

*American Bar Association v. U.S. Department of Education:*

**Federal Judge Rules that DOE Acted Capriciously in Denying Public Service Loan  
Forgiveness to Three Public Service Lawyers**

**Introduction**

On February 22, 2019, Judge Timothy Kelly issued an important opinion in *American Bar Association v. U.S. Department of Education*.<sup>1</sup> The American Bar Association (ABA), suing for itself and four public-service attorneys, accused the Department of Education (DOE) of violating fundamental principles of administrative law when it ruled that the public-service lawyers were ineligible to participate in the Public Service Loan Forgiveness program (PSLF), a student-loan repayment program designed to provide student-loan debt relief to people who work in public service jobs. The ABA also argued that DOE acted wrongly when it ruled the organization is not a public-service organization eligible to participate in the PSLF program.

In a lengthy opinion, which contained a detailed analysis of federal administrative law, Judge Kelly ruled against the ABA regarding its own claims. The ABA has no legal rights or obligations under the Public Service Loan Forgiveness statute, Judge Kelly determined; and therefore the Department's conclusion that the ABA did not constitute a qualified public-service employer had no legal consequences.<sup>2</sup> But Judge Kelly concluded that DOE had violated the rights of three public-service attorneys when it ruled they were ineligible for PSLF participation.<sup>3</sup>

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<sup>1</sup> *Amer. Bar Ass'n v. U.S. Dep't of Educ.*, Civil Action No. 16-2476, 2019 WL 858770 (D.D.C. Feb. 22, 2019).

<sup>22</sup> *Id.* at \*14.

<sup>3</sup> *Id.* at \*2 (summary judgment on behalf of plaintiffs' Quintero-Millan, Burkhart, and Voight on their claim that the Department of Education violated the Administrative Procedure Acts in determining that the three public-service lawyers were not employed by a qualified public-service provider).

As discussed below, more than one million Americans have applied for PSLF eligibility; and in initial screenings, about 75 percent of the applicants were certified as PSLF eligible due to the nature of their public service jobs.<sup>4</sup> Later, however, when DOE began processing requests for student-loan debt relief under the PSLF program, it denied 99 percent of them.<sup>5</sup> In *American Bar Association v. U.S. Department of Education*, Judge Kelly ruled that DOE had acted “arbitrarily and capriciously” toward three public-service lawyers when it changed the eligibility standards for the PSLF program and later ruled the three lawyers were ineligible to participate.<sup>6</sup> Judge Kelly’s decision has enormous implications for student-loan debtors who are relying on the PSLF program to help them deal with their federal student loans.

### **The Public Service Loan Forgiveness Program**

Congress enacted the Public Service Loan Forgiveness Program (PSLF) in 2007 to encourage people to take public-service jobs who might otherwise be dissuaded from doing so due to high levels of student-loan debt. Under the terms of the program, individuals working in qualified public-service jobs and who make 120 student-loan payments in approved income-based repayment plans will have the balance of their federal student loans forgiven.<sup>7</sup> In other

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<sup>4</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 18-547, PUBLIC SERVICE LOAN FOREGIVENESS: EDUCATION NEEDS TO PROVIDE BETTER INFORMATION FOR THE LOAN SERVICER AND BORROWERS 9 (Sept. 27, 2018) [hereinafter GAO 18-547].

<sup>5</sup> Stacey Cowley, *28,000 public servants sought student loan forgiveness. 96 got it*, N.Y. TIMES, Sept. 27, 2018, <https://www.nytimes.com/2018/09/27/business/student-loan-forgiveness.html>.

<sup>6</sup> *Amer. Bar Ass’n v. U.S. Dep’t of Educ.*, at \*1.

