REVISITING DEBT RELIEF

Scoring Biden Administration Actions to Cancel Student Debt on Day One and Beyond

December 2021

STUDENT
BORROWER
PROTECTION
CENTER

UCI Law

ABOUT THE STUDENT BORROWER PROTECTION CENTER

The Student Borrower Protection Center is a nonprofit organization focused on alleviating the burden of student debt for millions of Americans. The SBPC engages in advocacy, policymaking, and litigation strategy to rein in industry abuses, protect borrowers' rights, and advance economic opportunity for the next generation of students.

ABOUT THE STUDENT LOAN LAW INITIATIVE

The Student Loan Law Initiative is a partnership between the Student Borrower Protection Center and the University of California, Irvine School of Law to develop a body of rigorous research around how to address the student loan crisis.

CONTRIBUTING ORGANIZATIONS

Authors who contributed articles to this paper series hail from a diverse array of advocacy organizations and academic institutions. Authors are not speaking on behalf of their institutions, nor do authors necessarily endorse any piece in the compendium aside from their own.

Table of Contents

Foreword 4
Mike Pierce, Dalié Jiménez, & Jonathan Glater

Revisiting Relief for Borrowers Waiting for Income-Driven Repayment 8
Persis Yu

Revisiting Relief for Borrowers with a Defense to Repayment 16
Eileen Connor

Revisiting Relief for Public Service Workers 23
Mike Pierce

Revisiting Relief for Borrowers with Disabilities 31
John Whitelaw & Bethany Lilly

Revisiting Relief for Students Harmed through School Closures 36
Robyn Smith

Revisiting Relief for Borrowers Who Fall Through the Cracks in Discharge Programs 40
Winston Berkman-Breen & Claire Torchiana

Revisiting Relief for the the Tax Treatment of Student Loan Discharge and Cancellation 46
John R. Brooks

About the Authors 51

Foreword

By Mike Pierce, Dalié Jiménez, and Jonathan Glater

As we approach the end of 2021, 43 million Americans collectively owe nearly $1.6 trillion in federal student loan debt.[1] In response to the pandemic, the majority of these borrowers have not received a student loan bill for nearly two years. These borrowers recount how, for the first time in their adult lives, the absence of a student loan bill has offered financial breathing room—the chance to pay down other debts, build up savings, and begin to climb the economic ladder.

This extraordinary natural experiment shows us the potential of a country freed from its dangerous addiction to student debt and helps us imagine a future where a broader universe of opportunities is available for everyone. The burden of this debt, as with so many other markers of the 21st century American economy, is borne disproportionately by Black borrowers and communities of color more broadly.[2] Likewise, the absence of this debt offers a generational opportunity to narrow disparities in wealth and build a more just and equitable economy.[3]

Thanks to the tireless work of borrowers, advocates, and scholars, policymakers and politicians have begun to recognize the unnecessary and inequitable burdens caused by student debt, and the need for aggressive and innovative solutions to a crisis that should have been addressed long ago. The movement for broad-based student debt cancellation is rooted in the fact that Congress has given the executive branch the authority to settle, compromise, or otherwise modify student debt owed to the federal government.[4] In addition, over the years, Congress has established specific, targeted relief programs designed to eliminate student debt for certain types of borrowers, including servicemembers, public service workers, defrauded borrowers, and members of other vulnerable groups who have been forced to shoulder debts that should be canceled under the law.[5]

---

[1] See U.S. Department of Education, *Federal Student Aid Portfolio Summary* (accessed December 14, 2021); https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls

[2] Jiménez, Dalié and Glater, Jonathan, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*; Harvard Civil Rights- Civil Liberties Law Review (CR-CL), Vol. 55, No. 1, (2020); https://harvardcrcl.org/wp-content/uploads/sites/10/2020/09/Jimenez-Glater.pdf; See also Jalil B. Mustaffa, Ph.D. and Jonathan C. W. Davis Ph.D., The Education Trust, *Jim Crow Debt: How Black Borrowers Experience Student Loan* (Oct. 20, 2021); https://edtrust.org/resource/jim-crow-debt.

[3] Charron-Chénier, Seamster, L., Shapiro, T. M., & Sullivan, L, *A Pathway to Racial Equity: Student Debt Cancellation Policy Designs*, Social Currents (2021); https://doi.org/10.1177/23294965211024671

[4] Project on Predatory Student Lending, *Letter to Senator Elizabeth Warren* (2020); https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf; Herrine, Luke, *The Law and Political Economy of a Student Debt Jubilee*, 68 Buffalo L. Rev. 281 (2020) http://dx.doi.org/10.2139/ssrn.3442234.

[5] For further discussion, see Student Borrower Protection Center and DEMOS, *Delivering on Debt Relief* (2020); https://protectborrowers.org/debtreliefreport_lp/.

These provisions were intended to be the critical counterweight to a different kind of entitlement—the right to take on student debt. By ensuring families from all backgrounds have a way to finance higher education regardless of their financial circumstances, Congress embraced debt and credit as its principal policy lever to broaden access to the American dream. In doing so, Congress also recognized that a so-called "investment" in higher education would not pay off for millions of people. Congress legislated repeatedly and purposefully in an effort to ensure that the burden of student debt did not pose a barrier to opportunity, to equity, or to economic justice.

But for the past two decades, American student loan borrowers have twisted in the crosscurrent of two powerful forces, both of which sit beyond their control—the explosive growth of predatory schools, including the for-profit college sector, and the myriad failures of the student loan safety net.[6] Due to indifference by policymakers, mismanagement by public officials, and abuses by bad actors across the higher education and financial services sectors, millions of Americans now find themselves deeply indebted with no way out.

As we outlined in our 2020 series, *Delivering on Debt Relief*, the student loan safety net has been underused or rendered ineffective, often denying relief to the very borrowers it was designed to help.[7] From workers seeking Public Service Loan Forgiveness, to disabled borrowers, to those whose schools closed or engaged in outright fraud, borrowers all too often face an uphill battle seeking relief from a government that was all too willing to ignore them.[8]

In his campaign, President Biden explicitly promised to address the student debt crisis, through broad-based cancellation,[9] improved loan repayment,[10] and the restoration of programs designed to keep borrowers from drowning under the weight of their loans.[11] A year into this Administration, with multiple legislative fights and regulatory changes behind us, it is time to take stock of where the Administration stands on those promises; how many of the tools that we

---

[6] For further discussion, see, e.g., Student Borrower Protection Center, *Mapping Exploitation* (2021); https://protectborrowers.org/wp-content/uploads/2021/07/SBPC-Mapping-Exploitation-Report.pdf; and National Consumer Law Center and Student Borrower Protection Center, *Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt* (March 2021); https://www.nclc.org/images/pdf/student_loans/IB_IDR.pdf.

[7] *Delivering on Debt Relief*, supra note 5.

[8] Id.

[9] Turner, Cory, *Biden pledged to forgive $10,000 in student loan debt. Here's what he's done so far, National Public Radio* (2021); https://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise

[10] JoeBiden.com, *THE BIDEN PLAN FOR EDUCATION BEYOND HIGH SCHOOL* (2021), https://joebiden.com/beyondhs/

[11] Id. See also JoeBiden.com, *THE BIDEN PLAN TO BUILD BACK BETTER BY ADVANCING RACIAL EQUITY ACROSS THE AMERICAN ECONOMY* (2021); https://joebiden.com/racial-economic-equity/

outlined in *Delivering on Debt Relief* have been used, and how many borrowers have been helped; what work remains undone and who has been left behind.

What we find is a mixed record of success.

In the year since we published *Delivering on Debt Relief,* the Biden Administration has reportedly cancelled more than $12 billion in student debt for more than 650,000 student loan borrowers, including nearly a half-million borrowers with disabilities and tens of thousands of people working in public service, with potentially hundreds of thousands more on the way.[12] The Administration's actions to protect people with disabilities and those working in public service stand out as extraordinary achievements in contrast to the lackluster record of prior administrations of both parties.

But much work remains to be done. More than a hundred thousand borrowers who were defrauded by a predatory school or who attended a large predatory school chain that suddenly closed have been promised debt cancellation. However, hundreds of thousands more remain in limbo—a legacy of Trump-era barriers to debt relief allowed to remain in place.[13] Despite the promise of debt cancellation under income-driven repayment after 20 or 25 years in repayment, only 32 borrowers have ever had debts cancelled through the largest anti-poverty program in the student loan system. In contrast, more than 4.4 million borrowers remain tied to decades-old debts—a lasting consequence of government mismanagement and illegal practices by the largest student loan companies.[14]

Most notably, as of the publication of this report, President Biden has failed to honor his campaign promise to cancel student debt broadly. To justify this inaction, his Administration has expressed uncertainty about the President's legal authority to cancel student debt through executive action. Nonetheless, consensus is growing among legal scholars and practitioners that such an action is not only possible, but has already been exercised at scale by both the Biden and Trump Administrations to effectuate the ongoing pause in student loan payments in response to the global pandemic. At the same time, the Administration has announced plans to restart student loan payments for borrowers who had gotten a reprieve—a policy choice that is virtually certain to create widespread economic hardship for people with student debt and drown out the political benefits won through the Administration's debt relief actions to date.[15]

---

[12] See *Biden pledged to forgive $10,000 in student loan debt. Here's what he's done so far*, supra note 9.

[13] See U.S. Department of Education, *Office of Federal Student Aid Borrower Defense Report* (June 2021); https://studentaid.gov/sites/default/files/fsawg/datacenter/library/borrower-defense-report-june-2021.xls

[14] For further discussion, see, e.g., *Decades-Old Debt Trap*, supra note 7; see also Student Borrower Protection Center, *Driving into a Dead End* (2021); https://protectborrowers.org/wp-content/uploads/2021/10/SBPC_Driving_Into_A_Dead_End.pdf

[15] For further discussion see Student Borrower Protection Center, *Advocates Urge President Biden to Delay Restarting Student Loan Payments Given New Omicron Variant and Ongoing System Failures* (2021); https://protectborrowers.org/coalition-payment-pause-letter-to-biden/

With repayment obligations set to resume in February, the next year will test the Biden Administration's resolve to help tens of millions of people who owe student debt. The following series of policy briefs discuss in detail the challenges and choices that confront the Administration in the operation of the federal student loan system, and offer proposals for needed reforms that do not substitute for broad cancellation but will materially benefit millions of the most economically vulnerable student loan borrowers. The Administration must decide whether to pursue the series of commonsense actions outlined by the extraordinary scholars, advocates, and experts who contributed to this report. To us, the choice is clear.

REVISITING RELIEF FOR BORROWERS WAITING FOR INCOME-DRIVEN REPAYMENT

Persis Yu
Policy Director and Managing Counsel
Student Borrower Protection Center

Background

When Congress passed the first of the modern income-driven repayment (IDR) plans in 1992, it made a promise to borrowers that federal student loan payments would be affordable, and that even if they were low-income or chose to work in a public service job, through eventual cancellation, student loans would not be a lifetime burden. The IDR plans have failed to deliver on that promise.

Cancellation under income-driven repayment has been theoretically possible since 2016. Yet, last available data from the U.S. Department of Education (ED) reveals that only 32 IDR borrowers have successfully cancelled their loans,[1] even though *4.4 million* borrowers have been in repayment for 20 years or longer. [2] The shockingly low rate of cancellation of these borrowers' loans is emblematic of ED's failure to deliver the relief Congress intended when it passed the statutes enabling the creation of these IDR programs.[3]

Problems with income-driven repayment worsen racial disparities in the student loan system.[4] The Education Trust recently published a study based on a nationwide survey of nearly 1,300 Black borrowers and in-depth interviews with 100 Black borrowers. It found that IDR plans are not easing the student debt crisis for Black borrowers; indicators like

---

[1] National Consumer Law Center & Student Borrower Protection Center*, Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt* (March 2021), available at https://www.nclc.org/images/pdf/student_loans/IB_IDR.pdf.

[2] Laura Camera, *Progressives Up the Pressure on Biden over Student Debt Cancellation*, U.S. NEWS (April 14, 2021), available at https://www.usnews.com/news/education-news/articles/2021-04-14/progressives-up-the-pressure-on-biden-over-student-debt-cancellation, citing *Education Department Responses to Data Request by Senator Warren*, (April 2, 2021) available at https://www.warren.senate.gov/imo/media/doc/Education%20Department%20Response %20to%20Sen%20Warren%20-%204-8-21.pdf.

