STUDENT BORROWER PROTECTION CENTER

August 11, 2022

U.S. Department of Education
Office of the Secretary
400 Maryland Avenue SW
Washington, D.C. 20202

VIA ELECTRONIC SUBMISSION

Re: Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program (Docket ID ED-2021-OPE-0077)

Dear Secretary Cardona:

The Student Borrower Protection Center (SBPC), a national policy non-profit organization committed to ending the student debt crisis, submits this comment in response to the U.S. Department of Education's (ED) Notice of Proposed Rulemaking (NPRM), published to the Federal Register on July 13, 2022.[1] Although this detailed comment responds specifically to ED's proposed interpretation and implementation of the federal Public Service Loan Forgiveness (PSLF) program, this NPRM proposed significant improvements to a number of rules related to various federal student loan programs that ED administers pursuant to Title IV of the Higher Education Act of 1965 (HEA).

In particular, throughout the NPRM, ED has proposed important reforms in several places that will automate and expand access to many of the relief programs provided by the HEA. We commend ED for expanding access to disability discharges, borrower defense, closed school discharges, and false certification to greater categories of borrowers in each of these programs—and in doing so, more fully aligning these programs with their congressional intent and ensuring greater relief to more borrowers. We also support ED's efforts to eliminate burdensome and unnecessary paperwork problems by automating cancellation programs wherever ED has the information necessary to do so. For too long, paperwork and bureaucratic barriers—along with illegal practices by the private-sector firms that service and collect on these loans—have prevented millions of student loan borrowers from accessing critical relief. All too often, those who are most in need of the vital cancellation programs offered by the HEA are the least able to navigate ED's byzantine processes. We are encouraged by this administration's efforts to remove these barriers and limit its reliance on manual processing by private-sector financial services companies, and urge ED to continue to do so wherever possible.

[1] U.S. Dep't of Educ., *Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program*, 87 Fed. Reg. 41878 (July 13, 2022) ("NPRM").

This administration has delivered federal student loan relief to more public service workers than ever before. On October 6, 2021, ED's announcement of a limited waiver of certain PSLF rules (Waiver) was both an acknowledgement of the barriers that too many borrowers historically faced while attempting to access the program and a commitment to lowering those barriers. ED's intervention is working. In only nine months since ED announced the Waiver, the number of borrowers who have filed PSLF paperwork over the program's nearly 15 years has doubled; as of June 2022, 1,168,083 borrowers have filed forms with ED, an increase of 632,143 since September 2021, when only 535,940 borrowers were on track for debt cancellation.[2] In short, the Waiver is a success, although there is still much work to be done. It is also a blueprint, and we are encouraged to see ED explicitly state its intention to codify the Waiver into the PSLF regulations.[3]

Through this rulemaking, ED can finally faithfully execute PSLF's promise of loan cancellation for public service workers. Unfortunately, ED has already failed to fully capitalize on this opportunity, by publishing the PSLF NPRM without simultaneously issuing the NPRM for an overhauled income-driven repayment (IDR) plan. As discussed below, PSLF and IDR should be closely and carefully coordinated, and to revise one without even publishing proposed revisions to the other denies the public the opportunity to carefully consider the interaction between these policies when commenting on the first substantial overhaul of PSLF regulations in nearly 15 years. Still, in our comments below, we attempt to respond to ED's specific PSLF proposal while also incorporating comments that are relevant to ED's future IDR rulemaking. We urge ED to consider these comments comprehensively as it proceeds with its IDR rulemaking processes.

Although we applaud several of ED's proposed changes to the PSLF program, the critical takeaways from this comment are that until ED begins to extend PSLF eligibility to public service workers with for-profit employers and until it considers time spent in forbearance, deferment, or default as qualifying time for debt cancellation, ED will continue to fall short on keeping PSLF's statutory promise to borrowers across the country. Additionally, we urge ED to view its recent actions to correct for past miscommunication and student loan servicer misconduct, such as the Waiver, as remedial rights that attach to individual borrowers rather than sunsetting on arbitrary, or even uncertain, timelines.

This comment first provides background information on PSLF and the need for improved program rules, and then notes the several improvements in ED's proposed rules. It then goes into detail about areas where ED's proposed rules fail to meaningfully address PSLF's current shortcomings: qualifying employers, qualifying payments, truncated remediation of borrower harm, credit for Federal Family Education Loan (FFEL) program borrowers, and reconsideration.

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[2] *Compare Public Service Loan Forgiveness Data: June 2022*, Federal Student Aid, U.S. Dep't of Educ. *with Public Service Loan Forgiveness Data: September 2021*, Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data.

[3] NPRM, 87 Fed. Reg. at 41936.

1. Background.

Passed into law on a bipartisan basis in 2007, PSLF was created to provide relief to public service workers with student loan debt in exchange for a decade of service in their communities or to our country.[4] Since its inception, however, PSLF has been undermined by industry malfeasance and mismanagement by ED officials across successive presidential administrations. By December 2018, over a decade after the program began and more than one year after the first borrowers should have been eligible for cancellation, the program had a 98 percent rejection rate.[5] In September 2021, the month before the limited PSLF Waiver was announced, Temporary Expanded PSLF, the expansion meant to address PSLF's initial rejection rates, had its own 91 percent denial rate.[6] Internal projections from PHEAA, the company that ED contracted with to manage PSLF, estimated that even by 2026, almost ten years after borrowers were meant to have begun becoming eligible for relief through the program, four of every five borrowers pursuing PSLF would still not have secured promised loan forgiveness through it.[7] Underlying these statistics, millions of public service workers have been cheated out of their right to loan forgiveness guaranteed under federal law.

In August 2021, ED announced its intention to convene a negotiated rulemaking committee on Affordability and Student Loans, which would, *inter alia*, "rewrite regulations for Public Service Loan forgiveness."[8] The committee met for over three weeks during the months of October, November, and December.[9] However, negotiators did not reach consensus on ED's PSLF proposals during these sessions.[10] Two major topics of debate were whether to include public service workers with for-profit employers and how to count qualifying time for PSLF.

On October 6, 2021, during the first week of negotiations and drawing on its authority under the HEROES Act of 2003 and the ongoing COVID-19 pandemic, ED announced a limited-time waiver of certain of the PSLF requirements, namely requirements that qualifying payments must

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[4] 20 U.S.C. § 1001.
[5] *Public Service Loan Forgiveness Data: Pre-March 2019 PSLF Report*, Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data.
[6] *Id*. at *September 2021 Report*.
[7] Ben Kaufman, *Newly Uncovered Internal Projections from a Department of Education Contractor show PSLF Problems Will Persist Over Time*, Student Borrower Protection Center (Sept. 9, 2021), https://protectborrowers.org/newly-uncovered-internal-projections-from-a-department-of-education-contractor-show-pslf-problems-will-persist-over-time/.
[8] Press Release, U.S. Dep't of Educ., *New Negotiated Rulemaking Committee to Focus on Student Loans, Targeted Discharge and Forgiveness Authorities* (Aug. 6, 2021), https://www.ed.gov/news/press-releases/new-negotiated-rulemaking-committee-focus-student-loans-targeted-discharge-and-forgiveness-authorities.
[9] *Negotiated Rulemaking for Higher Education 2021-22*, U.S. Dep't of Educ., https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html (last visited August 2, 2022).
[10] Transcript, *Affordability and Student Loans Committee*, Session 3, Day 4, Morning 42 (Dec. 9, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec9am.pdf.

be made on Direct Loans and pursuant to certain payment plans.[11] Under the Waiver, ED announced that it will grant credit to borrowers with existing Direct Loans or who consolidated other loans into Direct Consolidation Loans for any period during which the borrower was in repayment, regardless of loan type. The Waiver is time limited, however, and is currently set to expire after October 31, 2022.