<sup>7</sup> GAO 18-547, *supra* n. 4 at 4-5.

words, individuals in the PSLF program will have their student-loan debt cancelled after ten years if they hold public service jobs and make regular student-loan payments.<sup>8</sup>

The PSLF program became a critically important option for individuals who had amassed high levels of student debt while in college or graduate school. PSLF became a particularly attractive program for law-school graduates as law-school tuition soared upward in recent years. The American Bar Association estimated in 2019 that graduates from private law schools finish their studies owing on average about \$122,000 in student loans in addition to an average of \$30,000 in loans taken out for undergraduate studies.<sup>9</sup> Graduates of public law schools owe an average of \$88,000.<sup>10</sup> In fact, for people who graduate from second- or third-tier law schools with high levels of student-loan debt and do not obtain high-paying jobs in the corporate law sector, PSLF may be the only viable option for paying off student loans.<sup>11</sup>

The U.S. Department of Education approved a process for certifying which individuals work in public-service jobs that are eligible for PSLF participation, and it assigned the

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<sup>8</sup> For a detailed analysis of the Public Service Loan Forgiveness Program, see Jason Delisle, *The Coming Public Service Loan Forgiveness Bonanza*, BROOKINGS INST. (Sept. 26, 2016), <https://www.brookings.edu/research/the-coming-public-service-loan-forgiveness-bonanza/>. See also If you are employed by a government or not-for-profit organization, you may be able to receive loan forgiveness under the Public Service Loan Forgiveness Program, U.S. DEP'T OF EDUC. (explaining PSLF program and eligibility requirements), <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service#track-eligibility>.

<sup>9</sup> AMER. BAR ASS'N, ISSUE RESOURCES: PUBLIC SERVICE LOAN FORGIVENESS (Jan. 28, 2019). (2019, January 28), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/aba-day/resources/pslf/](https://www.americanbar.org/advocacy/governmental_legislative_work/aba-day/resources/pslf/).

<sup>10</sup> *Id.*

<sup>11</sup> PAUL CAMPOS, DON'T GO TO LAW SCHOOL (UNLESS) (2012).

certification-review process to Fedloan Servicing.<sup>12</sup> According to a 2018 report from the U.S. Government Accountability Office, Fedloan Servicing processed 1,173,420 applications for certification and approved 890,516 of them, or about 75 percent.<sup>13</sup>

In the fall of 2017 the PSLF program had been in place for ten years, and the first wave of student-loan borrowers who had accumulated 120 student-loan payments began applying to have their loan balances forgiven under PSLF. DOE denied almost all of them. As the Government Accounting Office reported in 2018, DOE only approved 55 loan forgiveness applications out of more than 19,000 that it reviewed—an acceptance rate of less than 1 percent.<sup>14</sup> Although applications were rejected for various reasons, DOE threw out 70 percent of them on the grounds that the applicants were not eligible for the program.<sup>15</sup>

Thousands of student-loan debtors who believed they were eligible for public-service loan forgiveness reacted with shock and surprise. In October 2018, student-loan borrowers in public service jobs sued Navient Corporation, accusing the loan servicer of making systematic misrepresentations to borrowers in order to discourage them from enrolling in PSLF and boost Navient’s profits.<sup>16</sup>

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<sup>12</sup> Stacey Cowley, *Student Loan Forgiveness Program Approval Letters May Be Invalid, Education Dept. Says*, N.Y. TIMES, March 30, 2017, <https://www.nytimes.com/2017/03/30/business/student-loan-forgiveness-program-lawsuit.html>.

<sup>13</sup> GAO 18-547, *supra* note 4, at 9.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> Stacey Cowley, *28,000 public servants sought student loan forgiveness. 96 got it*, N.Y. TIMES, Sept. 27, 2018, <https://www.nytimes.com/2018/09/27/business/student-loan-forgiveness.html>.