[3] See, e.g., 153 Cong. Rec. S9536 (daily ed. July 19, 2007), https://www.govinfo.gov/content/pkg/CREC-2007-07-19/html/CREC-2007-07-19-pt1- PgS9534.htm.

There are five separate repayment plans tied to a borrower's income: the income-based repayment (IBR) plan, income-contingent repayment (ICR) plan, pay as you earn (PAYE) plan, revised pay as you earn (REPAYE) plan, and income-sensitive repayment (ISR) plan. With the exception of the FFEL ISR plan, all of the income-driven plans work in a similar way. The income-driven repayment plan calculates the borrower's monthly payment using the borrower's income and, if the borrower is unable to repay the loan within a certain number of years, the remaining balance is forgiven. See NCLC, Student Loan Law §3.3.1 (6th ed. 2019), updated at www.nclc.org/library.

[4] Joanna Pearl, SBPC, *Driving Inequity, Policy Choices are Driving Racial Disparities in Access to Income-Driven Repayment* (Sept. 27, 2021); Ben Kaufman*, New Data Show Borrowers of Color and Low-Income Borrowers are Missing Out on Key Protections, Raising Significant Fair Lending Concerns* (Nov. 2, 2020).

increasing balances and decreasing repayments suggest they may be exacerbating or prolonging it; even default rates remain high, despite the availability of these plans.[5]

Fundamental flaws in both the design and execution of IDR have led to its colossal failure. For one, for many borrowers who are struggling to make ends meet, IDR payments are not in fact affordable. The premise a borrower's income and family size alone can determine the resources that the borrower has available to repay student loans is inherently flawed. It ignores variations in expenses (such as regional differences in cost of living, childcare expenses, medical expenses, other familiar support, etc). It also ignores wealth and resources with which to pay (or offset) payments of student loans which on average are significantly higher for white borrowers than Black borrowers.[6]

Secondly, many borrowers who could take advantage of an IDR plan have had trouble accessing these plans, especially in the long term, due to poor and often abusive servicing practices.[7] Research suggests that implementation problems disproportionately harm borrowers of color.[8] A series of lawsuits and regulatory actions taken against private-sector actors across the student loan system, including the federal government's largest student loan contractors,[9] demonstrate

---

[5] Jalil B. Mustaffa, Ph.D. and Jonathan C. W. Davis Ph.D., The Education Trust, *Jim Crow Debt: How Black Borrowers Experience Student Loan* (Oct. 20, 2021) available at https://edtrust.org/resource/jim-crow-debt. See also, Joanna Pearl, SBPC, *Driving Inequity: Are IDR's Documentation Requirements Hurting Borrowers of Color?* (Sept. 2020) available at https://protectborrowers.org/wp-content/uploads/2021/09/Driving_Inequity.pdf.

[6] SBPC, *DRIVING UNAFFORDABILITY: How Income-Driven Repayment Currently Fails to Deliver Financial Security to Student Loan Borrowers* (Sept. 2021) available at https://protectborrowers.org/wp-content/uploads/2021/09/Driving-Unaffordability.pdf. See also, Charron-Chénier, Raphaël, Seamster, Louise. 2020. "Some Notes on the Impact of Student Debt Forgiveness across Income Groups." Scatterplot, December 17. Retrieved June 3, 2021 (https://scatter.wordpress.com/2020/12/17/some-notes-on-the-impact-of-student-debt-forgiveness-across-income-groups/#more-17591).

[7] CFPB, *Midyear update on student loan complaints, Income-driven repayment plan application issues* (Aug. 2016) available at https://files.consumerfinance.gov/f/documents/201608_cfpb_StudentLoanOmbudsmanMidYearReport.pdf; CFPB, *Student Loan Servicing: Analysis of Public Input and Recommendations for Reform* (Sept. 2015) available at https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf.

[8] Cornaggia, Kimberly and Xia, Han, *Who Mismanages Student Loans and Why?* (July 27, 2021). Available at SSRN: https://ssrn.com/abstract=3686937 or http://dx.doi.org/10.2139/ssrn.3686937; Pearl, Driving Inequity

[9] See, e.g., Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908 (11th Cir. 2020), Nelson v. Great Lakes Educ. Loan Servs., Inc., 928 F.3d 639 (7th Cir. 2019), Hyland v. Navient Corp., No. 18CV9031(DLC), 2019 WL 2918238, at *1 (S.D.N.Y. July 8, 2019), Consumer Fin. Prot. Bureau v. Navient Corp., No. 17-cv-00101, 2017 U.S. Dist. LEXIS 123825 (M.D. Pa. Aug. 4, 2017), Complaint, Pa. v. Navient Corp., No. 3:17-cv-1814-RDM (M.D.Pa. June 19, 2019), https://www.attorneygeneral.gov/wp-content/uploads/2018/01/PA-v.-Navient-Complaint-2017-10-6-Stamped-Copy.pdf; Complaint, Cal. v. Navient Corp., No. CGC-18- 19 567732 (Cal. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf; Complaint, Ill. v. Navient Corp., No. 2017-CH-00761 (Ill. July 10, 2018), https://illinoisattorneygeneral.gov/pressroom/2017_01/NavientFileComplaint11817.pdf; Complaint, Miss. v. Navient Corp., No. G2108-98203 (Miss. July 24, 2018), https://www.scribd.com/document/384612507/Navient-ComplaintFiled; Complaint, Wash. v. Navient Corp., No. 17-2- 01115-1 SEA (Wash. Jan. 18, 2017), https://www.classaction.org/media/state-of-washington-vnavient-corporation-et-al.pdf.

that the problems identified in these early warnings, which were largely ignored by ED, grew to fatally undermine the promise of IDR.

These abuses have caused borrowers to face long- and short-term consequences. Financially distressed borrowers need reduced monthly payments imminently and need help changing the circumstances that contributed to their financial distress in the first place. IDR solves both problems; it reduces monthly payments (as low as zero-dollar payments) and puts the borrower on a path towards cancellation.[10] When servicers steer borrowers into forbearance, they cheat them out of both forms of relief. Although problems of forbearances steering have gained widespread attention, it is far from the only administrative hurdle preventing borrowers from accessing the benefits of IDR. [11] Borrowers also report problems including processing delays, inaccurate denials, lost paperwork, and insufficient information or guidance. [12]

The shockingly low rate of cancellation of borrowers' loans through income-driven repayment is emblematic of ED's failure to deliver the relief Congress intended when it passed the statutes enabling the creation of these programs.

Finally, the all or nothing structure of IDR cancellation after 20 or 25 years is psychologically and financially overwhelming. After years of jumping through bureaucratic hoops and struggling to make payments, many low-income borrowers nonetheless see their balances grow ever larger. Borrowers often feel hopeless – and the result is financial devastation if the borrower defaults and faces seizure of a far higher balance than when they started. Older borrowers are the fastest growing segment of the student loan portfolio;[13] and for these borrowers, the current IDR framework means that many will never be able to move past their debt.

As the original *Delivering on Debt Relief* paper series discussed, the Department of Education's current regulations pose a significant barrier to providing relief.[14] For example, under current regulations, forgiveness is available only after 20 or 25

[10] See, e.g. 20 USC 1098e.

[11] See e.g., Pearl, *Driving Inequity*, supra note 5.

[12] CFPB, *CFPB Monthly Snapshot Spotlights Student Loan Complaints* (Apr. 2017) See also https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-finds-consumers-complain-needless-hurdles-applying-lower-student-loan-payments/

[13] CFPB, Office for Older Americans & Office for Students and Young Consumers, *Snapshot of Older Consumers and Student Loan Debt* (Jan. 2017) available at https://files.consumerfinance.gov/f/documents/201701_cfpb_OA-Student-Loan-Snapshot.pdf; see also Mikhail Zinshteyn, AARP, *Student Loan Debt Soaring Among Adults Over 50, AARP Study Finds* (Updated July 26, 2019) https://www.aarp.org/money/credit-loans-debt/info-2019/student-loan-debt-report.html.

[14] Persis Yu, *Delivering on Debt Relief: Relief for Borrowers in Income-Driven Repayment*, Student Borrower Prot. Ctr. (Nov. 2020); https://protectborrowers.org/wp-content/uploads/2020/12/Delivering-on-Debt-Relief.pdf#page=79.

years of qualifying payments on the loan being forgiven and defaulted loans are excluded from IDR. This needless regulatory barrier has been made worse through widespread mismanagement by the Department of Education and abuse by the student loan industry, knocking borrowers off track and denying them access to debt cancellation through no fault of their own.

The *Delivering on Debt Relief* paper series enumerated several of the ways that the authority Congress conferred on the U.S. Department of Education is much broader and provides the Department the ability under the Higher Education Act to provide relief to all of these borrowers.[15]

How the Biden Administration has Addressed and Approached Income-Driven Repayment

President Biden campaigned on the promise that he would make federal student loans affordable and manageable for millions of borrowers. He promised that borrowers making less than $25,000 would not make any payments on their loans and that he would cap student loan payments at five percent of a borrower's discretionary income.[16]

It briefly appeared that the Biden Administration intended to make good on these promises, including an overhaul of IDR as part of the regulatory agenda for a sweeping rulemaking announced in mid-2021. In the Department's first week of negotiations, it acknowledged many of the problems highlighted by advocates.[17] In particular, it raised these three important questions:

- It acknowledged that borrowers of color experience higher levels of distress and default, the Department asked how it could structure an IDR plan in a way that would ensure racial equity.
- It raised concerns about escalating loan balances.
- It also raised concerns about the time to forgiveness, especially for low-income and low-balance borrowers.

---

[15] Id.

[16] Biden for President, *The Biden Plan for Education Beyond High School* (2020); www.joebiden.com/beyondhs

[17] U.S. Dep't of Educ., Office of Postsecondary Education, *Issue Paper #10: Creating a New Income-Driven Repayment Plan* (Session 1: Oct. 4-8, 2021) https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/10idrplan.pdf.

As of the writing of this paper, the Department of Education has concluded the negotiated rulemaking to redrafting the IDR regulations and develop a new IDR plan. Unfortunately, the plan that emerged from that process fell short of addressing many of the acknowledged problems. The new proposed IDR plan, called Extended Income Contingent Repayment (EICR) set payments at 5% of a borrower's income that is between 200 percent and 300 percent the federal poverty level plus 10 percent of a borrower's income above 300 percent of the federal poverty level (for the borrower's family size and state). While this is a more generous payment amount, the EICR plan would only be available for undergraduate loans and explicitly excluded loans taken out to attend graduate school and Parent PLUS loans, despite the widely available evidence that shows that these programs disproportionately serve borrowers of color. There is also evidence to suggest that this amount may still not be affordable for many student loan borrowers.

The proposed EICR plan made a nod to the problem of escalating loan balancing by subsidizing all unpaid interest for borrowers with a $0 payment. This is certainly critically beneficial for this subset of borrowers who are likely the lowest borrowers. But it fails to address the huge problem of growing loan balances for very low-income and middle-income borrowers. Borrowers whose payments based upon their income are just $5 are on the hook for hundreds or thousands of extra dollars of interest. Finally, the EICR proposal did nothing to lower the time for cancellation and kept the repayment period at 20 years for undergraduate borrowers.

Unfortunately, the proposed EICR plan that emerged from the negotiated rulemaking process fell short of addressing many of the acknowledged problems.

While ED's proposals largely fell short of its potential to solve many of the large systemic problems facing IDR, its proposal did acknowledge several points made in the November paper. The Department's proposal for the third week of negotiations allowed defaulted borrowers to enroll in IBR and get credit towards cancellation.[18] It also acknowledged that borrowers have been steered into deferments and forbearances by counting a number of the deferments and forbearances, and for the others, creating a hold-harmless period where borrower could get time in forbearances counted if they pay the amount that they would have paid in an income-driven repayment plan.

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

Next Steps on Executive Action

The Department's EICR proposal was overwhelmingly rejected by negotiators at the rulemaking. As such, for the Department to create a new IDR plan, it must undergo two additional rounds of notice and comment.