Although it leaves out certain borrowers, the Waiver addresses many documented issues with the PSLF program and lowers several of the barriers to loan forgiveness for public service workers. It has resulted in debt cancellation for more than 146,000 public service workers, and counting,[12] and offers a model for how PSLF could be structured in the long term. One of ED's stated goals with the present NPRM is to continue much of the Waiver by codifying its provisions into the PSLF rules.[13]

2. ED's proposal, although missing certain key changes, would fix the current PSLF's program's several failures.

Although there was no consensus for PSLF during the negotiated rulemaking, ED's proposed PSLF rules include several changes that will ensure qualifying public service workers can access the program. We applaud these changes, which are each discussed in greater detail below, and which include a revised definition for "full-time" employment, flexibility around counting qualifying payments, including certain forbearance and deferments a qualifying time, granting PSLF credit for qualifying payments on Direct Loans underpinning Direct Consolidation loans, and setting the stage for an automated PSLF program. These proposals create a strong foundation for including the additional changes discussed in the next section, and collectively would finally keep PSLF's promise of debt cancellation to public service workers.

a. ED's proposed definitions of full-time employment will level the playing field for all public service workers, and will extend debt cancellation to more non-tenure track employees in the higher education sector.

We agree with ED's proposal to amend its definition of "full-time" to create a single standard for all public service workers. Although the HEA requires only "full-time"[14] employment in a qualifying public service job, without defining that term, ED previously chose through

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[11] Press Release, U.S. Dep't of Educ., *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* (Oct. 6, 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.

[12] *Public Service Loan Forgiveness Data: June 2022 PSLF Report*, Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data.

[13] NPRM, 87 Fed. Reg. at 41936.

[14] 20 USC § 1087e(m)(3)(B)(i).

rulemaking to prioritize employers' classifications of their workers over those workers' actual time spent engaged in public service.[15] In the current rule, the term is defined as, in short, the greater of either an average of 30 hours per week or whatever the employer defines as "full-time." This excludes from PSLF many workers—e.g., W-2 recipients, contract work and contingent workers—who may work at least 30 hours but who are not considered full-time employees. ED is proposing a uniform 30 hours per week standard for all public service workers.[16] This change would reduce employers' discretion as a barrier of entry to accessing PSLF.

We also agree with ED's inclusion of a calculation for time worked by non-tenure track employees of institutions of higher education, whose employment status may not reflect their actual hours worked. Specifically, ED proposes multiplying these public service workers' credit or contact hours per week by a factor of 3.35.[17] Any non-tenure track employees whose multiplied hours equal or exceed 30 hours per week would be considered full-time. ED notes that nearly identical factors for PSLF are already required by state law in California and Oregon.[18] Notably, recent legislation that has been passed or soon will pass in Washington and New York includes the same conversion factor for public service workers.[19] Although we support the spirit of this proposed amendment, we urge ED to carefully review any comments to this NPRM from educators or their labor unions, as those commenters are positioned best to provide informed and technical suggestions to ensure ED's intent to extend PSLF eligibility to these non-tenure track employees is accurately reflected in the proposed language.

To ensure these two changes will have their full intended effect, we urge ED to remove the question on the PSLF employer certification form that asks the employer to indicate whether the borrower is a full- or part-time worker. This is no longer necessary, as the form also requires employers to report the borrower's weekly hours, which would be the sole basis for determining full-time status under the proposed regulation. We regularly hear from borrowers whose employers do not consider them to be full-time employees for health insurance or other benefits, and so refuse to indicate that they are full-time for PSLF purposes, even if they work the required hours. To leave this question for employers risks that employers continue to apply their own definition of full- and part-time or, worse, refusing to certify employment on the basis that they do not consider the requesting borrower to be a full-time employee. This revision can be done at the sub-regulatory level.

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[15] 34 § CFR 685.219(b) (definition of "full-time").
[16] NPRM, 87 Fed. Reg. at 42001 (proposed § 685.219(b), definition of "full-time").
[17] *Id*.
[18] *Id*. at 41933.
[19] *See Public Service Loan Forgiveness Program–Public Service Employees*, C. 248, Laws of 2022 (Wash.), S.8389C/A.9523B (N.Y., 2022).

b. ED's proposed rule would remove an unnecessary limitation on how borrowers make qualifying payments.

We agree with ED's proposal to remove the limitations of when and how qualifying payments are made.[20] The HEA requires only that PSLF applicants make 120 payments in particular plans or amounts while in a qualifying job to secure loan cancellation.[21] The law does not dictate specifics around the timing of those payments, whether they must be made in complete payments, or whether available "lump sum payments" that cover periods of more than one month can be counted as such toward PSLF.[22]

ED, however, previously established through rulemaking that student loan payments may only count toward PSLF if they are made within 15 days of the scheduled due date and cover the full scheduled installment amount, no more or less.[23] In doing so, ED set the stage for significant confusion and servicing errors that continue to bar eligible borrowers from their entitled loan forgiveness.[24] Numerous investigations of student loan servicers have revealed that these private companies frequently misinform borrowers and routinely mishandle, misallocate, and misapply payments.[25] For public service workers, those errors can prevent otherwise-eligible payments from counting toward loan cancellation within the narrow definition of eligibility that ED established. Further, ED previously processed lump-sum payments made by public service workers who were able to put more toward their loans by placing borrowers' accounts into "paid ahead" status, which caused successive months or years of student loan payments to be disqualified from counting toward PSLF. ED has already corrected this issue and accepts lump-sum payments as qualifying payments for up to 12 months,[26] and seeks to codify this policy in its proposed regulation.[27] We are encouraged to see ED remove these barriers in its proposed rules.

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[20] NPRM, 87 Fed. Reg. at 42001-02 (proposed § 685.219(c)(2)(i-iv)).
[21] 20 USC § 1087e(m)(1)(A)-(B).
[22] *Id*.
[23] 34 § CFR § 685.219(c)(iii).
[24] *See*, *e.g*., Comment on Fed. Reg. Doc No. 2021-15831, Docket No. ED-2021-OUS-0082, https://www.regulations.gov/comment/ED-2021-OUS-0082-1201 ("I was working in washington state for the state in [mental] health and the first three years of my payments were disallowed because i rounded up my payments by pennies to make it an even amount. Because i "OVERPAID" they were not counted. Three years of payments gone. Meaning three extra years of payments till i could possibly qualify. How is that possible.").
[25] Press Release, Consumer Fin. Prot. Bureau, *CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment* (Jan. 18, 2017), https://perma.cc/DAP6-689Z; Press Release, Cal. Dep't of Fin. Prot. and Innovation, *California Department of Business Oversight Sues Student Loan Servicer PHEAA/FedLoan* (Apr. 2, 2020), https://dfpi.ca.gov/2020/04/02/california-department-of-business-oversight-sues-student-loan-servicer-pheaa-fedloan/; Press Release, N.Y. Att'y Gen., *Attorney General James and Superintendent Vullo Announce $9 Million Settlement of Federal Student Loan Servicing Claims with ACS Education Services* (Jan. 4, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-and-superintendent-vullo-announce-9-million-settlement.
[26] See "Can I qualify sooner by making higher monthly payments?", Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#qualifying-payments (last visited Aug. 8, 2022).
[27] NPRM, 87 Fed. Reg. at 42001-02 (proposed § 685.219(c)(2)(iii-iv)).

Additionally, these timeliness requirements do not exist for borrowers experiencing financial hardship and pursuing loan forgiveness under IDR.[28] Not only should qualifying payment rules for these programs be identical to the maximum extent possible, aligning rules about qualifying payments with standards for IDR payment counting would have the added benefit of significantly simplifying the servicing of accounts for both PSLF and IDR borrowers—eliminating much of the need for specialization among student loan servicers and mitigating the potential for future mismanagement and abuse.

We therefore applaud ED's proposal to remove the timeframe and paid-in-full limitations for qualifying payments. The new rule, as proposed, would allow public service workers to make payments in installments and more clearly explains how lump-sum payments will be credited for PSLF purposes. Although these are positive improvements, as ED finalizes its IDR rules proposal, we continue to urge the agency to ensure that the two programs qualifying payments standards are harmonized to the maximum extent possible.

c. ED's proposed rules to grant PSLF credit for certain time spent in deferment or forbearance should be expanded.

We applaud ED's inclusion of certain deferments and forbearances as qualifying time for PSLF, however, as discussed in greater detail below, the rationale underpinning this inclusion—significantly, that student loan servicers steer borrowers away from IDR plans and into deferment and forbearance[29]—supports including all time in deferment or forbearance, as well as in default. *See infra* Section 3(b)(ii).

d. ED's proposal to award PSLF credit on Direct Consolidation Loans for time spent on underlying Direct Loans is an important step toward making PSLF work for borrowers.

