August 11, 2022

U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Docket Number ED-2021-OPE-0077

The National Legal Aid & Defender Association (NLADA) is America's oldest and largest nonprofit organization dedicated to excellence in the delivery of legal services for people who cannot afford to pay for counsel, and we represent more than 700 organizations that provide civil legal aid and public defense services. These comments address the Public Service Loan Forgiveness (PSLF) program. PSLF directly affects our members personally but it is also deeply consequential for the ability of legal aid organizations and public defender systems to deliver effective services to low-income communities.

NLADA supports a number of the changes described in the NPRM, including increased flexibility around which payments qualify for PSLF, the qualification of payments on loans underlying Direct Consolidation Loans, automation of loan forgiveness, and the establishment of a formal reconsideration process. Our comments address a number of specific questions raised by the Department. In particular, they focus primarily on the Department's consideration of whether and how to end the unwarranted and harmful exclusion from PSLF of individuals working with qualifying employers simply because they contract with that employer.

Extend the Limited Waiver to the Effective Date of the New Regulations

Before addressing specific items within the NPRM, we strongly urge the Department to extend the PSLF Limited Waiver that is set to expire on October 31. The existing regulations, prior to the existence of the waiver, were not fit for purpose. We appreciate that the Department recognizes this and has taken steps to rectify them, both through the establishment of the waiver and through this rulemaking process. It is clearly then not only nonsensical, but actively harmful, to return to this deeply flawed framework even for a temporary period of time.

Moreover, its expiry would create considerable confusion for borrowers. NLADA still receives questions from members who do not fully understand the purpose or requirements of the waiver. Implementing another change on October 31 and then a further change next year will only deepen this confusion, is likely to cause some to make administrative errors, and may cause others to unnecessarily abandon the program altogether. The Department should therefore extend any and all elements of the waiver that it has the authority to extend, until the effective date of the new regulations.

Establish an Expansive Reconsideration Process

NLADA has heard consistently from individuals who have been denied loan forgiveness despite believing, often correctly, that they had met the requirements of the program. The lack of a transparent reconsideration or appeals process for those who were wrongfully denied compounded this problem. The establishment of a new formal process that provides the borrower the opportunity to present evidence and receive written reasons for the decision resulting from the process is welcome. However, the Department should also extend the time limit within a borrower can request reconsideration. While the proposed 90-day window would be sufficient for some, it is clear from prior experience of this program that others would need longer to understand fully the steps they need to take to engage in the process and collect additional evidence.

Additionally, the Department has extremely broad statutory authority to grant loan cancellation. This process therefore can and should offer forgiveness to any borrower who can show they have met the substantive requirements of the PSLF program (i.e. those who have made 120 monthly payments that are at least the amount required under income-driven repayment, while working in public service), even if that borrower would otherwise, for technical reasons, not be eligible.

Expand Eligibility to Public Servants Who Do Not Receive W-2 Forms

In the NPRM, the Department indicates its understanding that currently, many individuals performing public service work are denied the ability to earn forgiveness through PSLF, solely because the way in which they are paid for their services in their particular jurisdiction does not align with the requirements created by the existing PSLF regulations. This exclusion includes some who work in the educational and medical fields, as well as many of NLADA's members who provide public interest law services, and specifically, criminal defense for people who cannot afford to pay for a lawyer. Public defense is specifically identified in the Higher Education Act as public service contemplated for forgiveness and we deeply appreciate that the Department highlighted the exclusion of this group in the NPRM, and that it is considering whether and how to rectify this.

The Need to Address the Problem

With respect to *whether* this problem should be addressed, NLADA cannot emphasize strongly enough the urgency of the need. There are three main systems through which public defense is provided for low-income people: institutional public defenders; assigned or appointed counsel; and contract counsel. All of these models provide public defense services to meet the country's constitutional obligations under the Sixth Amendment; however, only institutional public defenders, who are directly employed at a nonprofit or government entity, are able to obtain forgiveness under the existing program. Assigned or appointed counsel are compensated by courts or coordinating entities known as managed assigned counsel (MAC) programs, on an hourly or per-case basis. Least commonly, contract counsel refers to solo practitioners or for-profit firms that contract with a government entity, such as a court, to handle a certain number of cases, or any cases assigned to them during a specified period of time.