Through the rulemaking process, negotiators offered several counter proposals. One such proposal provided a forgive-as-you-go repayment model. This model was proposed by Jack Remondi—CEO of Navient—during his testimony to the U.S. Senate Committee on Banking, Housing, and Urban Affairs Subcommittee on Economic Policy.[19] The basic scaffolding of the Forgive-As-You-Go model would provide for amortizing payments based upon the loan balance but would require borrowers to pay an amount based upon their income up to that amortizing amount. Any amount not covered by the borrower's payment would be cancelled each month instead at the end of the repayment period. This unique approach could provide a pathway to begin to overcome a number of the barriers that have kept IDR from delivering the promised relief.

As the Department finalizes its newest IDR plan, it is imperative that this new plan address the structural problems that have allowed IDR to fail if it is to live up to Congress' promise of an affordable pathway for borrowers to get out of debt.

Going forward, as ED finalizes its newest IDR plan, it is imperative that this new plan address the structural problems that have allowed IDR to fail if it is to live up to Congress' promise of an affordable pathway for borrowers to get out of debt. An IDR plan that simply tinkers around the edges but fails to address the deep-rooted structural challenges will likely result in some borrowers receiving a bigger benefit, but too many borrowers still left in the cold.

Whatever comes out of the rulemaking process, any relief that is realized through the new rule is unlikely to provide full relief to the millions of borrowers who have been repaying their loans for over 20 years, and who, if the system had worked properly, would no longer have outstanding student loan debt.

[19] *Testimony of Jack Remondi, President and CEO of Navient Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs* Subcommittee on Economic Policy "The Student Debt Burden and Its Impact on Racial Justice, Borrowers, & the Economy" (April 13, 2021) available at https://www.banking.senate.gov/imo/media/doc/Remondi%20Testimony%204-13-21.pdf. Notably, the proposal during rulemaking set the amortizing payment period at a shorter timeframe than provided in Navient's model.

This past October, ED announced a new PSLF waiver process.[20] Largely in recognition of the many ways that the federal student loan system has failed to help borrowers navigate into IDR and the Direct loan program, ED is redefining the way that it is counting qualifying payments towards forgiveness in that program.[21] Many of the problems that led to the failure of the PSLF program are truly IDR problems in disguise (e.g. borrowers steered into the wrong repayment plan, FFEL servicers failing to tell borrower of consolidation options). A program, like the PSLF waiver, is needed in order to help fulfill the promise of income-driven repayment and provide relief to the millions of borrowers (in particular, low-income borrowers and borrowers of color).

Lessons Learned

Unlike Public Service Loan Forgiveness and Borrower Defense to Repayment, income-driven repayment has not seen the groundswell of attention that these other programs have received. Public service workers and borrowers who have been defrauded by for-profit schools have been much more successful in organizing the borrowers who have been harmed by the failed policies and practices with those two programs. Those two programs are uniquely situated because they both have clearly articulated policy objectives and an application process. In both, we have seen huge number of borrowers, who clearly should get relief based upon the policy objectives, apply, and then get denied.

IDR is a much more nuanced program with harder to articulate policy objectives and no application process. The lack of an application process is actually critical to the program having a chance of succeeding, but it also makes the moment at which a borrower is aggrieved by the Department (and others') failed policy choices harder to pinpoint and harder to organize around. This highlights a fundamental flaw in our policy making process whereby only the most vocal constituents get their needs met.

IDR is the largest debt relief program in the federal student loan program and yet its failures have not been met with the same public scrutiny or sense of urgency that some of the other program have. The stigma of debt, and of student loan debt in particular, has meant that the student loan system has been allowed to fail borrowers for decades without appropriate scrutiny and outrage.

[20] U.S. Department of Education, *Fact Sheet on Public Service Loan Forgiveness Overhaul* (October 6, 2021), https://www.ed.gov/news/press-releases/fact-sheet-public-service-loan-forgiveness-pslf-program-overhaul.

[21] Mike Pierce, SBPC, *Revisiting Relief for Borrowers Working in Public Service* (forthcoming Dec. 16, 2021).

REVISITING RELIEF FOR BORROWERS WITH A DEFENSE TO REPAYMENT

Eileen M. Connor
Director
Project on Predatory Student Lending, Legal Services Center of Harvard Law School

Background

Borrower Defense to Repayment (Borrower Defense) is a crucial safe guard for individuals impacted by school misconduct—those who were misled and cheated in the course of enrolling in and borrowing for attendance at a post-secondary program. Borrower Defense is provided for in statute and contract. Beginning in the second term of the Obama Administration, the need for this safety valve became clear with the collapse of Corinthian Colleges and others. Efforts to create an administrative process to facilitate borrower defense cancellation were thwarted under the Trump Administ ration. Although the Biden Administration has taken steps to deliver Borrower Defense cancellation to some borrowers, it has not addressed the claims of most applicants, and the future of the program, including the Administration's forthcoming rules of the regulatory road, remain uncertain.

How the Biden Administration has Addressed and Approached Borrower Defense

In the first year of the Biden Administration, the Department of Education (ED) has undertaken a rulemaking to replace the standard and process established by Betsy DeVos.[1] It has retracted the DeVos policy concerning the amount of cancellation that results from a successful Borrower Defense, replacing it with a rebuttable presumption of complete cancellation.[2] It abandoned its appeal of a court order mandating loan cancellation to 7,000 former students of Everest Institute in Massachusetts.[3] It has also approved Borrower Defense claims for cohorts of students at Westwood College, Marinello Schools of Beauty, and the Court Reporting Institute,[4] and expanded the categories of former ITT students

---

[1] U.S. Dep't of Education, *Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings*, 86 Fed. Reg. 43,609 (Aug. 10, 2021) (establishing the Affordability and Student Loans Committee to address, among other topics, borrower defense to repayment).

[2] *Department of Education Announces Action to Streamline Borrower Defense Relief Process* (March 18, 2021), https://www.ed.gov/news/press-releases/department-education-announces-action-streamline-borrower-defense-relief-process; see also EA ID: General-21-51, *Rescission of Borrower Defense Partial Relief Methodology* (Aug. 24, 2021) (explaining policy and legal rationale for rescission of partial relief methodology); https://predatorystudentlending.org/news/press-releases/student-borrowers-harmed-by-dept-of-educations-unlawful-partial-relief-scheme-drop-lawsuit-after-dept-abandons-policy-press-release/

[3] U.S. Department of Education, *Vara v. Cardona (Formerly Vara v. DeVos)* (accessed December 15, 2021); https://studentaid.gov/announcements-events/vara

[4] *Department of Education Approves Borrower Defense Claims Related to Three Additional Institutions* (July 9, 2021), https://www.ed.gov/news/press-releases/department-education-approves-borrower-defense-claims-related-three-additional-institutions.

eligible for Borrower Defense cancellation.[5] The Department claims that these actions "bring[ ] total loan cancellation based on Borrower Defense by the Biden Administration to over $1.5 billion for nearly 92,000 borrowers."[6] The majority of borrowers benefiting from these actions (approximately 70,000) attended a school operated by Corinthian Colleges, and are receiving additional cancellation on the basis of previously-granted Borrower Defense claims. For approximately 22,000 borrowers, the Biden Administration has broken new ground by recognizing valid defenses to repayment, resulting in cancellation of approximately $500 million.

With respect to the grounds or bases for recognizing a Borrower Defense, the Biden Administration has gone beyond those relied upon by the Obama Administration. Those included misrepresentations about job outcomes of students ("job placement rate" and "guaranteed employment" claims) and the transferability of credits. In addition, this Administration has granted Borrower Defense on the grounds that a school misrepresented that its graduates could obtain a specific kind of job, that it misrepresented the nature and quality of its educational offerings, and that it misrepresented the time it would take to complete the program:

The Department of Education claims that its actions "bring total loan cancellation based on Borrower Defense by the Biden Administration to over $1.5 billion for nearly 92,000 borrowers."

The first category was employed for students of Westwood, who enrolled in a criminal justice program misrepresented as leading to employment as a police officer. The program did not have the minimum credit hours or the type of accreditation that large employers required of candidates. Even if *some* employers would hire program graduates, and even if *some* graduates got jobs as police officers, "such a small percentage of Westwood graduates gained employment in police officer positions that Westwood's representations that they could become police officers was still misleading."

ED also granted Borrower Defense applications on the basis that a school (Marinello School of Beauty) failed to provide "the mix of theoretical instruction in the classroom and practical instruction on the clinic floor that it represented it provided[.]"

---

[5] *Department of Education Announces Approval of New Categories of Borrower Defense Claims Totaling $500 Million in Loan Relief to 18,000 Borrowers* (June 16, 2021), https://www.ed.gov/news/press-releases/department-education-announces-approval-new-categories-borrower-defense-claims-totaling-500-million-loan-relief-18000-borrowers.

[6] Supra fn. 3.

ED also granted borrower defenses on the basis that a school (Court Reporting Institute) misrepresented the length of time required to complete the program, combined with the fact that as few as two percent of enrollees ever completed the program.

The Biden Administration's approach to adjudication is not completely clear. Although they have announced discharges for students at specific schools over periods of time, this is not to be confused with a true "group discharge" process. Publicly available documents include a "Statement of Facts" for each school[7], which reads:

"Applying a preponderance of the evidence standard, BDG has prepared a series of summaries of the evidence relating to [school]. Together, these summaries form a common statement of facts ***that will be applied in the individual adjudication of [B]orrower [D]efense applications*** from [school] borrowers that are adjudicated…based on the dates of the loans relating to the borrowers' claims."

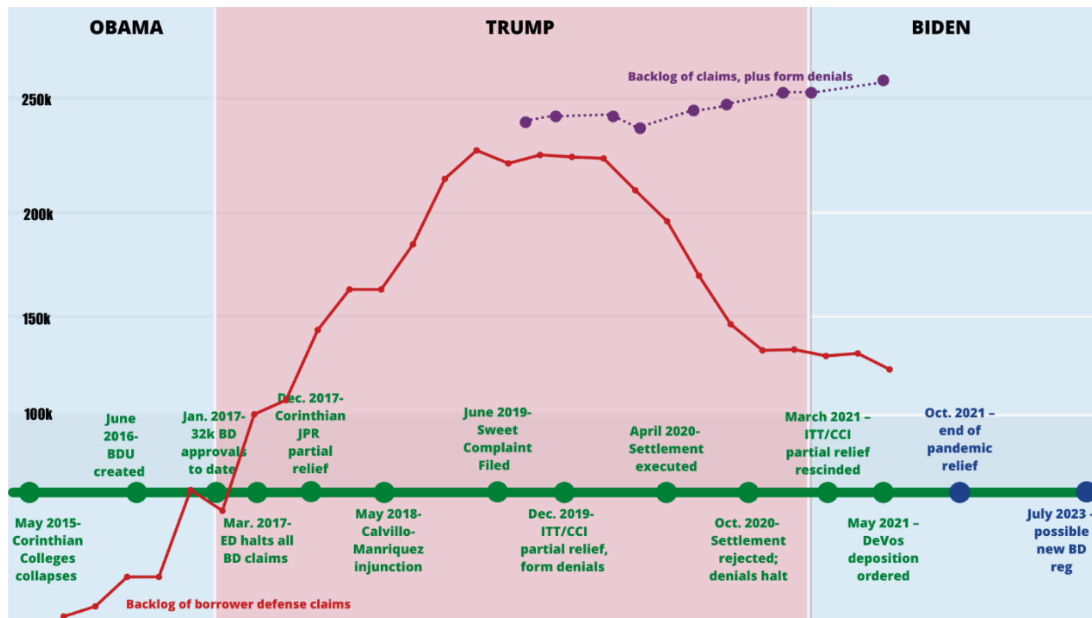
A group discharge process, of the kind the Department effectuated in 2017, under President Obama, for ACI in Massachusetts, results in the cancellation of the loans of an entire cohort of borrowers, regardless of whether the borrower submitted an individual application or not. By contrast, the Biden Administration has established a rule of decision that will be used to adjudicate individual applications. As an example, the Westwood College Executive Summary notes that ED had received approximately 5000 applications from borrowers who attended the school. This is just a fraction of the enrollment in the school during its height—19,190 in 2010, as noted in the summary. And, only a fraction of the 5000 applicants—1600, or 32 percent--qualified for Borrower Defense under the rule established in the memo. Although this announcement represents some progress, it's important to note that the Department rejected two out of three claims from Westwood borrowers and continues to enforce the loans of tens of thousands of individuals who are not aware of their ability to file for Borrower Defense.[8]

ED's treatment of former ITT students with loans exemplifies the Biden Administration's perplexing reluctance to implement Borrower Defense on a scale commensurate with institutional misconduct and related, invalid student loan debt. ITT Tech filed for bankruptcy in 2016. In the last ten years of its existence, it enrolled over 700,000 students and created $7 billion in debt. Much of the private student loan debt has been cancelled. On the federal side, the loans of 115,000 individuals have been cancelled due to an unprecedented extension of closed-school discharge. In August, the Department announced that it would exercise a discretionary authority to expand eligibility for this kind of cancellation to any borrower who attended, but did not complete, a program at ITT beginning in 2008. The rationale for this extension

[7] See U.S. Department of Education, *Borrower Defense Updates* (accessed December 15, 2021); https://studentaid.gov/announcements-events/borrower-defense-update

[8] There is no indication that the Department has or will make grants outside of the categories it announces in "Statements of Fact."

was that ITT had "engaged in widespread misrepresentations about the true state of its financial health and misled students into taking out unaffordable private loans that were allegedly portrayed as grant aid. ITT's malfeasance drove its financial resources away from educating students in order to keep the school in business for years longer than it likely would otherwise have[.]"[9] Yet, the Department has been comparatively parsimonious in finding that the same pattern of "widespread misrepresentations" and "malfeasance" that "drove its financial resources away from educating students" warrants Borrower Defense cancellation. Of the approximately 34,000 applicants with debt from ITT, the Department has granted the claims of 18,000 and rejected the rest.[10] And it continues to require individuals to apply in the first place in order to be considered.