We support ED's proposed rule to allow for qualified payments made on a Direct Loan to be applied to a subsequent Direct Consolidation Loan.[30] This proposal would codify one of the most powerful components of the PSLF Waiver, which is to allow for loan consolidation without restarting the clock on a public service worker's 120 months of work and payments. As discussed in detail below, *infra* Section 3(c), ED should extend this same opportunity to FFEL program borrowers, particularly given their history of being misinformed about their PSLF eligibility and consequent loss of qualifying time.

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[28] *See*, *e.g.*, 34 CFR § 685.209.
[29] NPRM, 87 Fed. Reg. at 41936.
[30] *Id.* at 42002 (proposed § 685.219(c)(3)).

Additionally, although this may be achieved at the sub-regulatory level, we urge ED to include clarifying language in either §§ 685.219(c)(3) or 685.219(d) that, in the instance of multiple Direct Loans or a combination of Direct Loans and FFEL program loans that have been consolidated, the resulting Direct Consolidation Loan shall be credited with as much PSLF qualifying time as the most eligible of the underlying loans. This conforms with ED's current policy during the Waiver,[31] and should be made clear to all stakeholders in the text of the rule itself.

e. ED's proposal to remove the burden of applying for PSLF from individual borrowers and to instead automate debt cancellation for public service workers will help ensure relief reaches borrowers who need it.

We support ED's proposed language to allow for the Secretary to make PSLF determinations on borrowers' PSLF eligibility without an application as a step toward automating the program. On October 6, 2021, when ED announced the PSLF Waiver, it also announced that it would begin to engage in data matching with the federal Office of Personnel Management and Department of Defense to obtain employment certification for federal employees for the purpose of awarding them PSLF credit.[32] ED has also since commenced conversations with other large public service employers, such as state and municipal governments, to conduct similar data matching. In its proposed section 685.219(f), *Application not required*, ED proposes that the Secretary can forgive loans if he has "sufficient information in the Secretary's possession to determine the borrower has satisfied the requirements for [loan] forgiveness under this section." This will make clear that ED has the authority to administer PSLF using data matching agreements to obtain employer certification without requiring borrowers to file paperwork, at which point ED can consult its own payment history records and award PSLF qualifying time and ultimate loan cancellation accordingly.

With these proposed changes, even more public service workers will be able to access PSLF, and more equitably. However, ED has omitted certain changes discussed during negotiated rulemaking that would better align its administration of PSLF with its implementing statute, address known shortcomings, and unlock debt cancellation for public service workers across the country. These additional changes are discussed in the next section of this comment.

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[31] *See* Dear Colleague Letter, U.S. Dep't of Educ., GEN-21-09, *Guidance for FFEL and Perkins Loan Program Participants on the Limited Public Service Loan Forgiveness Waiver* (Dec. 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.

[32] Press Release, U.S. Dep't of Educ., *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* (Oct. 6, 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.

3. Additional amendments to the PSLF program administration are needed to keep the promise of debt cancellation made to public service workers across the country.

The congressional intent behind PSLF is clear: work in public service for ten years, and the remainder of your federal student loan debt will be cancelled. As discussed above, since PSLF's creation, that promise has been mostly broken for the millions of public service workers with federal student loans.[33] The PSLF Waiver created an opportunity to address the program's shortcomings, but is time-limited. Through the current rulemaking, ED has an opportunity to codify aspects of the Waiver and to ensure that its program administration and its servicers no longer stand as a barrier between public service workers and their statutory right to debt cancellation. ED's proposed rules fail to completely seize this opportunity, and would continue many of the PSLF program's major shortcomings.

In this section, we call ED's attention to several remaining barriers to PSLF debt cancellation that are within ED's authority to address and that, if lowered, would represent a faithful execution of PSLF's Congressional intent. Most critically, ED should extend PSLF to any borrower working in public service, including those with for-profit employees or who work as contractors, and should count all time while in qualifying employment as qualifying payment, including time in forbearance, deferment, and default. Not only does ED have the statutory obligation and authority to make these changes, the PSLF Waiver and IDR Account Adjustment have effectively created remedial rights with respect to qualifying payments that must be codified and extended after these programs' stated expiration dates. Each of these, and others, are discussed in detail below.

a. ED's current proposal excludes entire classes of public service workers from PSLF.

A critical element of PSLF reform that ED has omitted from its proposed rule is to create a path to PSLF for public service workers at for-profit employers. The same is true for public service workers who are "1099 employees" as opposed to receiving IRS Form W-2s from their employer. Although there is no statutory bar to including these eligible borrowers, ED has historically excluded them via its regulations. This is in conflict with the text of the HEA's PSLF provisions, undercuts the Congress's intent to deliver relief to public service workers, and is out of touch with modern labor market dynamics. Unfortunately, ED's proposed rule maintains this exclusion with only narrow potential exceptions. ED also proposes a new standard by which

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[33] *Compare* Press Release, Student Borrower Prot. Ctr., *New Analysis: More Than 9 Million Public Service Workers with Federal Student Loans Eligible to Pursue Debt Cancellation, Fewer than 2 Percent Have Received Relief, and Only 15 Percent on Track* (June 9, 2022), https://protectborrowers.org/new-analysis-more-than-9-million-public-service-workers-with-federal-student-loans-eligible-for-debt-cancellation-fewer-than-2-percent-have-received-relief-and-only-15-percent-on-track/, *with Public Service Loan Forgiveness Data*, Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/data-center/student/loan-forgiveness/pslf-data.

non-government and non-501(c)(3) non-profit organizations would be deemed eligible for PSLF, which would likely reduce the number of currently eligible employers.

In its final rules, in addition to maintaining the current eligibility for traditional government and 501(c)(3) non-profit employees, ED should extend PSLF to any employee of an organization that provides one of the public services enumerated in the HEA's PSLF provisions, and should not limit the definition of eligible employee to workers who receive an IRS Form W-2.

i. ED's current PSLF regulations maintain an extra-statutory exclusion that denies millions of public service workers access to debt cancellation.

Under statute, borrowers must work in a "public service job" to qualify for PSLF.[34] In the HEA, the Congress defined "public service job" to include work in a broad swath of industries, ranging from emergency management to healthcare support occupations to school-based library sciences.[35] In its regulations, however, the Department simultaneously substantially broadened and unnecessarily and harmfully narrowed this definition by shifting the emphasis on public service "jobs" to employment by a public service "organization," essentially changing the qualification for PSLF from concerning the type of work someone does to the type of employer for which they work.[36]

This subtle change has carried significant implications for borrowers working in permitted public service fields as contract or temporary workers for for-profit companies, rather than as direct employees of a qualifying nonprofit organization or government agency. It also has significant implications for workers in public service fields that are increasingly privatized. For example, there are many healthcare workers, such as home health care aides, eldercare workers, and nurses, whose jobs clearly fall within the spirit of PSLF and the letter of the statute, but who are not eligible for the program because they happen to be employees of a for-profit hospital system or healthcare company.[37] The implications of this job-versus-employer distinction are largest for workers in historically low-income professions, whose roles are increasingly outsourced.[38]

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[34] 20 USC § 1087e(m)(1)(B)(i).
[35] *Id.* at § 1087e(m)(3)(B)(i).
[36] *Compare id.* § 1087e(m)(3)(B)(i) *with* 34 § CFR 685.219(b)-(c).
[37] Chris Schwartz and Laura Padin, *Tempting Out the Federal Government*, National Employment Law Project (June 2019), https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-Temping-Out-Federal-Government-6-19.pdf.
[38] Rebecca Smith and Claire McKenna, *Tempted Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers*, National Employment Law Project & National Staffing Workers Alliance (Feb. 2015), https://s27147.pcdn.co/wp-content/uploads/2015/02/Temped-Out.pdf.

Public service workers who nevertheless find themselves technically employed by a for-profit company tend to be lower paid, and they are disproportionately workers of color.[39] Research on the demographics of America's healthcare workforce shows vast racial and gender disparities across professions.[40] Healthcare jobs, in particular, are heavily reliant on workforces that are disproportionately Black, brown, and/or female.[41] As a result, ED's definition of qualifying employment for PSLF contributes to the growing racial wealth gap among student loan borrowers.

