TO THE BOTTOM: HOW OUTSOURCING PUBLIC SERVICES REWARDS CORPORATIONS AND PUNISHES THE MIDDLE CLASS* 2, 9 (2014), <https://inthepublicinterest.org/wp-content/uploads/Race-to-the-bottom.pdf>.

<sup>132</sup> U.S. DEP'T OF HEALTH AND HUM. SERVS., *SEX, RACE, AND ETHNIC DIVERSITY OF U.S. HEALTH OCCUPATIONS (2011-2015)*, 8 (2017), <https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/diversityushealthoccupations.pdf>.

<sup>133</sup> *See id.* at 6, 8.

<sup>134</sup> *TMA Joins CMA to Urge U.S. Education Secretary to Fix Loan Forgiveness Program*, CAL. MED. ASS'N (May 26, 2016), <https://www.cmadocs.org/newsroom/news/view/ArticleId/21851/Texas-Medical-Association-joins-CMA-to-urge-U-S-education-secretary-to-fix-public-service-loan-forgiveness-program>.



contracts with non-profit hospitals.<sup>135</sup> The effect of these state laws is to bar these practitioners from accessing PSLF, since they are employed by an ineligible employer, even though they provide a public service.

ii. Identifying Circumstances that Place Public Service Workers in a Bind Can Help Move ED to Relax Its Rules in Certain Instances

During the negotiated rulemaking session that occurred on November 1, 2021, a representative from the California Medical Association spoke about the laws in both California and Texas that prevent doctors from being direct, Form W-2 employees of hospitals in those states, explaining that the purpose of those laws is to prevent the “corporate practice of medicine” and, for that reason, the laws were unlikely to be changed.<sup>136</sup> The representative also noted that this put doctors practicing in California and Texas at a financial disadvantage relative to their peers in the rest of the country, framing the effect of ED’s regulation as an equity issue.<sup>137</sup> The representative, who was not a formal negotiator, identified an issue that resonated with other members, who continued to flag it over the remaining sessions.<sup>138</sup>

ED did not propose any solutions to this problem during the remainder of the negotiating process. However, in the proposed rules that it issued for comment the following summer, ED solicited comments on whether to include a “separate eligibility test” for employment scenarios such as the one discussed above, in which a borrower is legally unable to access PSLF as an employee.<sup>139</sup> It did

---

<sup>135</sup> Eligibility for Physicians Working in Texas and California Hospitals, 87 Fed. Reg. 65977 (Nov. 1, 2022) (to be codified at 34 C.F.R. § 685.219(b)).

<sup>136</sup> Elizabeth McNeil, *Comment on Public Service Loan Forgiveness*, 88–90 (Nov. 1, 2021), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/nov1pmfinal.pdf>.

<sup>137</sup> *Id.* at 90–91.

<sup>138</sup> See, e.g., Marjorie Dorime-Williams, *Comment on Public Service Loan Forgiveness*, 84 (Dec. 7, 2021), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec7pm.pdf>.

<sup>139</sup> Public Service Loan Forgiveness, 87 Fed. Reg. 41966 (proposed Jul. 13, 2022).



not propose specific language for such a test, but in its final rule, which was published November 1, 2022, ED proposed a special definition of “employee or employed” as an individual, “who works as a contracted employee for a qualifying employer in a position or providing service which, under applicable state law, cannot be filled or provided by a direct employee of the qualifying employer.”<sup>140</sup> In its commentary, ED explained that it viewed this as a specific circumstance that affected few borrowers and that the fact that an otherwise qualifying employer could not fill the positions directly due to state law was compelling.<sup>141</sup>

Although ED has not addressed the broader issue that many healthcare providers face, namely that privatization and market trends are driving these workers into PSLF-ineligible roles, this specific instance of Californian and Texan doctors is informative for assigned counsel. No state law prevents these attorneys from being directly employed by the states and counties that fund public defense, but it would be impracticable for these offices to onboard the attorneys that they already use for auxiliary counsel. These offices are stuck between *Gideon*’s mandate to provide counsel and the realities of administering public offices and budgets. ED may find these circumstances compelling and permit another “special eligibility test” for assigned counsel.