At least, though, the Department has recognized that, in certain instances, ITT's misconduct necessitates Borrower Defense cancellation. The same cannot be said for the well-documented misconduct of other schools, such as Art Institutes; Argosy; Virginia College; schools operated by Career Education Corporation, such as Le Cordon Bleu, Brooks Institute of Photography, Katherine Gibbs, and others; Kaplan; DeVry; University of Phoenix; Ashford; Grand Canyon University; Center for Excellence in Higher Education; Charlotte School of Law and other InfiLaw schools; FastTrain; Empire Beauty; Vatterot; FullSail; and so on. The Department has not granted a single Borrower Defense claim from any former student of these institutions. And, the Department has yet to grant a claim from a borrower who attended a school that is still in operation.

[9] U.S. Department of Education, *Extended Closed School Discharge Will Provide 115K Borrowers from ITT Technical Institute More Than $1.1B in Loan Forgiveness* (accessed December 15, 2021); https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness.

[10] U.S. Department of Education, *Department of Education Announces Approval of New Categories of Borrower Defense Claims Totaling $500 Million in Loan Relief to 18,000 Borrowers* (accessed December 15, 2021); https://www.ed.gov/news/press-releases/department-education-announces-approval-new-categories-borrower-defense-claims-totaling-500-million-loan-relief-18000-borrowers

This individualized and parsimonious approach continues to hamper the effectiveness of Borrower Defense. The Department is still a defendant in class-action litigation (now *Sweet v. Cardona*) over its failure to render decisions on the merits of hundreds of thousands of claims, and for subjecting borrowers to slanted system. The mass denials that DeVos issued to over 130,000 borrowers have not been retracted. The most recently available data, from June 2021, show that over 250,000 individuals have yet to receive a just resolution to their claims, as the chart above demonstrates.

NAVIENT | Department of Education Loan Servicing

U.S. Department of Education
Information about your federal student loan

Thank you for your loan forgiveness inquiry and we hope this information finds you well.

Your Borrower's Defense to Repayment application due to having loans with ITT Technical Institue is processing as of the date of this email. This loan forgiveness program can take up to ten years for processing. An Administrative Forbearance has been placed on your loans until April 15, 2029, while your application is processing. Once processed, you will be notified.

Best Regards,
Michelle, Loan Servicing Specialist
Navient - Department of Education Loan Servicing
ref:_00D6g24VAq._5008y1wLZJ:ref

---------- Original Message ----------

At least one loan servicer is also telling borrowers that it can take up to ten years for their Borrower Defense application to be processed.

Next Steps on Executive Action

The Department is engaged in the rulemaking process to create new rules of the road for Borrower Defense. It's critical that borrower advocates continue to voice the importance of Borrower Defense, and the need for group-based processes to address the scale and scope of wrongdoing committed by institutions. Former students have bravely taken it upon themselves to address the members of the negotiated rulemaking committee to express the urgent need for action on Borrower Defense, despite being denied a seat at the negotiating table.[11]

Cautious optimism has, over the past year, been tempered with impatience and frustration on the part of borrowers hoping for justice from the Borrower Defense program. Even borrowers who have been notified that their claim has been approved are still waiting for the cancellation to be processed. The lack of movement for many, and the slow pace of effectuation for others, will come to a head in February, when the student-loan payment pause is set to end. Although the Department has stated that borrowers with pending claims, or whose claims were denied as part of DeVos's mass

[11] Project on Predatory Student Lending, *Student Loan Truth: For-Profit Borrowers Keep the Pressure On During NegReg* (November 2021); https://predatorystudentlending.org/news/blog/student-loan-truth-for-profit-borrowers-keep-the-pressure-on-during-negreg-blog/

denials, will not be made to resume payments,[12] the Department's ability to ensure servicer and collector compliance with this edict is uncertain at best.

Lessons Learned

It is clear that ED is more comfortable cancelling debt associated with closed schools, and under the closed school discharge authority, than it is in granting Borrower Defense. One possible explanation for this is that the former is a policy decision made by the Secretary, and the latter is a quasi-adjudicative process that historically and currently is carried out by Federal Student Aid with oversight by the Office of General Counsel. The path dependency on systems built up under the previous Administration is a legacy that has not been easy for this Administration to escape.

[12] Supra fn. 7.

REVISITING RELIEF FOR BORROWERS WORKING IN PUBLIC SERVICE

Mike Pierce
Executive Director
Student Borrower Protection Center

Background

More than 14 years ago, Congress confronted the rising burden of student debt and an emerging set of concerns about the effects of this debt on segments of the labor market. In particular, Congress recognized that key "public service jobs" depended on a highly educated workforce and that, as the amount of debt that students had to take on to perform these key roles rose, American employers, including governments, nonprofits, and the armed services, struggled to recruit and retain highly qualified public service workers.

As a consequence, in 2007, Congress made a simple promise to public service workers across the country: if Americans use their education in service of others for ten years, their student loans should be forgiven.[1] The College Cost Reduction and Access Act of 2007, the law creating PSLF, was enacted by large, bipartisan majorities in Congress and signed into law by President George W. Bush in an effort to provide expansive and comprehensive debt relief to workers serving our country and our communities.[2] These lawmakers expressly recognized that the PSLF program must be far-reaching, breaking with the federal government's prior approach to providing narrower debt relief to workers in specific professions.

In 2013, the federal Consumer Financial Protection Bureau, considering the potential scope of PSLF as designed, estimated that as many as one in four U.S. workers were employed by a PSLF-eligible employer.[3]

In addition to envisioning a program that potentially covered tens of millions of U.S. workers, Congress designed the law to be expansive in its effects—providing a long-term solution to the economic consequences of unaffordable student debt. Rather than merely offering short-term payment relief by ensuring monthly payments are affordable, PSLF was created to provide public service workers with a path to secure complete debt cancellation.[4] By relying on this promise of

---

[1] College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007).

[2] Id.

[3] Consumer Fin. Prot. Bureau, *Public Service & Student Debt: Analysis of Existing Benefits & Options for Public Service Organizations* (Aug. 2013), https://files.consumerfinance.gov/f/201308_cfpb_public-service-and-student-debt.pdf

[4] Consumer Fin. Prot. Bureau, *Staying on Track While Giving Back: The Cost of Student Loan Servicing Breakdowns for People Serving their Communitie*s 21 (Jun. 2017), https://files.consumerfinance.gov/f/documents/201706_cfpb_PSLF-midyear-report.pdf ("Many choose careers in public service – seeking to give back to their country or community through teaching, nursing, military, or other service. Because many public service fields traditionally offer lower wages, individuals with average student loan debt and entry-level salaries in these fields are likely to face financial hardship when making their standard, 10-year payment amount [. . .] PSLF was created to protect public service workers against the prospect of this financial hardship and provide a pathway to satisfy their student loan obligation over a "standard" period of time (10 years)")

this total relief, a generation of teachers, nurses, first responders, and servicemembers thought that they could pursue careers in public service without fear that student debt would create a long-term barrier to economic security.

To access loan forgiveness, Congress established four key requirements for a borrower to qualify: (1) Borrowers must have the right type of loan; (2) borrowers' loans must be enrolled in the right type of payment plan; (3) borrowers must make the right number of payments; and (4) borrowers must work at the right type of employment.[5]

A combination of arbitrary and narrow regulations, administrative mismanagement by the U.S. Department of Education, and widespread abuses across the student loan industry conspired to deny a generation of public service workers the promise of Public Service Loan Forgiveness.

Unfortunately, with respect to each of these elements, a combination of arbitrary and narrow regulations, administrative mismanagement by the U.S. Department of Education (the Department), and widespread abuses across the student loan industry conspired to deny a generation of public service workers the promise of this protection.[6] When the first public service workers became eligible to have their debts cancelled under PSLF, the program made headlines across the country for rejecting 99 out of every 100 who applied.[7] Over time, Congress intervened with small fixes at the margins, but the program's rejection rate remained at nearly 98 percent more than three years later.[8]

The flailing program appeared doomed to fail by the time the novel coronavirus emerged in early 2020, nearly four years after the first public service workers became eligible to have their debts cancelled. On March 13, 2020, in response to the emerging COVID-19 pandemic, then-President Donald Trump declared a national emergency. The events that followed placed an incredible strain on our public service workforce, demanding teachers, healthcare workers, social workers, and

---

[5] 20 U.S.C. § 1087e(m).

[6] Readers should note that student loan companies, in defending against consumer protection litigation related to PSLF, have asserted that they are bound by substantial non-public contractual requirements imposed by the Department of Education. The distinction between Education Department contractual directives and the practices implemented independently by private-sector companies who are awarded these contracts is often unclear to borrowers and the public. However, some of these distinctions are described in the Department of Education's borrower-facing FAQs. See *Public Service Loan Forgiveness FAQ*, Fed. Student Aid, https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service/questions

[7] See *Public Service Loan Forgiveness Data: PSLF Report*, Fed. Student Aid, https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data

[8] Id.

millions of other public servants go to extraordinary lengths to protect public health and keep our communities whole. However, for public service workers who struggled to manage the burden of rising student debt and who had been excluded from PSLF, the pandemic also offered an opportunity for bold executive action, relying on emergency powers authorized due to President Trump's 2020 emergency declaration.[9]

Through the use of these emergency powers, the Biden Administration was given the chance to sweep away many of the legacy program requirements that had been used to justify inaction with respect to evident widespread mismanagement and abuse over the preceding decade.

Now, as the return to repayment on federal student loans rapidly approaches, there are several core lessons the Administration must learn and various key steps it must take to protect public service workers and restore the promise of PSLF.

How the Biden Administration has Addressed and Approached Public Service Loan Forgiveness

From the first days of the new Administration, President Biden was pressed by a broad coalition of individual public service workers, labor unions, advocates, state law enforcement officials, and lawmakers, demanding that the Administration deploy its emergency powers in the manner necessary to keep the nation's promises to its public service workforce.[10] In particular, these stakeholders called on the Biden administration to waive all requirements necessary to ensure borrowers received credit for each months they worked in public service, regardless of loan type, payment plan, loan status, or payment history—in effect cancelling debts for all workers who have served for a decade and owe federal student loans, as well as giving credit for service performed by those who are earlier in their careers. As public pressure mounted, in July 2021, the Department called on public service workers affected by the many failures of PSLF to share

[9] For further discussion see Student Borrower Protection Center, *Delivering on Debt Relief* (2020), https://protectborrowers.org/debtreliefreport_lp/

[10] For further discussion see, Student Borrower Protection Center, *All Hands on Deck: Paving the Way for Public Service Loan Forgiveness Reform* (2021), https://protectborrowers.org/wp-content/uploads/2021/10/PSLF-Memo-10.21.pdf

their stories directly—a request for comment that solicited tens of thousands of stories from public service workers across the country.[11]

In response, on October 6, 2021, Education Secretary Miguel Cardona announced a set of sweeping—but temporary—changes to PSLF, referred to as "the PSLF Limited Waiver."[12] Under the terms of the PSLF Limited Waiver, public service workers would be eligible to get credit for their service, up to and including complete debt cancellation, regardless of the type of federal student loan taken out or repayment plan selected. This action covered much of the ground demanded by borrowers and advocates, promising to deliver billions of dollars in immediate debt relief to tens of thousands of public service workers and prorated credit toward PSLF for more than half a million additional borrowers.[13] Beyond this first wave of public service workers, the Limited Waiver opened the door for millions of borrowers with older, federal loans to get credit for service previously excluded, so long as these borrowers took action during the Limited Waiver period, which is scheduled to end on October 31, 2022.