In the context of the COVID-19 pandemic, the inequity of this policy choice has been laid bare. Our nation's public health workforce, including front-line caregivers working in hospitals, nursing homes, and in patients' homes, has taken on the extraordinary burden of protecting vulnerable people at great personal risk, all while too often being denied the benefits promised under the law when their employer is not organized as a nonprofit.[42]

There is no statutory reason for this narrow focus solely on employer, nor does it reflect today's realities of public service employment for many borrowers. ED has the authority to revise its regulations to more accurately implement the Congress's intent that borrowers working in public service should receive loan forgiveness, and doing so would recognize that the economy and labor markets have evolved since the time of PSLF's passage.[43] To accomplish this, ED must build on its existing definition to create a path for contract and for-profit employees.

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[39] Janet Nguyen, *The U.S. Government is Becoming More Dependent on Contract Workers*, MarketPlace (Jan. 17, 2019), https://www.marketplace.org/2019/01/17/rise-federal-contractors/.

[40] U.S. Dep't of Health and Human Services, Health Resources and Services Administration, National Center for Health Workforce Analysis, *Sex, Race, and Ethnic Diversity of U.S. Health Occupations (2011-2015)* (Aug. 2017), https://bhw.hrsa.gov/sites/default/files/bhw/nchwa/diversityushealthoccupations.pdf.

[41] *Id*.

[42] *See*, *e.g*. Comment on Fed. Reg. Doc. No. 2021-15831, Docket No. ED-2021-OUS-0082, https://www.regulations.gov/comment/ED-2021-OUS-0082-1504 ("I am a Nurse in a Nursing Home. I do not qualify for the PSLFP because my employer is a for profit. I am still on the front lines with COVID; nursing homes were the hardest hit, with little supplies. I report for work every day, and yes I am quickly getting burnt out with staff shortages. I feel this loan forgiveness shouldn't be only qualified for non-profit facilities because employees have no control over that. I work within where I live, where my family is. That shouldn't limit me to the same forgiveness because I am unable to relocate to an underprivileged area and work non-profit. Everywhere is struggling right now with COVID, and my job is harder than ever because of it. The qualifications should be revamped for nursing homes nurses period. We are keeping the elderly population safe as best as we can, no matter who our employer is.").

[43] *See*, *e.g*. Kate Bahn, *Research finds the domestic outsourcing of jobs leds to declining U.S. job quality and lower wages*, Washington Center for Equitable Growth (Aug. 21, 2019), https://equitablegrowth.org/research-finds-the-domestic-outsourcing-of-jobs-leads-to-declining-u-s-job-quality-and-lower-wages/.

ii. Although ED's proposed rule continues its extra-statutory exclusion of public service workers with for-profit employers and contract workers, ED seeks input on extending PSLF to for-profit employees in limited instances.

In its proposed rule, ED maintains its focus on government and non-profit employers, rather than jobs. There are both policy (every employee in these organizations furthers their work) and practical (this is easily operationalized) reasons for this definition. Rather than playing a gatekeeping function for the program, this definition can serve as a basis for building additional points of entry to PSLF. Although the text of the proposed regulation itself does not include provisions that would extend eligibility to public service workers with for-profit employers or to contract workers, ED's accompanying preamble proposes and invites comment on specific scenarios in which PSLF eligibility could be extended. These scenarios, discussed below, reflect an understanding of important core principles that support expanding eligibility. However, they are severely limited in scope, and must serve only as illustrative examples of how to expand PSLF eligibility to its broad potential under the HEA, not as additional limiting factors.

ED proposes three such scenarios: 1) when state or local law prevents a public service worker from being a direct employee of an eligible non-profit employer, such as doctors in Texas and California, who are statutorily prohibited from being employed directly by non-profit hospitals;[44] 2) for-profit early childhood education providers, which ED reasons are an enumerated and specifically defined category in the HEA that may be readily verifiable based on licensure and state regulation;[45] and 3) workers who have a contract to work for a government or non-profit employer, either directly or through an organization, but who are not considered employees.[46] ED is seeking feedback on these scenarios, which are not currently reflected in its proposed regulation text.

Although we applaud ED's effort to expand eligibility, underpinning these limited-scope proposals are critical premises that should be extended to significantly broader classes of public service workers with for-profit employers.

First, ED appears to appreciate that borrowers cannot always choose to perform public service work for a particular employer type. ED discusses particular statutory hurdles in Texas and California, but other factors ranging from socio-economic circumstances, availability of certain jobs and employer types in a borrower's region, and industry norms may be an equally structural hurdle and limitation on borrowers' choice of employer, even in instances where they perform a clear public service.

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[44] NPRM, 87 Fed. Reg. at 41933.
[45] *Id*.
[46] *Id*. at 41934.

Second, in proposing to grant PSLF access to for-profit early childhood education providers, ED acknowledges that there are identifiable classes of for-profit public service workers for whom an assessment of eligibility could be operationalized, at the individual borrower or employer level. Private urgent care medical staff and home health aides are two such examples, which are each clear instances, respectively, of the following qualifying jobs under the PSLF statute:

> public health (including nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics) . . . public service for individuals with disabilities, [and] public service for the elderly[.][47]

The focus on for-profit early childhood education is overly narrow, as for-profit public health providers, among others, are also readily identifiable and clearly perform a qualifying public service. As ED currently does for governments and non-profits, it could determine that, for example, an entire for-profit hospital or urgent care is a qualifying employer and extend PSLF to its employees.

Finally, and similar to the examples of doctors in Texas and California, ED recognizes that contracted workers perform public services, even when they are not considered direct employees of a government or non-profit public service provider. Here, ED proposes allowing for the non-employer qualifying organization to certify for the purpose of PSLF hours performed by a non-employee worker pursuant to a contract.

ED could incorporate these principles into its proposed rules and dramatically expand the scope of workers who can access PSLF, and, per ED's own stated policy objective, "align the [PSLF] regulations with the statutory intent of the PSLF Program."[48] As discussed in greater detail below, by maintaining government and non-profit employers' existing eligibility and simultaneously permitting certification for non-employee contractors, and by extending employer eligibility to for-profit providers of public services, ED could increase the number of eligible public service workers without having to conduct individual assessments of job descriptions.

iii. ED's specific questions about extending PSLF to certain for-profit employers reflect its commitment to maintaining its extra-statutory exclusion.

In its discussion of qualifying employers, ED posed a series of questions, mostly related to for-profit early childhood education providers. This comment does not address each of those

[47] 20 USC § 1087e(m)(3)(B)(i).
[48] NPRM, 87 Fed. Reg. at 41933.

questions, to which other commenters are better suited to respond, but instead offers overarching responses that should apply to the entirety of ED's inclusion of additional public service workers in PSLF, not just in the case of for-profit early childhood education providers.

First, ED asks whether it should consider eligibility for or receipt of federal funding as a requirement for extending eligibility to individual for-profit early childhood education providers.[49] ED should not do this. The PSLF provisions in the HEA make no mention of funding sources, and so to use funding sources as a gatekeeping mechanism would be yet another example of extra-statutory limitations imposed by ED. Further, the focus on federal funding, as opposed to state or local public funding, is arbitrary. Additionally, public service workers generally do not pick their employers based on tax status or funding source, so to determine PSLF eligibility on this basis would exacerbate the already-uneven playing field for workers who perform the same service for different employers. Finally, there are sound reasons why an employer may choose not to accept federal funding, which sometimes includes restrictions that can run counter to the organization's mission or beliefs.[50]

Second, ED asks whether it should limit eligibility to for-profit early childhood education providers for which ED can receive federal Employer Identification Numbers and other information from another federal agency, to facilitate eligibility assessments.[51] ED should not do this. This would substitute one extra-statutory, operational limitation for another. Public service workers with federal student loan debt should not be penalized because federal agencies lack specific and shareable information about their employers.