Although an overhaul to the PSLF’s implementation would be the most effective way to ensure that all borrowers with public service jobs can access the program, as intended by Congress, minor amendments to the current regulations can still have the effect of extending PSLF cancellation to assigned counsel. Adjunct faculty have made enormous advances in accessing the program and the recent example of doctors in Texas and California are also instructive. Although the specific barriers each group faced differ from those of assigned counsel, their experience is still informative and can provide a roadmap for change.

---

<sup>140</sup> Eligibility for Physicians Working in Texas and California Hospitals, 87 Fed. Reg. 65977, 65988–89 (Nov. 1, 2022) (to be codified at 34 C.F.R. § 685.219(b)).

<sup>141</sup> *Id.* at 65977.



#### V. PROPOSED AMENDMENT TO ALLOW ASSIGNED COUNSEL TO ACCESS PSLF

Allowing assigned counsel to access the PSLF program on the basis of their defense casework, thereby giving them a path to discharging their student loan debt, is one way the shortage of criminal and family law attorneys in low-income communities could be addressed in the near-term. Practicing attorneys and current law students could use this benefit to offset some of the other financial stressors of rural, assigned counsel practice previously discussed. This policy change would not be unduly complicated to implement, has sound policy justifications, would have a national and immediate impact, and can be used to catalyze other critical changes at the local level.

It is important to note, however, that this proposed policy change does not address the overall issue of ED having narrowed PSLF eligibility by emphasizing public service employers over public service jobs. Although the proposal below would extend PSLF's student debt cancellation benefits to assigned counsel across the country, it would not extend access to the millions of borrowers who work public service jobs daily while employed by ineligible employers. This greater fix is well within ED's authority to undertake and would reflect a truer articulation of the program that Congress created in law, but would likely require a more comprehensive restructuring of how the program is currently administered.

##### *a. A Targeted Expansion of the Definition of "Employee" under PSLF*

In order to bring assigned counsel attorneys into eligibility for PSLF, ED would have to address two factors. First, the definition of "employee" must be expanded. Under the most recent PSLF regulations, "employee or employed" is defined as an individual:

1. To whom an organization issues an IRS Form W-2;
2. Who receives an IRS Form W-2 from an organization that has contracted with a qualifying employer to provide payroll or similar services for



the qualifying employer, and which provides the Form W-2 under that contract;

3. Who works as a contracted employee for a qualifying employer in a position or providing services which, under applicable law, cannot be filled or provided by a direct employee of the qualifying employer.<sup>142</sup>

Assigned counsel attorneys are not W-2 employees of the state or local governments they serve; they function as contractors, paid on an hourly basis according to rates set at the county or state level and paid out on a Form 1099 or the equivalent.<sup>143</sup> Nor are there laws explicitly preventing assigned counsels' defense work from being performed by a state or local government employee directly as we see in the healthcare context discussed above.<sup>144</sup> The definition would necessarily have to be modified to include contractual workers. The requirement that borrowers work an average of thirty hours per week found elsewhere in the regulation would not need to be amended once assigned counsel are included as "employees" and, if needed, once a formula for an assigned counsel attorney credit multiplier is developed, as we discuss below.<sup>145</sup>

The definition of "employee or employed" could be amended to include a new fourth prong that captures assigned counsels' relationship with the state or local government that employs them: "employee or employed" includes any individual "who works as a contracted employee for a qualifying employer providing legal services to low-income criminal and family court clients." This definition is focused on the services assigned counsel provide and stays within the bounds of what employers are already qualifying

---

<sup>142</sup> See WILLIAM D. FORD FED. DIRECT LOAN (DIRECT LOAN) PROGRAM, *supra* note 34, at 5.

<sup>143</sup> See discussion *supra* section II.a.

<sup>144</sup> See discussion *supra* Section IV.b.ii.

<sup>145</sup> We do not endeavor to suggest what the correct credit multiplier rule for assigned counsel should be. Our hope is that data could be collected from local and state bar associations and rural practitioners themselves to develop a formula—much like teachers' unions developed the adjunct faculty credit multiplier rule based on input from their members over many years. However, unlike with adjunct faculty, ED must first incentivize this work by creating a path to PSLF for non-Form W-2 employees.



for PSLF. It merely allows employees who do not receive a Form W-2 to count their work toward PSLF.