<sup>16</sup> *Hyland v. Navient Corporation*, Case 1:18-cv-09031 (S.D.N.Y. filed Oct. 3, 2018). *See also* Zack Friedman, *How This New Navient Lawsuit Affects Your Student Loans*, FORBES.COM,

Also that month, 150 Democrats in the U.S. Senate and House of Representatives sent a letter to Education Secretary Betsy DeVos, demanding that DOE turn over information about how it was handling the PSLF program.<sup>17</sup> “We are deeply troubled that millions of dedicated public servants may not obtain the loan forgiveness that they deserve if the Department does not act quickly to correct program implementation issues,” the Congressional Democrats wrote.<sup>18</sup>

### ***American Bar Association v. U.S. Department of Education***

The American Bar Association brought suit against DOE over its handling of the PSLF program in 2016.<sup>19</sup> In its complaint, ABA argued that the Department had violated the ABA’s rights when it ruled that ABA was not an approved public-service organization entitled to participate in PSLF. ABA also sued on behalf of four public-service lawyers who had been declared ineligible for PSLF participation by DOE.

All four attorneys in ABA’s lawsuit carried significant amounts of student-loan indebtedness. Michelle Quintero-Millan graduated from the University of Denver’s law school in 2012. She worked for a time as an ABA attorney providing free legal services to undocumented and unaccompanied immigrant children in South Texas. Her student-loan burden had grown

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(Oct. 8, 2018), <https://www.forbes.com/sites/zackfriedman/2018/10/08/navient-lawsuit-student-loan-forgiveness/#2f054ce143bd>.

<sup>17</sup> Press Release, Rep. James Rankin, Over 150 Democrats Call on Devos to Release More Information About The Department’s Failure to Faithfully Implement the Public Service Loan Forgiveness Program (Oct. 17, 2018), <https://raskin.house.gov/media/press-releases/over-150-democrats-call-devos-release-more-information-about-department-s>.

<sup>18</sup> *Id.*

<sup>19</sup> Ron Lieber, *They Thought They Qualified for Student Loan Forgiveness. Years Later, the Government Changes Its Mind*, N.Y. TIMES, Dec. 20, 2016, <https://www.nytimes.com/2016/12/20/your-money/student-loans/they-thought-they-qualified-for-loan-forgiveness-years-later-the-answer-is-no.html>.

from \$340,000 when she initially began repayment to more than \$430,000 due to accrued interest.<sup>20</sup>

Geoffrey Burkhart graduated from DePaul University College of Law in 2008 and went to work for ABA as Attorney and Project Director for Legal Services. His job included improving legal services for the poor. Burkhart's student indebtedness had grown from \$155,899 in 2009 to over \$200,000 in 2017, even though he had been making regular student-loan payments.<sup>21</sup>

Kate Voigt graduated from Boston College Law School in 2011. She began working for the American Immigration Lawyers Association, an organization that provides legal services for immigrants. Her debt had grown from \$205,546 when she first graduated to more than \$247,000.<sup>22</sup>

Jamie Rudert, a 2010 graduate of American University Washington College of Law, worked for Vietnam Veterans for America, where he represented veterans with disability claims. He estimated that his student-loan debt had grown from about \$135,000 when he graduated to \$161,985 by May 2017.<sup>23</sup>

All four lawyers took public-service jobs in the belief that their jobs qualified them to participate in PSLF. ABA argued that DOE had violated the Administrative Procedure Act when

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<sup>20</sup> *ABA v. USDOE* at \*4.

<sup>21</sup> *Id.*, at \*5.

<sup>22</sup> *Id.*, at \*6.

<sup>23</sup> *Id.*

it changed its definition of public service employment, and it also argued that the Department had violated due process by reversing course without giving the attorneys proper notice.<sup>24</sup>

DOE defended its actions with a variety of arguments. First, DOE argued that its decisions concerning PSLF eligibility were not “final agency actions,” and thus ABA’s lawsuit was premature.<sup>25</sup> But the court rejected that argument, saying that DOE’s decisions were in effect final. DOE also argued that its actions had no “immediate or practical effect” on the four lawyer plaintiffs. But Judge Kelly rejected this argument as mere “nonsense.”<sup>26</sup> It was clear, Judge Kelly observed, that the four lawyers faced growing debt burdens and had “structured their careers and long-term financial plans around their eligibility for the PSLF program.”<sup>27</sup> Thus, Judge Kelly wrote, “DOE’s ruling obviously had an ‘immediate’ and ‘significant’ impact on their ability to plan their careers and finances.”<sup>28</sup>