Third, ED asks whether it is "consistent with the purpose and goals of the PSLF program to include for-profit early childhood education" as qualifying employment for PSLF.[52] This question reflects ED's longstanding misapplication of the HEA's PSLF provisions. The statute specifically enumerates early childhood education as an acceptable type of "public service job" for PSLF,[53] and places no qualification related to tax status or corporate form of the early childhood education employer. Indeed, the fact that in a few instances the Congress included qualifiers that certain public services occur in public or non-profit contexts to count for PSLF indicates that the overall list of enumerated services is not limited to only those public or non-profit contexts.[54] The PSLF goals are therefore clearly agnostic to an employer's status in almost

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[49] *Id*.
[50] *See*, *e.g.*, *Statutory Restrictions on LSC-funded Programs*, Legal Services Corp., https://www.lsc.gov/our-impact/publications/other-publications-and-reports/statutory-restrictions-lsc-funded-programs#:~:text=The%20LSC%20Act%20prohibits%20participation%20in%3A&text=Habeas%20corpus%20actions%20challenging%20criminal,of%E2%80%94political%20or%20labor%20activities (last visited Aug. 2, 2022).
[51] NPRM, 87 Fed. Reg. at 41933.
[52] *Id*.
[53] 20 U.S.C. § 1087e(m)(3)(B)(i).
[54] *See*, *e.g.*, *id.* (specifying, *inter alia*, that a permissible public interest law service job is work at a non-profit on behalf of low-income communities).

every instance, and ED need not inquire about the consistency of PSLF's purpose and goals with respect to any specifically enumerated public service job. Whether ED can operationalize including all statutorily covered public service workers is separate from the question of PSLF's purpose and goals, and is addressed elsewhere in this comment.

Further, ED proposes that the purpose and goal of PSLF for early childhood education is, at least in part, to help providers "improve recruitment and retention of the early childhood workforce, increase early educator degree and credential attainment, and improve access to quality early childhood education for children and families[.]"[55] To the extent this is accurate, this purpose and goal is also agnostic to provider tax status, and maintaining the for-profit exclusion would likely have the perverse effect of reducing recruitment and retention, degree and credential attainment, and access to quality education in areas without access to public or affordable non-profit alternatives. ED's logic is at times internally incoherent and inconsistent, in addition to being extra-statutory.

These questions, although in an effort to include additional groups of public service workers, have the effect of maintaining ED's exclusion of even larger populations. They would also be moot if, as discussed below, ED removes its extra-statutory exclusion of for-profit public service providers from PSLF.

iv. Allowing public service workers with for-profit employers to access PSLF is required by law, and does not have to be burdensome for ED.

To truly "align the regulations with the statutory intent of the PSLF Program,"[56] ED can more closely track the statute itself by removing any for-profit exclusion. Although ED raises several reasons why including public service workers at for-profit organizations would be difficult to operationalize,[57] this is an improper substitution of operational analysis for legal analysis. The statute clearly covers "public service jobs" with no exclusion for jobs performed at for-profit organizations.

Still, there are ways for ED to remain faithful to the statute that could be incorporated into ED's existing PSLF infrastructure. ED can build on its current government and non-profit employer focus as a way to grant access to currently ineligible public service workers. It can extend employer-based eligibility to for-profit public service providers, thereby incorporating entire sectors of public service jobs, and also permit eligible employers to certify hours from contract workers. This would increase eligibility and dramatically limit the number of borrowers who

[55] NPRM, 87 Fed. Reg. at 41933.
[56] *Id*.
[57] *See*, *e.g.*, *id.* at 41934 (arguing that ED lacks the capacity to review individual job descriptions and that obtaining further documentation would add a significant burden to anyone participating in the program).

would require individual assessments. Critically, this would not require a dramatic reconfiguration of ED's PSLF administration.
For example, the PSLF Form already lists the enumerated types of qualifying public services and requires non-501(c)(3) non-profit employers to indicate which of these services they provide as part of the employer certification. The form could be revised so that any non-government and non-501(c)(3) non-profit employer must complete the additional attestation related to public services, regardless of whether they are non-profit or for-profit. Additionally, ED currently allows employees of non-501(c)(3) non-profit organizations that "provide at least one" of these services to access PSLF.[58] This same standard could be applied to for-profit employers. Even if ED adopts its proposal to limit PSLF eligibility to only those non-501(c)(3) non-profit employers for which a majority of their full-time equivalent employees provide an enumerated public service, *see infra* § 3(v), the same restriction could be applied to for-profit employers.

Again, there is no statutory basis for treating these two employer types differently, and so any mechanism that ED has adopted for non-501(c)(3) non-profit employers can be utilized for for-profit employers. Taking this approach would extend PSLF to, for example, the entire for-profit healthcare industry, which is clearly within the scope of the HEA's PSLF provisions, but which is currently excluded for the reasons discussed above.

To supplement this approach, where necessary, such as in instances of self-employment or certain contracted work, ED must make a determination about an individual public service worker, it should do so. It can rely on the same attestation process that it uses for employers. During negotiations, ED suggested that borrower attestations were less reliable than employer attestations, but offered no support for that assertion.[59] There is no statutory basis for devaluing an individual borrower's attestation as compared to an employer's, and ED should not allow any bias against borrowers to prevent those same borrowers from accessing their statutory rights.

Although ED raises concerns that if it extends PSLF eligibility to all borrowers with public service jobs, as required by statute, it could create different outcomes for borrowers at the same organization,[60] or that doing so would be unfair to the "many support staff who provide services to the organization rather than to its clients [and who] would not qualify even though their services are vital to keeping the organization itself in operation,"[61] these arguments are without merit. Here, too, ED already extends PSLF eligibility to all employees of non-501(c)(3) non-profit organizations that provide at least one of the enumerated services in the HEA, regardless

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[58] *Public Service Loan Forgiveness (PSLF)* Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#qualifying-employer (last visited Aug. 2, 2022) (under Qualifying Employer, select "qualifying public services").
[59] Transcript, *Affordability and Student Loans Committee*, Session 3, Day 2, Afternoon 81-82 (Dec. 7, 2021) https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec7pm.pdf.
[60] NPRM, 87 Fed. Reg. at 41934.
[61] *Id*.

of any individual employee's role at the organization.[62] For exactly the reason ED articulates—that administrative and operational staff are critical to organizations' ability to serve their clients—it is appropriate for all non-profit organization staff to qualify for PSLF. For the same reason, all staff at an organization that provides an enumerated service should also be eligible.

Additionally, as ED proposes, it can allow PSLF-eligible employers who hire contractors to certify the hours worked by those contractors, rather than basing eligibility on the contractors' actual employers' statuses.[63] This recognizes that non-W-2 workers regularly spend their days as functional employees for public service employers or executing public service functions, but are denied access to PSLF merely due to their formal employment status. In this instance, PSLF-eligible employers could certify the hours worked by contractors, even if those hours do not constitute full-time work.

We applaud this proposal for contract workers and encourage ED to extend it broadly. However, we also caution against imposing unnecessary limitations. For example, ED inquires as to whether to limit eligibility to contractors that co-locate with the PSLF-eligible employer.[64] Not only is this specific example out of sync with the normalization of remote work in recent years, it is also an example of unnecessary and extra-statutory limitations. The sole inquiry should be whether the borrower can be considered a public service worker per the HEA's PSLF provisions, which may be determined in some instances, as ED currently does, via proxy based on what services an employer provides.

Also, ED's suggestion that an employer can certify contractors' work "if that qualifying employer is willing" to do so raises a serious employer-side concern.[65] Many public service workers at PSLF-eligible organizations currently face pushback from their employer when asked to sign their PSLF Form. Employers are often unfamiliar with PSLF or see it as beyond the scope of their relationship with their employees. ED must encourage all employers to engage in PSLF for their workers, but in the instances of contracted workers especially, ED must provide clear guidance about any expanded eligibility and also explain to contractors how to substantiate their contracted hours in the event the public service employer refuses to sign their PSLF Form. For an expansion of eligibility to be meaningful, ED cannot allow reluctant employers to act as gatekeepers. Additionally, ED should allow a non-qualifying for-profit employer—i.e., one that does not itself provide a public service—to certify hours worked by its employees for PSLF-

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[62] *Public Service Loan Forgiveness (PSLF)* Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service#qualifying-employer (last visited Aug. 2, 2022) ("Qualifying employment for the PSLF Program isn't about the specific job that you do for your employer. Instead, it's about who your employer is.").
[63] NPRM, 87 Fed. Reg. at 41934.
[64] *Id*.
[65] *Id*.

qualifying clients on those clients' behalf by completing a PSLF Form and including the client's EIN, in addition to its own.

v. ED proposes a new threshold for when employees of a non-501(c)(3) non-profit employer are eligible for PSLF that is unnecessary and would likely reduce the number of eligible public service workers.