The most recent data available, a 2013 survey of indigent defense systems by the Department of Justice, found that "state-administered indigent defense systems employed 6,564 full-time equivalent (FTE) litigating assigned or appointed counsel, 5,270 FTE litigating public defenders, and 1,793 FTE litigating contract counsel."[1] Both assigned/appointed counsel and contract counsel, *well over half of the individuals counted*, are excluded from PSLF due to the overly restrictive regulations.[2]

This makes clear the extent to which the existing regulations have failed to implement the statute and the stated intent of Congress. It is not a small segment of public defenders excluded from PSLF, it is likely to be a majority of them. This is, more importantly, directly contributing to a recruitment and retention crisis that is weakening the public service sector, but also badly harming the ability of public defense systems to provide the protections promised by the Sixth Amendment, undermining our Constitution and concepts of justice. Defenders in ineligible systems also disproportionately operate in rural areas, as the NPRM notes, and it is these areas that face the greatest challenges in recruitment and retention.

In drafting these comments, NLADA consulted with a number of our members and partners representing each of these delivery models for public defense to discuss the questions raised in the NPRM. The remainder of these comments will provide responses to these questions. It is notable that during every conversation it was emphasized to us that not only is the need to address this issue urgent but also, because eligibility for PSLF is so significant, many entities not currently set up to meet potential new requirements would be willing to change data aggregation systems or compensation structures (e.g. moving from flat fee contracts to hourly compensation) in order make forgiveness a possibility for attorneys.

The Department's Proposed Approach to Addressing this Problem

With respect to the question of *how* to address this problem, the NPRM proposes that "only for the purposes of PSLF, eligible borrowers could include a borrower who works as a contractor at a qualifying employer if that qualifying employer is willing to certify the periods worked by that individual." However, the definition of "employee" in §685.219 (b) as proposed appears to require receipt of a W-2 form. Attorneys working in the above-described systems do not generally receive W-2s. The Department should expand this definition, or otherwise make explicit within the regulation that contractors who do not receive W-2 forms are eligible notwithstanding this limited definition.

That aside, certification of periods worked, as proposed by the NPRM, would be a viable approach. First, the data that the "employer" would need to accurately certify is readily available

[1] *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics, U.S. Department of Justice, (November 2016), https://bjs.ojp.gov/content/pub/pdf/saids13_sum.pdf

[2] Moreover, the types of systems surveyed (state-administered systems) tend to utilize public defenders more frequently, meaning across the country the proportion of attorneys whose public defense work is eligible for forgiveness is even lower than in this sample. Additionally many systems, even those that primarily use institutional public defenders, supplement their primary public defense delivery system with assigned counsel to provide representation when a conflict of interest prevents the primary public defense system from representing a client and in certain other circumstances (e.g., in some civil cases like child protection proceedings).

to them. Many if not most assigned counsel are paid hourly. The “employer” in these instances would be a court, a unit of government making payments on behalf of a court, or a MAC program, all of which are qualifying employers and often sign PSLF forms for their own staff. MACs are common and handle defense functions in jurisdictions ranging from individual counties and cities, to regions encompassing multiple counties, as well the entire state of Maine.

It is clear that MAC programs would universally and enthusiastically do what was necessary to certify PSLF forms for the attorneys in their programs, and that many courts would likely do the same. We believe this is a straightforward change, and that the only practical change that seems to be required would be an additional field on the PSLF form to indicate the “employee” is a contractor. It is important that a contractor be able to combine forms (as a borrower currently can with part-time employment), because some attorneys take appointments from more than one court system.