DOE rejected two attorneys’ PSLF claims based on the agency’s “Primary Purpose” standard. In essence, DOE said that Quintero-Milan and Burkhart were not qualified for PSLF because ABA--their employer--was not an organization that offered public services as its primary purpose. DOE maintained that the Primary Purpose standard had always been in place, and that the original determination that Quintero-Milan and Burkhart’s qualified for PSLF had been a “mistake” or “contractor’s error.”<sup>29</sup>

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<sup>24</sup> *Id.* at \*1.

<sup>25</sup> *Id.* at \*9.

<sup>26</sup> *Id.* at \*12.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at \*15.

But Judge Kelly rejected that argument. The record was clear, Judge Kelly ruled, that DOE had changed its certification standard when it adopted the Primary Purpose rule and that it had done so without complying with the Administrative Procedure Act.<sup>30</sup>

DOE ruled that Voight was ineligible for PSLF participation under its “School-Like Setting” standard. Voight, DOE maintained, had offered educational services, but she had not done so in a school-like setting. DOE also argued that it had applied the school-like-setting standard consistently over the years.

Again, Judge Kelly disagreed. The evidence was all-but-conclusive, Kelly ruled, that DOE adopted this standard *after* it had informed Voight that her job was PSLF qualified but before it reversed itself and told her she was ineligible.<sup>31</sup>

Thus, Judge Kelly concluded, with regard to three of the plaintiff attorneys--Quintero-Milan, Burkhart, and Voight—DOE had changed its position concerning PSLF eligibility to their detriment without engaging in the reasoned decisionmaking process required by the Administrative Procedure Act. Therefore, all three lawyers were entitled to summary judgment on their claims against DOE.<sup>32</sup>

As previously stated, Judge Kelly ruled against ABA on its own claims. In Judge Kelly’s opinion, ABA had been unable to establish that it had been injured by DOE’s ruling that ABA

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<sup>30</sup> *Id.* at \*16.

<sup>31</sup> *Id.* at \*17.

<sup>32</sup> *Id.* at \*20-21.



was not a qualified public-service organization under the PSLF program.<sup>33</sup> Kelly also ruled against attorney Rudert based on a separate legal analysis.<sup>34</sup>

In summary, Judge Kelly ruled, the APA requires a court to set aside agency actions if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>35</sup> DOE, by changing the way it determined PSLF eligibility in violation of the procedural requirements of the Administrative Procedure Act, had violated the rights of Quintero-Milan, Burkhart, and Voight. Accordingly, Judge Kelly vacated DOE’s Primary Purpose and School-Like Setting standards along with the denial letters DOE had sent to Quintero-Millan, Burkhart, and Voight, and remanded their PSLF applications back to DOE for reconsideration in light of Judge Kelly’s opinion.<sup>36</sup>

### **Political Developments**

According to news reports, Education Secretary Betsy DeVos does not support the Public Service Loan Forgiveness program and wants to put an end to it.<sup>37</sup> One senior DOE administrator

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<sup>33</sup> *Id.* at \*23 (“the ABA has no protected property interest in its status as a qualifying organization that provides public interest law services”).

<sup>34</sup> *Id.* at \*21. In a later decision, Judge Kelly denied plaintiff Jamie Rudert’s motion to amend Judge Kelly’s decision, reiterating that Rudert was not entitled to relief. *Amer. Bar Ass’n v. U.S. Dep’t of Educ.*, Civil Action No. 16-2476, 2019 WL 2211208 (D.D.C. May 22, 2019).

<sup>35</sup> *Id.* at \*19.

<sup>36</sup> *Id.* at \*25.