ED's proposed rule, in addition to maintaining the for-profit employer exclusion, also introduces a new potential limitation on employer eligibility. ED explains that "in the past, [it] considered an organization to be a qualifying employer for the purposes of PSLF if its primary purpose was to provide a qualifying service."[66] Because "determining an organization's primary purpose can be confusing and hard to apply[,]" ED proposes shifting to a standard by which "the majority of an organization's full-time equivalent employees must be providing a qualifying service for the organization to be a qualifying employer for PSLF."[67] These statements both misrepresent the current eligibility standard in place and propose an unnecessary limitation on public service workers' potential eligibility.

Despite ED's statements to the contrary, it currently does not consistently apply a "primary purpose" standard for PSLF. These limitations do not appear in statute or regulation, but ED's website clearly states that for a non-501(c)(3) non-profit to be eligible for PSLF, the organization must "provide[] at least one" of the enumerated public services. Under this standard, any qualifying service performed by an organization results in the organization, as a whole, being an eligible employer. Indeed, this very question was litigated only a few years ago. In *American Bar Association et al. v. U.S. Department of Education*, plaintiffs successfully challenged ED's unannounced shift to the "primary purpose" standard. In the 2019 memorandum opinion in favor of the ABA, a federal judgment discusses at great length the sudden introduction of this standard around 2017, before vacating the standard for violation of the Administrative Procedure Act.[68] Although ED may, during this rulemaking, propose a new standard, it is inaccurate to suggest that the status quo is the "primary purpose" standard.

Further, because ED misstates the current standard, its proposal lacks a meaningful discussion about why a shift away from the effective "provides at least one service" standard is necessary. ED makes passing reference to its belief that "an entire organization should not be designated as a qualifying employer if only a couple of its employees are providing a qualifying service because that demonstrates that the qualifying service is not in fact a core part of the organization's work."[69] This statement is only relevant, however, in the ED-imposed and extra-

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[66] *Id*.
[67] *Id*.
[68] Mem. Op., *American Bar Association et al. v. U.S. Department of Education*, 1:16-cv-02476 (Feb. 22, 2019), https://www.abajournal.com/files/ABAvDOE22219opinion.pdf (last visited Aug. 2, 2022).
[69] NPRM, 87 Fed. Reg. at 41934.

statutory context where PSLF eligibility is determined only by employer and not job. It also reflects a tacit preference for being under-inclusive rather than overly broad, but without engaging with the reality that millions of public service workers across the country pay the price for this decision.

ED's proposed new "majority" standard also raises concerns about how this would be calculated. For example, are the administrative and other staff who support an organization's direct service providers counted as employees providing a service? To discount these employees would be inconsistent with the Congress's intent and the text of the HEA's PSLF provisions, which grants eligibility to administrative and support staff at any government and 501(c)(3) non-profit organizations, in addition to any external-facing employees.

ED should not abandon its effective policy of determining PSLF eligibility based on the "provides at least one service" standard—which is not mutually exclusive with also making individualized borrower determinations, when necessary—which tracks the Congress's statutory intent more closely than ED's proposed standard, or at the very least should include more accurate and thoroughly reasoned discussion and analysis along with any proposed new standard.

vi. ED's proposed definition of "employee" is unnecessarily narrow.

ED proposes a definition of "employee" or "employed" that requires a public service worker to receive an IRS Form W-2.[70] This is a change from the current definition—which is simply, "an individual who is hired and paid by a public service organization"[71]—and would restrict both ED's and employers' ability to certify employment and extend PSLF credit to public service workers.

As discussed above, ED should allow all public service workers to access PSLF, and should use proxies for public service work only when they have the effect of expanding eligibility, not narrowing it. The statute does not limit debt cancellation to those borrowers who receive an IRS Form W-2. ED should either revise its proposal to focus on the work, rather than means of payment—e.g., "an individual who is compensated to perform work for a qualifying employer"—or should list other employment types, such as being an IRS Form 1099 recipient.

[70] *Id*. at 42001 (proposed § 685.219(b) (definition of "employee or employed")).
[71] 34 CFR § 685.219(b).

b. ED must use all of its broad authority to take an expansive view of what payments and time count as qualifying for PSLF.

The Higher Education Act requires only that PSLF applicants make 120 payments on particular plans or amounts while in a qualifying job to secure loan cancellation.[72] The law does not dictate specifics around the timing of those payments or whether they must be made all at once or in installments.[73] ED, however, currently only allows student loan payments to count toward PSLF if they are made within 15 days of the scheduled due date and cover the full scheduled installment amount, no more or less.[74] In doing so, ED set the stage for significant confusion and servicing errors that continue to bar eligible borrowers from their entitled loan forgiveness.[75] Although the Waiver accomplishes this, it is time-limited, and after October 31, 2022, the regular program rules will again take effect.

It is also worth noting that these timeliness requirements do not exist for borrowers experiencing financial hardship and pursuing loan forgiveness under Income-Driven Repayment (IDR) plans.[76] Aligning rules about qualifying payments with standards for IDR payment counting will have the added benefit of significantly simplifying the servicing of both PSLF and IDR borrowers—eliminating much of the need for specialization among student loan servicers and mitigating the potential for future mismanagement and abuse.

We applaud ED for lowering some of these barriers in its proposed rules by eliminating the requirement for borrowers to make full payments within 15 days,[77] and urge it to take additional steps to ensure the maximum possible credit toward PSLF is reliably applied to borrowers' accounts.

Two such critical steps are to more explicitly tie credit toward IDR as qualifying credit for PSLF, and to credit time spent in default, forbearance, and deferment toward both programs. Unfortunately, because ED did not release its proposed IDR rules concurrently with its proposed PSLF rules, the rulemaking processes for these two programs—which should be done in harmony—have been severed. As discussed below, for many, if not most, PSLF-seeking borrowers, IDR is both a requirement and an onramp to loan cancellation. For this reason, the programs must be closely coordinated.

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[72] 20 USC § 1087e(m)(1)(A)-(B).
[73] *Id*.
[74] 34 CFR § 685.219(c)(iii).
[75] *See*, *e.g*., Comment on Fed. Reg. Doc. No. 2021-15831, Docket No. ED-2021-OUS-0082, https://www.regulations.gov/comment/ED-2021-OUS-0082-1201 ("I was working in washington state for the state in [mental] health and the first three years of my payments were disallowed because i rounded up my payments by pennies to make it an even amount. Because i "OVERPAID" they were not counted. Three years of payments gone. Meaning three extra years of payments till i could possibly qualify. How is that possible.").
[76] *See, e.g*., 34 CFR § 685.209.
[77] *See* NPRM. 87 Fed. Reg. at 41935, 42001.

Finally, we appreciate ED's desire to codify elements of the Waiver and we urge it to view those provisions as remedial rights that, once extended, travel with the borrowers whom they are intended to make whole. Although ED has identified past harms that must be remedied, its current time-limited framework for relief, and the ongoing servicer misconduct, undermines borrowers' ability to access that relief. By ensuring that the Waiver's provisions—as well as the IDR Account Adjustment—attach to individual borrowers, ED can make cancellation credits available at any point throughout the life of the loan.

i. ED's proposed rules should make clear that any credit toward IDR debt cancellation is a qualifying payment for PSLF purposes.

The HEA's PSLF provisions provide that, in addition to payments under the standard 10-year repayment plan, payments made pursuant to the income-based and income-contingent repayment plans count as qualifying payments for PSLF, so long as they are made while the borrower has qualifying employment.[78] Therefore, although these IDR plans provide for debt cancellation after 20 to 25 years, they are also an important factor in obtaining PSLF's 10-year cancellation. Negotiators stressed this point during their sessions, even arguing that "it's the rules surrounding Income Driven Repayment that are the most important thing in [rethinking qualifying payments,] and they are much of what the administrative problems have been [sic]."[79]

For this reason, ED must clarify that, more than payments made pursuant to IDR plans counting toward PSLF, time toward IDR cancellation counts as time toward PSLF cancellation. Negotiators during negotiated rulemaking argued for an expanded framework under which borrowers can obtain credit toward IDR, which may include time spent in forbearance, deferment, or default, as discussed below.[80] For this reason, distinguishing between IDR payments and IDR credit is important. To the extent ED currently contemplates counting any month that would count toward IDR cancellation as qualifying for PSLF, it should make this explicit in the PSLF rules.