However, the Limited Waiver also had substantial remaining gaps, including with respect to public service workers who borrowed parent loans on behalf of a dependent student—borrowers included in the law authorizing PSLF but inexplicably excluded from this emergency relief.[14] In addition, most borrowers who had attempted to pursue PSLF but had been misled into deferring or forbearing repayment continue to be denied credit for service performed during these periods.[15] It is important to note, however, that borrowers who served in the armed forces will receive credit for all service performed, including during periods where loans were placed in deferment or forbearance.

[11] U.S. Department of Education, *Notice and Request for Information on Public Service Loan Forgiveness* (July 2021), https://www.regulations.gov/document/ED-2021-OUS-0082-0001

[12] U.S. Department of Education, *Fact Sheet on Public Service Loan Forgiveness Overhaul* (October 6, 2021), https://www.ed.gov/news/press-releases/fact-sheet-public-service-loan-forgiveness-pslf-program-overhaul

[13] See *Fact Sheet*, supra note 12 ("approximately 22,000 borrowers...will be immediately eligible to have their federal student loans discharged without further action on their part, totaling $1.74 billion in forgiveness. Another 27,000 borrowers could potentially qualify for $2.82 billion in forgiveness if they certify additional periods of employment.")

[14] See, e.g., U.S. Department of Education, *Dear Colleague Letter to FFEL and Perkins Loan Program Participants on the Limited PSLF Waiver* (December 7, 2021); https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2021-12-07/guidance-ffel-and-perkins-loan-program-participants-limited-public-service-loan-forgiveness-waiver

[15] This exclusion is particularly egregious for borrowers who had made every effort to enroll and remain in income-driven repayment over the preceding decade and were placed in forbearance without their consent due to improper loan servicing practices or as a result of a natural disaster. See, e.g., Student Borrower Protection Center, *New Data Show Student Loan Defaults Spiked in 2019 – A Warning to Industry and DeVos Amid Economic Fallout* (2020); https://protectborrowers.org/every-26-seconds/

Next Steps on Executive Action

The Department initially announced a process for awarding additional credit toward PSLF that bypassed the federal contractor responsible for administering this program in the past. FedLoan Servicing, a business unit of the Pennsylvania Higher Education Assistance Agency, has been accused by borrowers and law enforcement officials of mishandling key aspects of this program, denying its benefits to public service workers across the country. Given FedLoan Servicing's track record of mismanagement and abuse and its notoriously haphazard approach to record keeping, the Department chose to rely on information about borrowers' loan history stored in an administrative system maintained by the government—the National Student Loan Data System (NSLDS). This operational decision enabled Education Department employees to directly evaluate borrowers' eligibility and streamline implementation of debt cancellation. As a consequence, more than 31,000 public service workers were reportedly notified that they were eligible for complete debt cancellation six weeks after the Limited Waiver was first announced.[16]

More than 31,000 public service workers were reportedly notified that they were eligible for complete debt cancellation six weeks after the Limited Waiver was first announced.

As this process continues to deliver debt relief to those eligible, two significant hurdles have emerged:

- **Mismanagement and Abuse by FedLoan Servicing.** At the same time as this automatic, Department-led process delivered cancellation for tens of thousands of people, many more sought additional information and relief from FedLoan Servicing directly. Consistent with its sloppy, misinformed, and often unlawful approach to administering PSLF for nearly a decade, FedLoan Servicing reportedly provided incorrect information to an unknown number of public service workers in the weeks after the Limited Waiver was first announced and allegedly improperly rejected paperwork submitted by public service workers who thought they were taking necessary steps to qualify for this opportunity.[17] These practices were so widespread and egregious that the

[16] Washington Post, *First Wave of Public Servants Awarded Forgiveness through Temporary Program* (November 20, 2021); https://www.washingtonpost.com/education/2021/11/20/public-service-student-loan-forgiveness-pslf/

[17] National Public Radio, *Borrowers say they were wrongly denied loan forgiveness. Now, help is on the way* (November 2020); https://www.npr.org/2021/11/04/1051463060/student-loan-forgiveness-overhaul-fedloan-public-service-borrowers

Student Borrower Protection Center threatened private litigation against FedLoan Servicing in November 2021.[18] It remains unknown whether FedLoan has corrected these practices and whether those affected have been given the opportunity to get back on track.

- **Deception by Private Sector Holders of Older, Federally Guaranteed Student Loans.** Similarly, holders of older federal loans, including banks and other private lenders, continue to provide incorrect information to public service workers related to the terms of the PSLF program and the Limited Waiver. In December 2021, labor unions representing nearly nine million working people nationwide joined the Student Borrower Protection Center to warn these private-sector loan holders that they risk breaking the law and cheating their customers out of their rights.[19] In the days following this letter, the Department also warned these firms that they had shared information about the PSLF waiver with federal and state consumer protection regulators and that the Department renewed its commitment to policing deception and other abuses by these companies in the year ahead.[20]

Taken together, these potential obstacles have wasted millions of public service workers' scarce months to qualify for the Limited Waiver before it expires in October 2022. Fortunately, the promise of automated debt cancellation may provide an alternate path forward for many of these borrowers. When the Limited Waiver was first announced, Department officials also announced a process through which they would automatically match the student loan accounts of servicemembers and federal employees to employment records maintained by other parts of the U.S. government—potentially unlocking immediate and automatic debt cancellation for those borrowers who had served in the federal workforce or armed services for a decade or more.[21] This bulk certification process may hold the key to automating relief for public service workers across the country, both as part of the limited waiver and with respect to the program itself in the years to come.[22]

---

[18] Student Borrower Protection Center, *Letter to PHEAA Warning of Potential Consumer Protection Violations Related to PSLF Implementation* (November 2020); https://protectborrowers.org/letter-to-pheaa-warning-of-potential-consumer-protection-violations-related-to-pslf-implementation/

[19] Student Borrower Protection Center, *Press Release: Advocates Warn Student Loan Companies Seek to Undermine PSLF Overhaul* (December 2021); https://protectborrowers.org/advocates-warn-student-loan-companies-seek-to-undermine-pslf-overhaul-to-pad-profits/

[20] U.S. Department of Education, *Dear Colleague Letter to FFEL and Perkins Loan Program Participants on the Limited PSLF Waiver* (December 7, 2021); https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2021-12-07/guidance-ffel-and-perkins-loan-program-participants-limited-public-service-loan-forgiveness-waiver

[21] See *Fact Sheet*, supra note 12.

[22] Note that this issue brief does not discuss prospective changes to PSLF currently under consideration by ED. These changes may memorialize aspects of the Limited Waiver and may prevent the next generation of public service workers from encountering the same obstacles to debt relief as those who attempted to access PSLF in the first decade of the program. For a detailed discussion of the

Lessons Learned

The Biden Administration's embrace of debt cancellation for public service workers offers a number of lessons for borrowers and their advocates with respect to the broader fight for debt relief in the year ahead. In particular, the Department of Education appears responsive to organized, sustained pressure from borrowers and stakeholders, at least where such pressure is directly tied to documented evidence of government mismanagement in the past. The years-long fight to provide promised debt relief to public service workers was marked by a seemingly endless stream of public reports documenting the extraordinary gap between borrowers' rights under the law and the experiences of those struggling under the weight of mounting student debt.[23]

Law enforcement officials and labor unions were also particularly active in litigating these issues—the State of California sued the Department for mismanaging the program at the same time as the Commonwealth of Massachusetts and the State of New York litigated cases against FedLoan Servicing for similar abuses, and the American Federation of Teachers prosecuted lawsuits on behalf of their members against both student loan giant Navient and against the Department.

This combination of public scandal, stakeholder pressure, and consumer protection litigation appears to be present elsewhere in the student loan system, particularly with respect to the decades-long mismanagement of Income-Driven Repayment. Executive action to provide widespread debt relief to low-income borrowers denied their rights under IDR seems possible in the year ahead, as advocates, consumer protection officials, and the Department itself acknowledge the significant economic costs of IDR's failure to the most economically vulnerable borrowers. Moreover, the problems that the Administration has faced implementing the PSLF waiver point to the need for widespread debt cancellation. Any attempt to target relief inevitably leads to borrowers being left out or further subject to the abusive practices that got us to where we are today.

---

intersection between this planned rulemaking and the Limited Waiver, see Student Borrower Protection Center, *Memo to Negotiators on Public Service Loan Forgiveness* (2021); https://protectborrowers.org/wp-content/uploads/2021/10/2021.10.29-Neg-Reg-Memo-re-Fixing-PSLF.pdf. See also U.S. Department of Education, *Negotiated Rulemaking for Higher Education 2021-2022* (Accessed on December 12, 2021); https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html

[23] During the final weeks before the Administration announced the Limited Waiver, two additional scandals emerged undermining any remaining case that, over time, the program would live up to its promise on its own. First, Politico reported that thousands of public school districts across the country had educators rejected by ED when attempting to pursue PSLF, seemingly due to improper handling of paperwork or clerical errors. Second, the continued obstacles to PSLF facing active-duty members of the military received extraordinary attention due to an investigative piece aired by CBS News' 60 Minutes. In both cases, the ED appears to have made policy decisions in response to this press coverage. See Politico, *Thousands of teachers rejected for public service loan forgiveness program, new data shows* (2021); https://www.politico.com/news/2021/09/21/teachers-rejected-loan-forgiveness-program-513396; and CBS News, *60 Minutes: Military members promised student debt relief in exchange for ten years of public service say promise is often broken* (2021); https://www.cbsnews.com/news/student-loan-debt-forgiveness-public-service-60-minutes-2021-10-03/

REVISITING RELIEF FOR BORROWERS WITH DISABILITIES

Bethany Lilly
Senior Director of Income Policy
The Arc

John Whitelaw
Advocacy Director
Community Legal Aid Society, Inc. (Delaware)

Background

The total and permanent disability (TPD) discharge process is supposed to enable student loan borrowers with work-limiting disabilities, including veterans, to discharge their federal student loans. Unfortunately, narrow regulations and bureaucratic barriers mean that hundreds of thousands cannot access debt relief and are at risk of having their Social Security benefits garnished.

As outlined in our previous paper as a part of the *Delivering on Debt Relief* series, the "permanently and totally disabled" standard for loan discharges mirrors the disability criteria used by the Veterans Affairs and the Social Security Administration (SSA).[1] The only difference is that the durational requirement for TPD loan discharges is 60 months rather than the 12 month standard used by the Social Security Administration. The Department of Education's (ED's) current regulations unnecessarily narrow the eligibility criteria for SSA beneficiaries, excluding beneficiaries who have had their disability for 5 years, or who have deadly health conditions, along with others who meet the statutory standard for TPD loan discharge.

ED's current regulations also create a 3-year monitoring period that places significant bureaucratic burdens on borrowers. This monitoring period is not authorized by the statute. It requires borrowers to submit paperwork to ED that duplicates regular information they are already required to provide to SSA. The Government Accountability Office found that this monitoring period results in loans being reinstated inappropriately for hundreds of thousands of borrowers.[2]

In addition, the application process for TPD discharge is complex, despite ED and SSA having the relevant data to automate discharge and having automated the process for veterans. The absence of an automatic process leaves many people with disabilities trapped with their debt, despite eligibility for relief.

These barriers are particularly concerning for the many borrowers whose Social Security Disability Insurance or Retirement benefits are garnished to pay their student loan debt, leaving them with as little as $750 a month on which to live.