Modifying the definition of “employee” in this way does not conflict with the original intention of the law. As ED noted in its commentary on the 2022 newly proposed rules for PSLF, “the Department reviewed the text and legislative history of the PSLF provision and determined that [current eligibility criteria] was consistent with Congressional intent to focus on the services provided by the qualifying employer rather than on the services provided by the individual employee.”<sup>146</sup> The proposed language is in line with this perspective; it merely expands what ED would consider as an individual employee, without requiring ED to expand the types of qualifying employers. This amendment would simply allow attorneys who have a different employment structure to qualify legal work that ED and Congress have already decided is essential and meets the standard for PSLF cancellation.

*b. Exploring a Credit-Multiplier Rule for Assigned Counsel to Fulfill the Full-Time Requirement*

In addition to the expansion of “employee or employed” discussed above, stakeholders should consider whether a “credit multiplier” is appropriate for assigned counsel work, as it is for adjunct teaching. As discussed above, when qualifying employment for PSLF, employers are asked to certify that a given employee has worked full-time, which is often translated into working an average of thirty hours per week. For a salaried employee in a government or non-profit agency, this requirement is typically not a hurdle and does not require any onerous record-keeping for the employer. However, some public sector workers who have a different employment structure, such as non-tenured adjunct faculty, have run up against this documentation problem when certifying work hours in addition to those for which they are formally employed.

For adjuncts, the problem lay in the reality that behind every one “credit hour” of instruction in the classroom there may be several hours of labor that are necessary for teaching such as course

---

<sup>146</sup> Institutional Eligibility Under the Higher Education Act of 1965, *supra* note 116.



preparation, grading, and office hours with students that are not captured by a PSLF rule that asks employers to certify how many hours they paid to these workers. In this way, there was a disconnect between paid hours and hours spent working in public service. If PSLF regulations are expanded to include assigned counsel attorneys, they may face similar barriers to qualifying the full-time requirement of PSLF as non-tenured adjunct faculty faced prior to the introduction of the credit-multiplier rule.

For assigned counsel attorneys, the heart of the issue is how to document and prove the time devoted to their public defense cases in excess of the hours that are approved by the court. Assigned counsel attorneys are paid under the common legal rubric of the “billable hour.” Similar to the work of adjunct faculty and their credit hours, the labor of representing a client in family or criminal court often goes well beyond tasks that can be parsed and billed under assigned counsel payment schemes.

Most assigned counsel payment schemes separate work into three loose categories: in-court appearances such as arraignments, calendar calls, hearings, and trials; out-of-court work that is approved under the local or state standard for assigned counsel billing; and out-of-court work the attorney considers necessary to mount a defense that may or may not be approved for payment by the local jurisdiction. As noted above, not all work performed by an assigned counsel attorney can be *reliably* charged to the county—however critical it may be, such as driving hours in rural, understaffed regions between court hours or investigating witnesses or preparing mitigation materials. Necessities for assigned counsel attorneys like performing a conflict of interest check, traveling to and from courthouses or local jails to visit incarcerated clients, office overhead, maintaining malpractice insurance, and the cost of continuing legal education (“CLE”) are not easily covered by a billable hour.<sup>147</sup> Due to the nature of assigned counsel statutes, lawyers working on these cases have no firm assurances that all of their out-of-court work will be compensated or that all of their out-of-court work could be verified for PSLF purposes. For example, NY’s 18b law provides attorneys be paid “per hour for time

---

<sup>147</sup> Microsoft Teams interview with Adriel Colón-Casiano, 18-b Panel Attorney, Law Office of Adriel Colón-Casiano (February 17, 2023).



expended in court or before a magistrate, judge or justice, and \$60 per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred.” Ultimately, it is a local judge who decides what “time reasonably expended out of court” means on any given case. And yet, PSLF requires work that can be documented by the employer. For assigned counsel attorneys whose billable time to the county on a public defense case may grossly under credit the time they actually spent representing their clients, a certification for PSLF purposes of only paid hours would under-credit an assigned counsel attorney’s work.