<sup>37</sup> Jordan Weissmann, *Betsy DeVos Wants to Kill a Major Student Loan Forgiveness Program*, SLATE, May 17, 2017, <https://slate.com/business/2017/05/the-trump-administration-wants-to-end-the-public-service-loan-forgiveness-program.html>.

reportedly referred to the program as a “disaster” and a “budget gimmick” and said DOE would not support PSLF if it were not legally obligated to do so.<sup>38</sup>

Apparently, the Trump administration and leading Republicans consider PSLF to be too expensive.<sup>39</sup> A House of Representative Budget Proposal, introduced by House Republicans in 2017, called for elimination of the program.

An independent analysis conducted in 2016 by Jason Delisle of the Brookings Institution also argued that the program would lead to a bonanza of canceled debt for PSLF participants. Delisle recommended elimination of the program altogether and allowing the Department of Education’s income-based repayment programs to accomplish the goal of providing debt relief to public-service employees.<sup>40</sup>

On the other hand, Democrats strongly support PSLF. On April 11, 2019, Senate Democrats introduced a bill titled the What You Can Do for Your Country Act of 2019, which supporters maintain would overall PSLF and expand eligibility. If the bill were to become law all types of federal student loans would qualify for PSLF and all types of federal student-loan repayment plans would be eligible. The bill would also require DOE to provide public employees with clearer information and guidance about the program. Thirteen Senate Democrats

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<sup>38</sup> Casey Quinlan, *Education Department official slams Public Service Loan Forgiveness program as ‘disaster’*, THINK PROGRESS, Dec. 4, 2018, <https://thinkprogress.org/education-department-official-slams-public-service-loan-forgiveness-program-as-disaster-5ab844a8473c/>.

<sup>39</sup> Andrew Kreighbaum, *Proposal Would Overhaul Public Service Loan Forgiveness*, INSIDE HIGHER ED, April 12, 2019 (Trump administration as repeatedly proposed eliminating PSLF).

<sup>40</sup> Delisle, *supra* note 8.

cosponsored the bill, including presidential contestants Cory Booker, Kristen Gillibrand, Kamala Harris, Amy Klobuchar, Bernie Sanders, and Elizabeth Warren.<sup>41</sup>

### **Conclusion and Implications**

Judge Kelly's ruling is one of at least 63 federal court decisions that have ruled against the Trump administration over the past two years.<sup>42</sup> As the *Washington Post* reported, plaintiffs accused the Trump administration of violating the Administrative Procedure Act in two-thirds of these cases;<sup>43</sup> and it was this violation that constituted the heart of Judge Kelly's decision.

*American Bar Association v. U.S. Department of Education* is an important decision for three public-service attorneys, and it could have enormous implications for other individuals in public-service jobs who are relying on the PSLF program to manage their college loans. As discussed earlier, DOE denied 99 percent of the applications for PSLF loan forgiveness it had processed as of September 2018, including applications filed by people who had previously been told by DOE's servicing agent that they were eligible to participate. Judge Kelly's ruling has the potential to force DOE to reverse thousands of those denials and reprocess them in harmony with Judge Kelly's conclusion that DOE had applied the Primary Purpose rule and the School-Like-Setting Rule in violation of the Administrative Procedure Act.

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<sup>41</sup> Press Release, Senator Tim Kaine, Gillibrand, Kaine Lead Group of 13 Senators To Introduce New Legislation To Overhaul Flawed Public Service Loan Forgiveness Program, Ensure Millions of Americans Will Now Be Eligible For the Loan Forgiveness They Have Earned, Senator Tim Kaine, April 11, 2019, <https://www.kaine.senate.gov/press-releases/gillibrand-kaine-lead-group-of-13-senators-to-introduce-new-legislation-to-overhaul-flawed-public-service-loan-forgiveness-program-ensure-millions-of-americans-will-now-be-eligible-for-the-loan-forgiveness-they-have-earned>.

<sup>42</sup> Fred Barbash & Deanna Paul, *The real reason the Trump administration is constantly losing in court*, WASH. POST, March 19, 2019.

<sup>43</sup> *Id.*