This is not a hypothetical exercise. ED is currently engaged in an adjustment of borrowers' accounts to award IDR credit for any past time spent in repayment, even if no payment was made, and for certain time spent in deferment and forbearance.[81] ED has stated these adjusted

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[78] 20 USC § 1087e(m)(1)(A).
[79] Transcript, *Affordability and Student Loans Committee*, Session 3, Day 2, Afternoon 73 (Dec. 7, 2021) https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec7pm.pdf.
[80] *See*, *e.g.*, Materials Distributed by the Negotiators Prior to Session 3, *Proposed Regulatory Text with Edits for Issue Paper #10: Income-driven Repayment Plans (Submitted by Persis Yu and Josh Rovenger)*, https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html.
[81] Press Release, U.S. Dep't of Educ., *Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs* (Apr. 19, 2022), https://www.ed.gov/news/press-releases/department-education-announces-actions-fix-longstanding-failures-student-loan-programs.

credits will count toward PSLF for public service workers.[82] Although this is a one-time adjustment, it is conceivable that in future IDR rulemaking, elements of the adjustment would be codified and that partial- or non-payment periods would count for IDR credit, especially given that these were subjects of discussion during negotiated rulemaking. This would include time in forbearance, deferment, or default, as discussed below. In these instances, those IDR credits should count toward PSLF, but ED's proposed rules are not explicit on this point.

To clarify the relationship between IDR and PSLF, ED should revise its proposed PSLF rule to insert a new § 685.219(c)(2)(v) that provides "For a borrower on an income-contingent repayment plan under § 685.209 or an income-based repayment plan under § 685.221, receiving a month of credit toward loan cancellation pursuant to those plans."

ii. ED can and must include all time as qualifying for PSLF, including time spent in forbearance, deferment, or default.

We applaud ED's proposed inclusion of certain time in forbearance and deferment as satisfying qualifying payment requirements for PSLF.[83] In its discussion of these proposals, ED explicitly recognizes that borrowers in forbearance and deferment often would have qualified for a $0 IDR payment, if given the opportunity to enroll, or are forced to make a choice between necessary deferments (such as for cancer treatment) and continuing to make PSLF-qualifying payments.[84] Critically, ED acknowledges that this expansion of eligible time is, at least in part, "because of concerns based on past practices that borrowers, who are likely to have a $0 payment on an [IDR] plan . . . could instead be offered [by their student loan servicers] deferments or forbearances,"[85] and the understanding that "allowing these deferments and forbearances to count toward PSLF prevents the borrowers from losing months or years of progress toward loan cancellation by making the wrong choice or getting inaccurate advice."[86] Acknowledging that this servicer "steering" of borrowers into deferment and forbearance effectively robs them of credit for PSLF and IDR is a critical step in revising both programs.

Indeed, we see this acknowledgement reflected in the PSLF Waiver, and in ED's IDR Account Adjustment, which automatically grants IDR credit—and, therefore, PSLF credit—for borrowers who experienced certain long-term periods of forbearance or deferments, and allows borrowers

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[82] *Income-Driven Repayment and Public Service Loan Forgiveness Program Account Adjustment*, Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/announcements-events/idr-account-adjustment (last visited Aug. 2, 2022).
[83] *See* NPRM, 87 Fed. Reg. at 42002 (proposed § 685.219(c)(2)(v)).
[84] *Id.* at 41936.
[85] *Id.*
[86] *Id.*

to apply to receive credit for time in certain other periods.[87] These policies also award credit for any time spent in repayment, regardless of the plan.

However, the solutions ED currently proposes do not completely address the problems that it has identified. ED must build on its proposed PSLF improvements to more faithfully reflect its findings and remedial policies in the new proposed PSLF regulations. In particular, ED's proposal fails to include instances of voluntary forbearance. This point was stressed by representatives for the state attorneys general during negotiations, as their offices have been at the forefront of addressing this industry misconduct.[88] Nor does it grant time spent in repayment, regardless of payment plan, as both the Waiver and IDR Account Adjustment do.

All time in repayment and in forbearance or deferment, as well as time in default, should count as qualifying payments for public service workers pursuing PSLF, as with borrowers seeking cancellation through IDR. As discussed in the next section, ED's proposed Hold Harmless provisions are an inadequate substitute for directly granting credit for these time periods.

ED currently proposes using certain forbearance types as a proxy for whether borrowers would have qualified for $0 payments on IDR.[89] It also proposes granting credit for time spent in certain administrative forbearances, such as when a borrower's repayment plan or consolidation application is under review, timelines which are out of the borrower's control.[90] The same could be done for other time spent in forbearance or deferment. For example, certain forbearance types are already geared toward low-income borrowers and require significant supporting documentation[91] or that the borrower has poor health.[92] ED could extend PSLF and IDR credit in these instances using the same authority and rationale underpinning its proposed credit for time in economic hardship or cancer treatment deferments.[93]

Although ED does not currently propose credit for time spent in default, for a borrower who struggles with their loans and has been steered, default is a logical ending point. Put differently, for most borrowers, finding themselves in default is a signal that the system failed to direct them

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[87] Press Release, U.S. Dep't of Educ., *Department of Education Announces Actions to Fix Longstanding Failures in the Student Loan Programs* (Apr. 19, 2022), https://www.ed.gov/news/press-releases/department-education-announces-actions-fix-longstanding-failures-student-loan-programs.
[88] Transcript, *Affordability and Student Loans Committee*, Session 3, Day 3, Morning 34-35 (Dec. 8, 2021), https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec8am.pdf.
[89] *See* NPRM, 87 Fed. Reg. at 41936.
[90] *See id*. at 42002 (proposed § 685.219(c)(2)(v)(H)).
[91] See 34 CFR § 685.205(a)(6) (providing for up to three years of forbearance for borrowers for whom the sum of their monthly payments is equal to or greater than 20% of their total monthly gross income).
[92] *See id*. at § 685.205(a)(1) (providing for up to three years of forbearance for borrowers for whom the sum of their monthly payments is equal to or greater than 20% of their total monthly gross income).
[93] *See generally* NPRM, 87 Fed. Reg. at 41936.

into a $0 or otherwise affordable alternative.[94] This is particularly true for borrowers who attended for-profit colleges or two-year colleges, who make up 70 percent of all borrowers in default and for whom the median debt burden and wages suggest that the typical defaulted borrower likely would qualify for a $0 IDR monthly student loan payment or substantially reduced payment, up to a 75 percent, under an IDR plan than under a standard repayment plan.[95] The cost to a borrower's credit and the risk of involuntary collection are sufficient deterrents to avoid any intentional defaults for the sake of obtaining payment-free PSLF or IDR credit. Negotiators asserted that ED has the authority to grant credit for time in default, specifically for payments made while in default, but ED has not responded to those proposals, nor are those suggestions reflected in the proposed rule.[96]

Indeed, during the final session of negotiated rulemaking, ED's proposed IDR rule would have allowed borrowers in default to access IBR because "doing so allows [borrowers] to also make progress toward loan cancellation."[97] Not only is this evidence that defaulted time can be counted as IDR time toward cancellation, it also underscores the need for ED to align its PSLF and IDR proposals. If ED will count time in default toward IDR cancellation, its PSLF regulations must make clear that time in default can therefore count toward PSLF cancellation.