[1] See Student Borrower Protection Center, *Delivering on Debt Relief* (2020), https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf (pp. 94-111)

[2] See Government Accountability Office, *Social Security Offsets: Improvements to Program Design Could Better Assist Older Student Loan Borrowers with Obtaining Permitted Relief*, https://www.gao.gov/assets/gao-17-45.pdf

How the Biden Administration has Addressed and Approached Total And Permanent Disability Discharge

Under the Biden Administration, ED has taken some steps to address bureaucratic barriers and eligibility issues in the TPD program, in addition to addressing the garnishment of Social Security benefits. Their steps largely reflect the recommendations we made in *Delivering on Debt Relief*.

Bureaucratic Barriers

In March 2021, ED announced that the agency would reinstate student loan discharges for 230,000 TPD borrowers who had had their loans reinstated after paperwork issues. in August 2021, ED announced that they would automate discharges for over 323,000 borrowers receiving disability benefits from SSA.

In March 2021, ED announced that the agency would reinstate student loan discharges for 230,000 TPD borrowers who had had their loans reinstated after paperwork issues, and cease requiring borrowers currently in the monitoring period to submit paperwork.[3] ED also announced that the agency would propose eliminating the monitoring period in the negotiated rulemaking. Then in August 2021, ED announced that they would automate discharges for over 323,000 borrowers receiving disability benefits from SSA.[4] These two improvements dramatically reduced the bureaucratic burden on disabled borrowers and ED followed through on the announced commitment, proposing in the fall 2021 negotiated rulemaking to eliminate the monitoring period.[5]

Eligibility

In the fall 2021 negotiated rulemaking on TPD, ED proposed expanding eligibility for the TPD program to include three new categories of SSA beneficiaries: an additional medical review category to capture some additional borrowers who are prospectively expected to be disabled for five years, beneficiaries who are on the "compassionate allowance list" of

[3] See "Education Department Announces Relief for Student Loan Borrowers with Total and Permanent Disabilities During the COVID-19 Emergency," U.S. Department of Education, March 29, 2021, https://www.ed.gov/news/press-releases/education-department-announces-relief-student-loan-borrowers-total-and-permanent-disabilities-during-covid-19-emergency

[4] See "Over 323,000 Federal Student Loan Borrowers to Receive $5.8 Billion in Automatic Total and Permanent Disability Discharges," U.S. Department of Education, August 19, 2021, https://www.ed.gov/news/press-releases/over-323000-federal-student-loan-borrowers-receive-58-billion-automatic-total-and-permanent-disability-discharges

[5] See U.S. Department of Education, *Negotiated Rulemaking for Higher Education 2021-22, Issue Paper #1: Total and Permanent Disability*, https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/1tpd.pdf

conditions that are likely to result in death or permanent disability, and those whose disability onset five years ago or have been receiving benefits for five years. These expansions would reflect the clear statutory language and make it easier for borrowers not caught by the expanded automation to provide proof of their disability.

Offsets for Student Loan Debt

In addition to these reforms to the TPD program, the Administration's extension of the student loan payment pause included continuing halting collections on defaulted loans.[6] This meant that thousands of Social Security beneficiaries have not had their monthly benefit checks garnished while the payment pause has been in effect.

Under the Biden Administration, ED has taken some steps to address bureaucratic barriers and eligibility issues in the TPD program, in addition to addressing the garnishment of Social Security benefits. Their steps largely reflect the recommendations we made in *Delivering on Debt Relief*.

Next Steps on Executive Action

It is important for ED to automate to the maximum extent possible the process for all the new eligibility categories. Automation ensures that the discharges to which borrowers are entitled will not be delayed or prevented because of their disability or lack of resources.

The Biden Administration should finalize the proposed regulations from the negotiated rulemaking on TPD. The proposed changes significantly reduce bureaucratic barriers and expand eligibility to reflect the statute. They will help disabled borrowers access the discharges to which they are entitled.

It is also important for ED to automate to the maximum extent possible the process for all the new eligibility categories—something we understand they are working through with SSA. Implementing automation is complicated because it necessarily involves data sharing with a different governmental

[6] See "Biden Administration Extends Student Loan Pause Until January 31, 2022," U.S. Department of Education, https://www.ed.gov/news/press-releases/biden-administration-extends-student-loan-pause-until-january-31-2022

agency, but automation ensures that discharges to which borrowers are entitled will not be delayed or prevented because of their disability or lack of resources.

It will also be necessary for ED to revise the TPD application form to reflect the new regulations and we urge them to also take into consideration the recommendations from *Delivering on Debt Relief* to simplify the form to make it easier for both borrowers and health care providers assisting them. We do note that ED's proposed regulations have expanded the type of health care provider who can complete this form. We strongly support this expansion.

Notwithstanding these important reforms, not all disabled borrowers who are eligible will be captured by the new automatic processes. This is especially true for older adults who have disabilities but will not be eligible via the categories identified in the regulation because they rely on Social Security retirement benefits. ED, SSA, and Treasury should identify all Social Security beneficiaries who are having their Social Security benefits garnished for student loan debt and those borrowers over 65 still making payments on student loans and send them an annual mailer to inform them that TPD discharge is available and how to apply.

Most importantly, it is likely that the Administration will not be able to finalize the new rule until well into 2022. With the payment pause (and temporarily stopped collections) ending on January 31, 2022, the Administration must identify those SSA disability beneficiaries who would be eligible for discharge under the new rule and ensure that they do not have their benefits garnished while waiting for the new rule.

Lessons Learned

Helping ED understand how the SSA disability programs work was crucial to obtaining the changes that have been adopted in the negotiated rulemaking. Having representatives from the disability community as negotiators ensured that there were voices that understood that system at the negotiating table to walk everyone through the details and advocate for necessary changes.

In addition, while the reforms to the TPD program will help hundreds of thousands of people with disabilities, there are also millions of disabled borrowers who rely on the other forgiveness or discharge programs currently being discussed by the Administration. It is crucial that changes to those programs reflect what we know works for TPD: automation and simplified eligibility.

REVISITING RELIEF FOR STUDENTS HARMED BY SCHOOL CLOSURES

Robyn Smith
Of Counsel
National Consumer Law Center

Background

Since the Higher Education Act (HEA) was first amended to make financial aid available to for-profit postsecondary schools, hundreds of thousands of students have been displaced by school closures, in many cases leaving low-income students, primarily people of color, with student debt that they are unable to repay, through no fault of their own. Yet the U.S. Department of Education (ED) has thwarted the mandate of HEA to discharge the loans of all borrowers unable to complete their educations due to school closures. It has generally required borrowers to apply for relief, instead of granting automatic discharges to borrowers who are eligible according to ED's records. In addition, ED has seldom used its discretion to provide discharges to additional borrowers who withdrew prior to their schools' closure based on problems leading up to closure. As a result, there are likely hundreds of thousands of borrowers who are or should be eligible for discharges, but who continue to suffer the consequences of student debts they should not legally owe.

In September 2021, the Government Accountability Office released a study confirming that ED's reluctance to provide widespread and automatic closed school discharges has had severe financial consequences for borrowers.[1] Of the 80,000 borrowers who received discharges for schools that closed between 2010 and 2020, 96 percent were enrolled at for-profit schools.[2] Fifty-two percent of the borrowers who received automatic discharges were in default and 21 percent were delinquent by three or more monthly payments.

There are likely hundreds of thousands of borrowers who are or should be eligible for discharges, but who continue to suffer the consequences of student debts they should not legally owe.

In September 2021, the Congressional Subcommittee for Higher Education and Workforce Investment held a hearing on problems with ED's closed school discharge process. The hearing included testimony regarding the need for widespread retroactive automatic discharges to borrowers harmed by school closures, a disproportionate number of whom are people of color.

[1] U.S. Gov't Accountability Off., GAO-21-105373, *College Closures: Many Impacted Borrower Struggled Financially Despite Being Eligible for Loan Discharges* (Sept. 30, 2021).

[2] These are borrowers whose schools closed after Nov. 1, 2013 and who did not enroll in another Title IV institution within 3 years of their school's closure.

How the Biden Administration has Addressed and Approached Closed School Discharges

In August 2021, ED extended the withdrawal look-back period for closed school discharge eligibility based on extenuating circumstances for ITT Technical Institute (ITT). ED is providing automatic discharges to approximately 115,000 borrowers who withdrew on or after March 31, 2008 and did not enroll in another Title IV institution within 3 years of the closure date of September 6, 2016.[3]

In the fall of 2021, ED commenced a negotiated rulemaking to amend the closed school discharge regulations. Although consensus was not achieved, the Department proposed two major amendments that were also proposed in *Delivering on Debt Relief*.[4]

First, ED proposed amending the regulations to require automatic closed school discharges for otherwise eligible borrowers who obtained loans on or after January 1, 1986 (both retroactively and in the future), and who did not complete an accreditor-approved teach-out. ED also proposed repealing the discharge prohibition applicable to borrowers who complete a comparable program (outside of a teach-out) after transfer any credits. This will significantly expand the number of borrowers who receive closed school discharges.

Second, ED proposed adding events, many of which I recommended in the first paper, to the list of extenuating circumstances upon which ED may extend the withdrawal eligibility look-back period, including placement of a school on Heightened-Cash-Monitoring-2 status, specified negative accreditation actions, and a court judgment for federal or state law violations, among others.

The Department proposed these changes for Direct, FFEL and Perkins Loans. As of this writing, it is unclear whether ED will adopt these proposals as final regulations.

[3] See U.S. Dep't of Educ., Press Release, *Extended Closed School Discharge Will Provide 115K Borrowers From ITT Technical Institute More than $1.1 B in Loan Forgiveness* (Aug. 26, 2021).

[4] See U.S. Dep't of Educ., Office of Postsecondary Education, *Proposed Regulatory Text for Issue Paper #2: Closed School Discharge* (Session Three: December 6 -10, 2021); https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/clsdschoolsess3.pdf and Robyn Smith, *Delivering on Debt Relief: Relief for Borrowers Whose Schools Closed*, Student Borrower Prot. Ctr. (Nov. 2020); https://protectborrowers.org/wp-content/uploads/2021/02/Delivering-on-Debt-Relief-Final.pdf (p. 112-133)

Next Steps on Executive Action

If ED adopts its closed school proposals, the earliest they will go into effect is July 2023. This is a long time to wait for the likely hundreds of thousands of people who have been eligible for discharges for decades. Thus, if ED plans to adopt these proposals, it should immediately direct servicers and guaranty agencies to identify borrowers who will be eligible under the new regulations. It should also put the loans of all such borrowers into administrative forbearance until ED or the guaranty agencies are able to grant the discharges.

If ED adopts its closed school proposals , it should immediately direct servicers and guaranty agencies to identify borrowers who will be eligible under the new regulations. It should also put the loans of all such borrowers into administrative forbearance until ED or the guaranty agencies are able to grant the discharges.

ED should implement the new regulations early, as soon as they are final, to provide relief as soon as possible to eligible borrowers. Discharges require refunds of all money borrowers have paid on discharged loans, as well as the clearing of negative credit information, neither of which are available through administrative forbearance.

ED should prioritize discharges for borrowers who have suffered the longest, starting with those who experienced closures in 1986. In addition, ED should send discharge applications to borrowers who were reported as completing on or near the closure date to account for school reporting and record-keeping errors.

Advocates should monitor ED's implementation of the new regulations once finalized, and in the meantime should continue to urge ED to extend the withdrawal look-back eligibility period and grant automatic discharges for all the schools and circumstances identified in the first paper, as well as other appropriate schools.

Lessons Learned

The advocacy and insights of legal aid attorneys and their clients, including in negotiated rulemaking and Congressional testimony, were indispensable to convincing ED to grant widespread automatic discharges. The student and borrower advocacy community should recognize the crucial role that the legal aid community plays in student loan policy and support increased legal aid funding.

REVISITING RELIEF FOR BORROWERS WHO FALL THROUGH THE CRACKS IN DISCHARGE PROGRAMS

Claire Torchiana
Counsel
Student Borrower Protection Center

Winston Berkman-Breen
Deputy Director of Advocacy and Policy Counsel
Student Borrower Protection Center

Background

The Higher Education Act (HEA) provides several statutory loan discharge programs for borrowers who meet certain eligibility requirements. These programs include Public Service Loan forgiveness (PSLF), Borrower Defense to Repayment (BDR), Total and Permanent Disability discharge; Closed School discharge, False Certification discharge, and Income-Driven Repayment plans, among others. Although enacted by Congress to give relief to borrowers in certain circumstances, too often breakdowns in program administration or industry misconduct deprive potentially eligible borrowers of their statutory right to loan relief.