One potential solution would be the introduction of a “credit multiplier” for assigned counsel attorneys subsequent to the proposed change in employment eligibility; as with the adjunct faculty credit multiplier, it would be necessary to gather data across the very diverse assigned counsel community about how hours are billed and what gaps exist. It would be prudent for a national organization such as the American Bar Association or the National Legal Aid & Defender Association to design national surveys to gather real-time data. Using this information, ED could amend the PSLF regulations to create a similar “credit multiplier rule” that could be applied to billable hours on an assigned counsel case to account for any work that is commonly excluded from the billable hours framework. Although many assigned counsel attorneys would still not meet the full-time threshold, this would allow those who bill enough hours of assigned casework during a given period to qualify for PSLF on the basis of that public service work, assuming all other overlapping program requirements with regard to qualifying loans and payments are met. As the PSLF regulations already permit workers to combine hours worked for multiple qualifying employers in order to reach the credit multiplier threshold, assigned counsel attorneys could be permitted to combine billable hours from multiple jurisdictions and then apply those total hours to the “credit multiplier rule” reach the necessary number of hours per week or month needed.<sup>148</sup>

---

<sup>148</sup> Another potential modality could be an average monthly billable hour requirement. Our proposal seeks to closely match the existing PSLF requirements and definitions of full-time work. Further discussion amongst the diverse assigned counsel community may refine our general recommendation. *See How To Get Your Student Loans Forgiven (No, Really)*, U.S. DEP’T. OF EDUC.,



The amendment would also be easy to implement. Attorneys in private practice already account for their time under a billable hours rubric; they could readily track hours worked as assigned counsel. Likewise, it does not require government court systems that already pay assigned counsel attorneys on an hourly basis to modify their payment arrangements. The county employers do not need to track hours beyond the assigned counsel's billable hours; they merely apply the credit multiplier, once determined, to those hours when certifying their employment on the PSLF Form. While the concept of creating a credit multiplier rule for assigned counsel may be straightforward, determining the actual numbers of such a rule will require significant data, carefully collected from practitioners, bar associations, defense organizations, and local jurisdictions to ensure a significant percentage of assigned counsel attorneys can reasonably and fairly access PSLF cancellation.

*c. There is a Sound Basis for Amending the PSLF  
Regulations to Include Work Done as Assigned Counsel*

Not only would this proposed amendment work within the PSLF regulation's existing format, incorporating assigned counsels' employment structure as qualifying work is also a sound policy proposal that would improve outcomes for practitioners, their clients, and their broader communities. It would also have the added benefit of giving immediate debt relief to some currently practicing attorneys.

Because past work can be certified at any time under the rules that are in effect at the time of certification, this change would allow assigned counsel attorneys currently practicing to retroactively qualify prior years of service and either immediately discharge their debt or qualify a significant number of months towards the 120 qualifying payments needed for cancellation. This would also deter assigned counsel who already have established private practices from turning away from their public defense work if they know their previous and future work can now count towards PSLF cancellation.

---

<https://studentaid.gov/sites/default/files/pslf-infographic.pdf> (last visited Mar. 23, 2023).



Giving assigned counsel attorneys the financial incentive of qualifying for both a reduced monthly payment through IDR and total debt cancellation via PSLF would encourage them to make those assignments a regular and robust part of their practices. It could also make the prospect of establishing a practice in a rural jurisdiction more attractive or feasible for a recent graduate who may factor their student debt into where and how to work. For those recent graduates who cannot establish their own solo practices, this new rule could allow them to join an established small firm with an existing infrastructure and focus on assigned counsel cases for the early years of their practice until they achieve PSLF and ultimately be in a position to take over the practice when more senior partners seek retirement. In this way, small rural practices may find a solution to avoid closing entirely when a senior partner retires. The proposed amendment would give assigned counsel attorneys the flexibility to continue their public defense work while also providing the opportunity to supplement their income and build their practices with the types of non-qualifying casework that is vital to the needs of their communities, such as matrimonial work, trusts and estates, contracts, and personal injury. Additionally, the proposed amendment would still appropriately exclude practitioners who only take a singular case or two or who take work inconsistently from qualifying. Contract counsel would not be able to qualify if they are paid on a flat-rate without accounting for the hours they work on each case, thereby disincentivizing counties from continuing to use that model.