The above change would enable thousands of people performing public defense services to access the forgiveness to which they are entitled under the law.

Additionally, the Department should also consider taking further steps that would account for some or all those whose compensation is not paid on an hourly basis, but who nonetheless perform these services full time. This occurs most commonly in two ways:

- Appointed counsel paid on a per-case or per-case activity basis. While there may not be a record of the number of hours an attorney has spent on this caseload, it is often that the number of cases would indisputably require a full time schedule to complete. We suggest allowing “employer(s)” in these circumstances to certify the PSLF form if *in their judgement* the caseload warrants full-time attention (or, if a borrower is combining forms, an estimated number of hours). This would not be in any sense arbitrary. It would be based on established data or an “employer’s” direct observation.[3]
- Contract counsel. This is usually either an attorney 1) incorporated as a solo practitioner or firm or 2) employed by a small firm that handles a certain number of public defense cases or takes case assignments for a defined period of time.
    - For solo practitioners/firms: as above, providing the contracting entity (court, county, etc.) the ability to certify a PSLF form if the contract represents a full time caseload should be sufficient (helpfully, contracts are sometimes based on a minimum hourly rate).

[3] In some jurisdictions, this judgement would be directly informed by formal written caseload formulas, which already exist and provide a reliable estimate of the time demanded by any particular caseload. Even where these do not exist, “employers” will usually have direct knowledge of the time required to handle a particular number of cases *and* the actual number of cases an attorney has taken. These contracting “employers” have in place layers of accountability and measures to ensure the integrity of this certification. Many are judges, officers, and/or employees of courts, whose position and status are dependent upon upholding laws, and they are beholden to ethical rules. Those without direct knowledge of caseload demands (e.g. a county administrator who pays an attorney on behalf of a court), could easily obtain guidance from the court, or in 34 states, from a statewide public defense oversight entity known as an indigent defense commission.

- For attorneys employed by a larger firm: this would require a for-profit law office to be allowed to certify that a W-2 employee has been engaged full-time in representing clients under a public defense contract.

The NPRM also seeks information about "whether there could be ways to distinguish which types of contractors should be eligible, such as restricting eligibility to a contractor whose job site is co-located with a qualifying employer—either virtually, in-person, or with individuals served by the qualifying employer, such as students—versus one who works completely separately from the qualifying employer." **Co-location is not a viable approach to this distinction.** While a public defender necessarily interacts with a court in representing their client, and even if they are paid by that court, their work is considered independent from that court. This arrangement is fundamental to the functioning of our system of justice. Nor are individuals accused of crimes understood to be "served" by the court. Similarly, a public defender whose appointments and compensation are administered by a MAC program are not in a meaningful sense co-located with the MAC, the relevant function of which is administrative.

Finally, the NPRM seeks input about what types of guidance would be required for employers. We have two suggestions:

1) A simple explanatory confirmation, either on the PSLF form itself or separately, stating clearly that independent contractors, including the types of public defenders described above, are eligible for the purposes of PSLF, would provide reassurance to judges and court administrators that they are authorized to certify when this is requested of them.
2) For "employers" who pay an attorney on the basis of their caseload (rather than an hourly rate): guidance is necessary that clarifies a) that an "employer" is permitted to certify a form based on their knowledge of the demands of an attorney's caseload, and b) how this should be recorded on the PSLF form. For example, could they report "30+" for average hours?

It is not clear that there is any reason that these changes could or should not apply retroactively. Contractors who become eligible for PSLF under the new regulations should be able to submit PSLF forms for periods worked prior to the effective date of the new regulations, and to have qualifying payments during those periods counted towards PSLF. Any other changes contemplated by the Department that expand access to PSLF should also apply retroactively where possible.

Thank you for your consideration of our comments. We look forward to continuing to work with the Department to improve access to the PSLF program. If you have any questions or if further information would be helpful, please contact David Miller at d.miller@nlada.org.