Borrowers who should be eligible to have their debts canceled are too often denied for technical reasons that undermine the programs' intent and purpose, or are sidelined by harmful or abusive practices by rogue government contractors.

For instance, the PSLF program broadly serves to discharge federal student loan debt for borrowers who have worked in public service.[1] However, poor communication when the program began and servicer misconduct around eligibility requirements resulted in tens or hundreds of thousands of public service workers making payments that ultimately did not count toward loan forgiveness.[2] The Closed School discharge program serves to cancel federal loans for borrowers who cannot complete their program due to their school's closure.[3] However, rigid eligibility windows and school malfeasance can render these stranded borrowers ineligible for discharge.[4] Income-driven repayment programs were intended to permit low income borrowers lower

[1] "Provides loan forgiveness for service in areas of national need, including the military, law enforcement officers, firefighters, public defenders, prosecutors, early childhood educators, and librarians and for certain other public sector jobs." 110 CIS Legis. Hist. P.L. 84. See also, U.S. Department of Education, *Press Release: U.S. Department of Education Announces Transformational Changes to the Public Service Loan Forgiveness Program, Will Put Over 550,000 Public Service Workers Closer to Loan Forgiveness* (2021); https://www.ed.gov/news/press-releases/us-department-education-announces-transformational-changes-public-service-loan-forgiveness-program-will-put-over-550000-public-service-workers-closer-loan-forgiveness ("Borrowers who devote a decade of their lives to public service should be able to rely on the promise of Public Service Loan Forgiveness.").

[2] Student Borrower Protection Center, *Memorandum, From Ben Kaufman & Winston Berkman-Breen to Interested Parties (*Oct. 29, 2021), https://protectborrowers.org/wp-content/uploads/2021/10/2021.10.29-Neg-Reg-Memo-re-Fixing-PSLF.pdf.

[3] The mandate in the HEA is broad: the Department "shall discharge a borrower's liability on a loan" if the student "is unable to complete the program in which such student is enrolled due to the closure of the institution. 20 U.S.C. § 1087(c)(1) 28 (FFEL Loans); 20 U.S.C. § 1087e(a)(1) (Direct Loans have the same terms and conditions as FFEL Loans unless otherwise specified); 20 U.S.C. § 1087dd(g)(1) (Perkins Loans, including National Direct Student Loans. 59 Fed. Reg. 94-1008 (Jan 14, 1994) ("loans will be canceled for student borrowers who are unable to complete their program of study because the school closed").

[4] For instance, thousands of former ITT borrowers who did not receive the benefit of their educational bargain because of their school's malfeasance predating closure were until recently saddled with massive debts. U.S. Department of Education, *Extended Closed School Discharge Will Provide 115K Borrowers from ITT Technical Institute More Than $1.1B in Loan Forgiveness* (accessed December 15,

monthly payments in the immediate term, paired with the promise of loan forgiveness after 20 or 25 years.[5] However, they have historically resulted in few borrowers successfully navigating the program and have caused borrowers' balances to balloon in the process.[6]

Borrowers who should be eligible to have their debts canceled via these programs are too often denied for technical reasons that undermine the programs' intent and purpose, or are sidelined by harmful or abusive practices by rogue government contractors. Although ED has broad and longstanding statutory authority to extend loan forgiveness to any borrower at any time, ED has failed to routinely and systematically exercise this authority. Even in circumstances where Congress intended certain borrowers to receive relief through these specific programs and where those borrowers are blocked from receiving debt relief, ED chooses not to exercise its broadest authority to cancel student debt and ensure this relief is provided.

How the Biden Administration has Approached Helping Overlooked Borrowers

The Biden Administration's attempts to address gaps in the statutory discharge programs have mostly been limited to one-off actions using emergency authority granted by virtue of the COVID-19 pandemic national emergency or by proposing minor adjustments to program implementing regulations.

For example, on October 6, 2021, ED announced a waiver to certain of the PSLF program requirements using its emergency authority under the Higher Education Relief Opportunities for Students Act of 2003,[7] also known as the HEROES Act of 2003, which permits the secretary to waive any statute or regulation related to the federal student loan

---

2021); https://www.ed.gov/news/press-releases/extended-closed-school-discharge-will-provide-115k-borrowers-itt-technical-institute-more-11b-loan-forgiveness.

[5] See, e.g., 34 C.F.R. §§ 682.215, 685.221, 685.209(a), 685.209(c), 685.209(b). The first income-contingent plan was meant to "provide borrowers with a variety of repayment plans, including an income-contingent repayment plan, so that borrowers['] . . . obligations do not foreclose community service-oriented career choices," which typically come with lower salaries than the private sector. Staff of S. Comm. on the Budget, 103d Cong., Reconciliation Submissions of the Instructed Committee Pursuant to the Concurrent Resolution on the Budget (H.R. Con. Res. 64) 453 (Comm. Print 1993).

[6] National Consumer Law Center & Student Borrower Protection Center, *Education Department's Decades-Old Debt Trap: How the Mismanagement of Income-Driven Repayment Locked Millions in Debt* (March 2021), https://protectborrowers.org/wp-content/uploads/2021/03/IDR-Brief-NCLC-SBPC.pdf.

[7] 20 USC 1098bb.

program under certain circumstances.[8] This action should result in thousands of public service workers' loans being forgiven and bringing hundreds of thousands of public service workers closer to loan forgiveness.[9] However, because the Administration relied on temporary authority tied to emergency powers invoked in response to the pandemic, the waiver is time limited. In addition, it did not include all borrowers who have historically been excluded from PSLF promise of loan forgiveness.

Also in October, ED convened a negotiated rulemaking committee beginning to revise regulations regarding student loans, and various related forgiveness and discharge programs.[10] During this process, ED negotiators have repeatedly claimed that ED lacks the statutory authority to implement regulatory changes to programs that would lower barriers to entry for borrowers and provide much-needed relief.[11]

Although Congress has conferred ED broad authority to administer the federal student loan program, including the discharge programs, ED has taken a narrow approach when executing its authority and in the process saddled millions of people with unjust debts.

Next Steps on Executive Action

The Secretary of Education has plenary authority under the HEA with respect to federal student loans, and where a borrower should qualify for loan forgiveness under a statutory discharge program but is barred for some reason, the Secretary can use this alternative authority to grant forgiveness in the spirit of the program.

Specifically, the HEA permits the Secretary to compromise any loan of up to $1,000,000, which includes discharging the obligation in full.[12] The HEA also confers the authority to modify any aspect of a federal student loan, including the "rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of

---

[8] 20 USC 1098bb.

[9] *Press Release*, supra note 1.

[10] U.S. Department of Education, *Press Release: New Negotiated Rulemaking Committee to Focus on Student Loans, Targeted Discharge and Forgiveness Authorities* (August 2021); https://www.ed.gov/news/press-releases/new-negotiated-rulemaking-committee-focus-student-loans-targeted-discharge-and-forgiveness-authorities.

[11] See, e.g., U.S. Dep't of Educ., *Proposed Regulatory Text for Issue Papers #4 and 5: Public Service Loan Forgiveness, Session 2, Comment A6* (Nov. 1-5, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/public-service-loan-forgiveness.pdf.

[12] 20 U.S.C. § 1082(a)(6). See generally, Project on Predatory Student Lending, *Letter to Senator Elizabeth Warren* (2020); https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf; Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 Buffalo L. Rev. 281 (2020); http://dx.doi.org/10.2139/ssrn.3442234.

any note or other instrument."[13] Traditionally these authorities have been used on an individual basis upon request by borrowers and their advocates, and have not been systematized in furtherance of Congress's intent under the HEA.

The Biden Administration, through the Secretary and ED, can adopt a policy of using its plenary authority to compromise or modify any federal student loan in coordination with the existing statutory discharge programs to ensure that the promise of loan forgiveness is delivered to the borrowers whom Congress intended. Where ED claims that it lacks statutory authority to improve aspects of existing programs that are known to exclude otherwise qualifying borrowers, it can bring these authorities to bear.

The Biden Administration can adopt a policy of using its plenary authority to compromise or modify any federal student loan in coordination with the existing statutory discharge programs to ensure that the promise of loan forgiveness is delivered to the borrowers whom Congress intended.

For example, the Secretary can modify the payment histories of any borrowers who were steered into deferments or forbearances—a known predatory industry tactic[14]—to grant credit toward loan forgiveness under the PSLF and income-driven repayment plan programs for those months, which would not otherwise qualify. This policy would make borrowers whole and restore them to the loan forgiveness eligibility they could have accrued had they not been harmed by illegal or improper loan servicing. Additionally, under these same programs, ED's currently policy when borrowers consolidate their loans is to reset any credit toward loan forgiveness and require borrowers to begin accruing the varying 10, 20, or 25 years of qualifying payments from scratch, regardless of the number of qualifying payments they had previously made. The Secretary already has the authority to consolidate borrowers' loans and begin the newly consolidated loans with the same loan forgiveness credit balance as the underlying loans had.

There are innumerable additional examples of when ED could use the Secretary's authority to compromise and modify within the statutory discharge programs, but the use case is essentially the same across these many examples: where, but for some industry misconduct or bureaucratic quirk of the program, a borrower would have received loan forgiveness, the Secretary has the authority to make them whole by compromising or modifying their student loan, however necessary. Nothing in the HEA prevents ED from putting into place regulations or issuing guidance to routinize its authority to compromise or modify debts. It can systemically invoke this authority in both a regulatory and sub-regulatory

13 20 U.S.C. § 1082(a)(4). See also, id.

14 See e.g., Washington Office of the Attorney General, AG Ferguson: Judge rules national student loan servicer Navient broke the law in servicing student loan debt (March 2021); https://www.atg.wa.gov/news/news-releases/ag-ferguson-judge-rules-national-student-loan-servicer-navient-broke-law

manner to immediately deliver relief to eligible borrowers. Nor would ED have to address or overcome concerns about whether it can wield its authority to compromise or modify debts on an individual versus broad basis: the very nature of these statutory discharge programs is that borrowers are eligible based on individual characteristics, such as total and permanent disability, or shared individual characteristics, such as attending a school that closed. To compromise or modify debts in this context would be broad relief extended to many borrowers. It would be individual relief extended broadly. In effect, ED can use this flexible authority conferred by Congress to replicate the temporary benefits of the PSLF waiver in a permanent way and across other existing HEA discharge programs.

REVISITING RELIEF FOR THE TAXATION OF STUDENT LOAN DISCHARGE AND CANCELLATION

John R. Brooks
Professor of Law, Georgetown University Law Center
Visiting Professor of Law, Fordham University School of Law

Background

To be truly effective, any policy of student debt discharge and cancellation must also provide clarity on the tax treatment of that cancellation. Standard tax law treats many forms of cancelled debt as a form of taxable income, just like wages and salaries. If that tax treatment applies to student debt cancellation, it could impose significant financial hardship at exactly the point when a borrower should instead be relieved of hardship. It would in effect require immediate payment of 25 percent to 35 percent of the canceled debt principal for most people, in the form of taxes.

The tax treatment of student debt cancellation is a complicated hodgepodge of rules that appear to treat cancelled debt differently depending on the reason for the cancellation. For example, prior to 2018, the tax code only explicitly excluded from gross income debt cancelled through Public Service Loan Forgiveness (PSLF). The tax code was silent, however, on debt cancelled due to Income-Driven Repayment or through the Education Department's settlement and compromise authority—implying to many, including the IRS, that such cancellation must therefore be taxable.

As I wrote in my contribution to the original Delivering on Debt Relief volume, the tax code's explicitly reference to PSLF was not because Congress intended to provide some extra, targeted relief for such debt cancellation, but rather because it was cleaning up a mess the IRS had created in misreading a 1969 Supreme Court case, *Bingler v. Johnson*.[1] Prior to that the IRS had—correctly—ruled that student debt cancellation should be non-taxable, as an extension of the "scholarship" exclusion in section 117 of the Internal Revenue Code.[2] But because PSLF appeared—to the IRS—to involve the sort of quasi-employment relationship the Court took issue with in *Bingler*, the IRS reversed itself in 1973 and said that PSLF-type cancellation *did* create taxable income.[3] Congress quickly slapped the IRS back, adding section 108(f) of the tax code to overrule that erroneous interpretation.[4]

No one—including Congress—intends to hit borrowers with a large tax bill right at the moment that they think they're relieved of the financial difficulties of student loans.