Importantly, the proposal does not create a loophole whereby high-earning private attorneys who maintain a minimum assigned counsel docket receive PSLF's debt cancellation benefits. In order to qualify for PSLF, a borrower must still be enrolled in one of the IDR plans or the ten-year standard repayment plan.<sup>149</sup> IDR plans require a borrower to certify their income annually and generally set the borrower's income as equal to ten to fifteen percent of that income that is above 150% of the federal poverty line, which is

---

<sup>149</sup> See 34 C.F.R. § 685.219(c)(1)(iv).



published annually by the federal government.<sup>150</sup> For high earners, ten to fifteen percent of their adjusted annual income ends up being at or higher than the amount due under the ten-year standard plan. When borrowers make payments at or above the amount due under the ten-year standard repayment plan, they will have paid off their loans at the same time that they qualify for PSLF: 120 payments, which is ten years of payments. For high-income attorneys, this renders PSLF cancellation moot. Therefore, in most instances, if a private attorney met the required credit multiplier threshold for assigned counsel work, but had another significant source of income, practically speaking, they would not be able to access PSLF. Therefore, those who have objections to a rule that may appear to give high income borrowers in the private sector access to a program meant for public sector workers need not be concerned because that potential scenario is hemmed in by the program's other requirements.

Furthermore, changing PSLF regulations could be accomplished in a much shorter time period and without some of the intractable funding issues that emerge when attempting to expand institutional defender offices within a state.<sup>151</sup> For this reason, a regulatory change would likely be a less fraught political challenge than a legislative change.

Lastly, this regulatory change does not cost local jurisdictions money to implement, as money for assigned counsel is already allocated, which cuts through some of the more partisan roadblocks that have traditionally impeded increased defense funding.<sup>152</sup> Once implemented, however, this change may incentivize greater local investment in assigned counsel work if there is an increase in demand. The proposed amendment favors practitioners who take on a large portion of public defense case work and have already demonstrated their commitment to this client population. It would

---

<sup>150</sup> *Income-Driven Repayment Plans*, U.S. DEP'T. OF EDUC., <https://studentaid.gov/manage-loans/repayment/plans/income-driven> (last visited Mar. 23, 2023).

<sup>151</sup> See Primus, *supra* note 54, at 65–68 (providing examples of long-term changes to public defense delivery systems).

<sup>152</sup> See, e.g., Jonah E. Bromwich, *Hundreds Have Left N.Y. Public Defender Offices Over Low Pay*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/nyregion/nyc-public-defenders-pay.html>.



encourage those with student debt who have been disincentivized from taking on more cases to do so and simultaneously create an entry point for new lawyers to take on these cases in counties where current practitioners are looking to wind down their practices.

## CONCLUSION

PSLF was intended to attract more university graduates to public service work and to help retain those who were already engaged, particularly those lacking intergenerational wealth who took on debt to achieve necessary credentials. Assigned counsel rules were designed to fill an urgent gap created in the wake of *Gideon* for public defenders in every jurisdiction. Neither one was designed to solve the much larger crises at hand; student debt and the public defender shortage. While those structural behemoths are being tirelessly addressed by activists, scholars, and policymakers, the work is slow-going and unfortunately incremental in most cases.

In the wake of the CARES Act student loan pause and the many subsequent tweaks to the federal student loan program that have been rolled out since March 2020, we are beginning to see how millions of lives can be transformed by seemingly minor adjustments at the margins that result in tens of thousands of dollars in student loan debt cancellation for public service workers.<sup>153</sup> We cannot allow the perfect to be the enemy of the good when small but mighty regulatory corrections have the power to offer some immediate relief to individual student loan borrowers working in the public sector. Lawyers working in chronically underserved rural communities, with the same student debt burdens as colleagues employed by institutional defender offices, deserve to have their service recognized and their student debt canceled under the same programs. More importantly, economically marginalized people living in rural areas deserve advocates who are not burdened with the financial stress of their student debt, who will be able to sustain local law practices, and who will provide a full-throated defense to

---

<sup>153</sup> For more information on PSLF data as of December 2022 on the Limited PSLF waiver, see *If Your Federal Student Loan Payments are High Compared to Your Income, You May Want to Repay Your Loans Under an Income-Driven Repayment Plan.*, U.S. DEP'T. OF EDUC., <https://studentaid.gov/manage-loans/repayment/plans/income-driven> (last visited Mar. 23, 2023).



their clients for years to come. The minor amendments to ED's PSLF regulations proposed above would create a path to debt cancellation for assigned counsel struggling with crushing student loan debt while also incentivizing more private attorneys to engage in this work, thereby making a simple but profound contribution to the public defender shortage. They also serve as an example for how the federal government can use all of the tools, however minor, in a comprehensive approach to addressing social problems.