[1] 394 U.S. 741 (1969).

[2] See, e.g., I.R.S. Priv. Ltr. Ruling 6004275330A (Apr. 27, 1960).

[3] Rev. Rul. 73-256, 1973-1 C.B. 56.

[4] Tax Reform Act of 1976, Pub. L. No. 94-455, § 2117, 90 Stat. 1520, 1911–12. The provision was added permanently to the tax code in 1984. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 1076(a), 98 Stat. 494, 1053. On this being Congress's direct response to the IRS's erroneous ruling, see S. Rep. No. 94-938, at 430.

So Congress added explicit language on PSLF to the tax code *not* in order to provide some special treatment to PSLF cancellation, but rather in order to patch a hole the IRS had created in the *general* policy of non-taxation. But that earlier history has been effectively forgotten, so that the IRS now gets this backwards. It looks at the tax code and says, in effect, any form of student debt cancellation not listed explicitly in section 108 must instead be taxable.

This situation was not only a misreading of the law, but could have seriously undermined the policy and politics of general student debt cancellation. No one—including Congress—intends to hit borrowers with a large tax bill right at the moment that they think they're relieved of the financial difficulties of student loans, and it's not hard to imagine the blowback if that were to happen.

How the Biden Administration and Congress Have Addressed and Approached the Taxation Of Student Debt Cancellation

As I argued in *Delivering on Debt Relief*, the Biden Administration had sufficient legal authority to rule that student debt cancellation generally should not be taxable, relying on a combination of the scholarship exclusion, other relevant parts of the tax law, and prior precedent.[5] However, before the Administration could do so (and they were warm to the idea), Congress added section 108(f)(5) in 2021, via the American Rescue Plan Act (ARPA). That provision says that any student debt cancellation between 2021 and 2025 will not create gross income for tax purposes.

[5] For a more extended technical analysis, see John R. Brooks, *Treasury Should Exclude Income From Discharge of Student Loans*, 152 Tax Notes 751, 752–53 (2016).

Before the Administration could act, Congress added a provision to the American Rescue Plan Act that any student debt cancellation between 2021 and 2025 will not create gross income for tax purposes.

Section 108(f)(5) temporarily answers the question of how student debt cancellation should be treated for tax purposes—it should be ignored—but only for the next few years. After that, absent any other action, we revert to the same confused landscape, where the IRS believes—again, incorrectly—that some student loan cancellation is taxable, particularly for the one-time relief through settlement and compromise that many in this package have urged.

It appears that Congress created this non-taxable window in part to urge the Administration to act in the near term to cancel student debt administratively. But in doing so, it may have inadvertently exacerbated the original tax problem. First, the new provision implies that the IRS has been reading section 108 correctly all along—that student debt cancellation is non-taxable only if included in section 108. This new provision providing for non-taxability ironically reinforces that erroneous claim that student debt cancellation would otherwise be taxable. Second, by providing only a short window for non-taxability, Congress has provided no help to the many borrowers—9 million currently—in Income-Driven Repayment programs that may have debt cancelled after 2025.

Next Steps on Executive Action

Ideally, the Biden Administration would still rule that student debt is not taxable, even without section 108(f)(5) of the tax code. But that seems highly unlikely in the near term, because Congress has mooted the issue until 2026. It is hoped that Congress might extend that period or make it permanent, but in the meantime, the Biden Administration is at least free of any tax uncertainty for the remainder of the first term, and it should take advantage accordingly.

Lessons Learned

There are several important takeaways from this back-and-forth on the tax treatment of student debt cancellation. First, sustained attention on the issue resulted in some significant movement. The possibility of taxing student debt cancellation has been regularly used as a pretext to avoid debt cancellation altogether,[6] but the attention of advocates

[6] See, e.g., John R. Brooks, *Why is the Department of Education Dragging Its Feet on Debt Relief for Disabled Veterans?*, Student Borrower Prot. Ctr. (Dec. 13, 2018), https://protectborrowers.org/why-is-the-department-of-education-dragging-its-feet-on-debt-relief-for-disabled-veterans.

and academics brought the issue to the fore and pushed Congress to provide a solution, even if only a temporary and partial one. Shining light on this issue absolutely made a difference.

Second, more negatively, advocates and policymakers may have miscalculated the trade-offs of this temporary approach. The desired short-term benefit of pushing the Administration to cancel student debt administratively has not (yet) come to pass, but the long-term pain for many borrowers remains. For those for whom any debt cancellation would come after 2025—nearly all of those currently in IDR, plus all current students—there is no relief. They remain under a cloud of uncertainty, that the benefit of debt cancellation may turn out to be financially ruinous if accompanied by an onerous tax bill. There is perhaps some reluctance among advocates to admit that those debts may stick around that long, but not planning for that possible future could leave these borrowers out in the cold.

Third, we may now need definitive Congressional action. While I am convinced that current law, properly read, should treat student debt cancellation as non-taxable "scholarships" (which, by the way, appears to be the theory for why the IRS does not tax the cancellation or reduction of student loan *interest*[7]) or as otherwise non-taxable, the compounding of errors has made it harder for that reading to win out. Prior to ARPA, the IRS was reluctant to read the law this way, and the addition of section 108(f)(5) only reinforces the IRS's view that the problem can only be solved legislatively. Unfortunately, they may now be correct. The good news, however, is that Congress has shown that it has the will and ability to address this issue, and hopefully it will work toward a permanent solution.

[7] See Rev. Rul. 75-537, 1975-2 C.B. 32; I.R.S. Gen. Couns. Memo 33,721 (Jan. 4, 1968) (student loan interest subsidies would be income to the borrower but for § 117).

ABOUT THE AUTHORS

WINSTON BERKMAN-BREEN

Winston Berkman-Breen is the Deputy Director of Advocacy & Policy Counsel at the Student Borrower Protection Center. Prior to joining the SBPC, Winston was the Director of Consumer Advocacy and Student Loan Advocate at the Department of Financial Services. In this role, he proposed and advanced consumer protection policies and advised on consumer matters across the agency's business units, including regulatory action and enforcement investigations, with a particular focus on student loan and debt collection policy. Prior to joining DFS, Winston worked in legal services, with a focus on affirmative and defensive litigation related to debt collection, student loans, and foreclosure. He was a Justice Catalyst Fellow and Staff Attorney with the Consumer Protection Unit at the New York Legal Assistance Group, and was a Fellow with the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School.

JOHN BROOKS

John Brooks is a Professor of Law at Georgetown University Law Center, where he has been on the faculty since 2011. His research and scholarship focus on federal tax law and federal student loan law, as well as public finance and social insurance more generally. He is one of the foremost legal academic experts on the income-driven repayment student loan programs, which he has been researching and writing on since 2013. He teaches courses on federal income tax law, corporate tax law, and tax policy.

EILEEN CONNOR

Eileen Connor joined the Project on Predatory Student Lending in 2016. Previously, she was a Senior Staff Attorney in the Special Litigation Unit of the New York Legal Assistance Group, where she was counsel on multiple consumer class-action lawsuits concerning student loan debt. Prior to joining NYLAG, she was a John J. Gibbons Fellow in Constitutional and Public Interest Law at Gibbons P.C. and a staff attorney at the Habeas Corpus Resource Center in San Francisco. Eileen has twice represented legal aid providers and their clients in the U.S. Department of Education's negotiated rulemaking sessions.

Jonathan Glater is a professor of law at UCLA School of Law where in the 2020-21 academic year. He previously taught at the University of California, Irvine School of Law. Glater received a B.A. from Swarthmore College, J.D. from Yale Law School, and M.A. in international relations from Yale University. After graduating from law school he worked in private practice in Buenos Aires, Argentina, and in New York City, before joining the reporting staff of The New York Times, where he worked for nine years before entering the legal academy.

DALIÉ JIMÉNEZ

Dalié Jiménez's scholarly work focuses on contracts, bankruptcy, consumer financial distress, the regulation of financial products, its intersection with consumer protection, and access to justice. Professor Jiménez spent a year as part of the founding staff of the Consumer Financial Protection Bureau where she worked on debt collection, debt relief, credit reporting, and student loan issues. Prior to her academic career, she clerked for the Honorable Juan R. Torruella of the United States Court of Appeals for the First Circuit, and was a litigation associate at Ropes & Gray, L.L.P. in Boston.

BETHANY LILLY

Bethany Lilly is the Director of Income Policy at The Arc where she specializes in public policy related to Social Security, income supports, paid family and medical leave, and poverty. Bethany joined The Arc in May 2019 after six years at the Bazelon Center for Mental Health Law, where she worked on public policy impacting people with mental health disabilities. Prior to joining the Bazelon Center, Bethany was a law clerk with the U.S. Senate Committee on Health, Education, Labor, and Pensions; a legal fellow at the Center for Medicare Advocacy; and, while completing her J.D. at Duke University School of Law, worked at the Duke AIDS Legal Project.

MIKE PIERCE

Mike Pierce is Executive Director and co-founder of the Student Borrower Protection Center. He is an attorney, advocate, and former senior regulator who joined SBPC after more than a decade fighting for student loan borrowers' rights on Capitol Hill and at the Consumer Financial Protection Bureau. Prior to becoming SBPC's Executive Director, Mike served as the organization's founding Policy Director and Managing Counsel for three years. Before he left government service to start the SBPC, for seven years, Mike was the CFPB's lead subject-matter expert on higher education and consumer protection. He advised all aspects of the Bureau's work related to student lending, servicing, debt collection, and oversight of for-profit colleges. Earlier in his career, Mike served as a policy advisor to Congressman John Sarbanes (MD-03), where he assisted in the passage of legislation creating the Public Service Loan Forgiveness (PSLF) program and worked on the 2008 reauthorization of the Higher Education Act.

Robyn Smith currently works as Of Counsel with the National Consumer Law Center, where she concentrates on student loan and for-profit school issues. She also works on these issues as a senior attorney at a legal services organization in Los Angeles. Prior to this, Ms. Smith worked at the California Attorney General's office where she investigated and prosecuted businesses engaged in consumer fraud and unlawful business practices. Ms. Smith also represented low-income consumers in a wide range of consumer law matters as the Directing Attorney of the Consumer Law Project at Public Counsel in Los Angeles and as the Managing Attorney of the Windward Branch of the Legal Aid Society of Hawaii.

CLAIRE TORCHIANA

Claire Torchiana is a Counsel at the Student Borrower Protection Center. Prior to SBPC, Claire was an Equal Justice Works Fellow at Housing and Economic Rights Advocates (HERA) where she focused on issues around federal student loan debt. She engaged primarily in direct legal services; in addition to impact litigation and policy advocacy. Prior to working at HERA, Claire provided direct services for a year at her law school's Community Law Clinic, in addition to completing internships at the California Attorney General's Office; the San Francisco City Attorney's Office and the National Housing Law Project in San Francisco. Claire earned her J.D. at Stanford Law School.

JOHN WHITELAW

John S. Whitelaw rejoined CLASI as its first Advocacy Director in December 2017. John works with advocates to pursue creative strategies to address systemic problems faced by CLASI clients. He also provides supervision and mentorship to advocates in housing, government benefits, and SSA matters. John has more than thirty years of experience representing low income and other vulnerable clients in various legal aid programs. Previously John was Co-Director of the Aging and Disabilities unit at the North Philadelphia office of Community Legal Services, Inc. of Philadelphia.

PERSIS YU

Persis Yu is the SPBC's policy director and managing counsel. Persis is a nationally recognized expert on student loan law and has over a decade of hands-on experience representing student loan borrowers. Persis was previously a staff attorney at the National Consumer Law Center and the director of its Student Loan Borrower Assistance Project, where she led a team of attorneys to advocate on behalf of low-income student loan borrowers. Prior to joining NCLC, Persis was a Hanna S. Cohn Equal Justice Fellow at Empire Justice Center in Rochester, New York. Persis is a graduate of Seattle University School of Law, and holds a Masters of Social Work from the University of Washington, and a Bachelor of Arts from Mount Holyoke College.

STUDENT BORROWER
PROTECTION CENTER

PROTECTBORROWERS.ORG

UCI Law

LAW.UCI.EDU