There is no legal barrier to including this time. Nothing in the HEA's PSLF provisions explicitly prohibits a loan from accruing eligible time toward cancellation while in default.[98] Not only could ED count time in default as credit under IBR, as it proposed, the same rationales and legal authorities on which ED currently relies in proposing in its NPRM to count time spent in administrative forbearance and cancer treatment deferment apply equally to time spent in any repayment plan and in other forbearances or deferments, as well as in default. Additionally, the non-emergency authority that ED is using to execute the IDR Account Adjustment and the discharge of over 200,000 loans for borrowers who have been defrauded can be incorporated into the ED's PSLF administration to ensure all time that should be counted is credited.[99] Further,

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[94] *See* U.S. Government Accountability Office, GAO-15-663, *Federal Student Loans: Education could do more to help ensure borrowers are aware of repayment and forgiveness options* 13 (Aug. 2015), http://www.gao.gov/products/GAO-15-663 (finding that 70 percent of borrowers in default had income that would entitle them to a reduced monthly payment under an IDR plan).
[95] *See* Consumer Financial Protection Bureau, Annual report of the CFPB Student Loan Ombudsman 20-21 (October 2015), https://files.consumerfinance.gov/f/201510_cfpb_annual-report-of-the-cfpb-student-loan-ombudsman.pdf).
[96] Transcript, Affordability and Student Loans Committee, Session 3, Day 2, Afternoon 72 (Dec. 7, 2021) https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec7pm.pdf.
[97] U.S Dep't of Educ., Proposed Regulatory Text for Issue Paper #10: Income-driven Repayment Plans, Session Three: December 6-10, 2021 at 3, https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/10idrsess3.pdf.
[98] *See* 20 USC § 1087e(m).
[99] *See* Theresa Sweet, et al., v. Miguel Cardona, U.S. Dep't of Educ., Case No. 3:19-cv-03674 (July 25, 2022, N.D. Cal.), Dkt. No. 288 (Defs' Cons'd Opp'n to Mot. for Intervention) at 14-15, https://storage.courtlistener.com/recap/gov.uscourts.cand.344091/gov.uscourts.cand.344091.288.0.pdf (the federal government asserts the Secretary's "compromise and settlement authority" as a basis to cancel loans of borrowers whose schools defrauded them).

counting these statuses as qualifying payments for IDR credit in ED's future IDR NPRM would result in their qualifying for PSLF credit.

As a threshold matter, ED should assume that borrowers operate in good faith, rather than narrowing relief programs for all to address hypothetical individuals who could potentially abuse the system. Additionally, the system already includes safeguards. The HEA's deferment and forbearance provisions, for example, generally include caps on the maximum time that a borrower can defer or forbear payments, or contemplate financial, medical, or employment difficulties.[100] And given that any overuse of these programs is often due to servicer steering, instead of punishing borrowers who end up in these programs, ED should address the overuse through its servicing contracts. For PSLF, the program's concurrent employment requirement would also limit the types of deferments or forbearances that could be counted.

It is necessary to incorporate these principles into the PSLF (and IDR) rules because the poor servicing that historically led borrowers to languish in forbearance, deferment, or default, and which failed to inform them that only certain plans qualify for debt cancellation, is still taking place. As recently as March of this year, the Consumer Financial Protection Bureau sanctioned a federal student loan servicer, EdFinancial, for "lying" to borrowers about their eligibility for PSLF.[101] In the wake of that action, ED conceded that it has "no reason at all to think that these issues—which dated from at least January 2017 through at least February 2021—were unique to EdFinancial."[102] ED reiterates this sentiment in the preamble to its proposed rule when it asserts that "even better servicing and clearer information would likely be unable to address the scale of the challenge [to ensure PSLF-eligible borrowers can access the program.][103] Clearly, servicer misconduct is not a thing of the past, nor is it limited to just one actor or one misrepresentation. Although the PSLF Waiver and the IDR Account Adjustment collectively provide a way for many (but not all) borrowers to recuperate time that was stolen from them, it is extremely likely that servicers will continue to interfere with borrowers statutory rights to affordable repayments and eventual cancellations, given that they are currently doing so, and ED's proposed rules should reflect that reality. To fully remedy this ongoing harm to borrowers, ED's PSLF and IDR proposals must both extend credit to borrowers for all time on their loans since they exited their grace period after attending school.

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[100] *See*, *e.g.*, *Student loan forbearance allows you to temporarily stop making payments*, Federal Student Aid, U.S. Dep't of Educ., https://studentaid.gov/manage-loans/lower-payments/get-temporary-relief/forbearance (last visited Aug. 2, 2022).
[101] Press Release, Consumer Financial Protection Bureau, *CFPB Sanctions Edfinancial for Lying about Student Loan Cancellation* (Mar. 30, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sanctions-edfinancial-for-lying-about-student-loan-cancellation/.
[102] Electronic Announcement, Federal Financial Aid, U.S. Dep't of Educ., *FSA Letter to FFEL Program Participants - Responsibilities to Borrowers Seeking to Benefit from the Public Service Loan Forgiveness Program* (Mar. 30, 2022), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-30/fsa-letter-ffel-program-participants-responsibilities-borrowers-seeking-benefit-public-service-loan-forgiveness-program.
[103] NPRM, 87 Fed. Reg. at 41936.

iii. Given ongoing servicer misconduct, the proposed Hold Harmless procedure is an inadequate substitute for extending credit to borrowers for the entirety of the life of their loans.

ED proposes a Hold Harmless procedure whereby borrowers can receive credit for time while working a qualifying job but during which their loans were in non-qualifying deferment or forbearance, either by making a payment commensurate to what would have been required at the time or by establishing their past eligibility for $0 payments under an IDR plan.[104] We urge ED to award PSLF and IDR credit for any time on a loan beginning after its initial grace period, including time spent in forbearance, deferment, or default, which would moot the need for a Hold Harmless procedure. We also stress that as a solution to steering—as ED made clear during negotiated rulemaking[105]—through this proposal, ED is yet again asking borrowers to pay for servicers' malfeasances. Nevertheless, we offer the following comments on this proposal.

First, we call ED's attention to a potential drafting error. The proposed language provides that "For any months in which a borrower postponed monthly payments . . . the borrower may obtain credit toward forgiveness for those months, as defined in paragraph (d), for any months *in* which the borrower . . . makes an additional payment equal to or greater than the amount they would have paid . . . or otherwise qualified for a $0 payment[.]"[106] (*Emphasis added*). Because the Hold Harmless procedure contemplates present payments for past months, the provision should read ". . . for any months *for* which the borrower . . . ." The contemplated payments are being made after the fact, not "in" or during the month for which the borrower seeks to recover credit.

Second, the Hold Harmless provision should be amended to ensure that borrowers who are eligible for the current PSLF Waiver and IDR Account Adjustment to access those benefits—i.e., receive credit for the periods covered by these programs—even after their respective deadlines have passed. As discussed above, each of these policies was a direct response to identified patterns of servicer misconduct and poor communication that resulted in borrowers being misinformed about or unable to access loan types or repayment plans that would qualify them for debt cancellation. Unfortunately, the wrongs that necessitated these remedial policies persist and currently undermine their ability to make borrowers whole.

For the PSLF Waiver in particular, as recently as May 2022, over six months after the Waiver was announced, FedLoan Servicing, the former dedicated servicer for PSLF, and ED's other servicers continued to send letters to borrowers misinforming them about the program's key

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[104] *See id*. at 42002 (proposed § 685.219(g)(6)).
[105] Transcript, *Affordability and Student Loans Committee*, Session 3, Day 2, Afternoon 70 (Dec. 7, 2021) https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/dec7pm.pdf.
[106] *See* NPRM, 87 Fed. Reg at 42002 (proposed § 685.219(g)(6)).

elements.[107] We have spoken to borrowers who, understandably, were dissuaded from taking the steps to access the Waiver as a result of these inaccurate messages. FedLoan Servicing was put on notice that it was making misrepresentations within weeks of the Waiver's announcement, and yet its actions persisted, even months later while its portfolio is being transferred to MOHELA.[108]
Additionally, ED's own PSLF Help Tool stands as a barrier to the Waiver for many borrowers. When a borrower whose employer has not previously been verified by ED attempts to generate their PSLF Form, the Help Tool prohibits the borrower from proceeding and instructs them to wait as many as 30-60 days while ED confirms the employer's eligibility. Soon, this waiting period will extend beyond the Waiver's deadline, which means these borrowers are locked out of the Waiver's benefits. Importantly, this is in the context of ED having failed to engage in a comprehensive messaging campaign to reach borrowers and employers.

For these reasons, the Waiver is effectively over months before its stated deadline, as there does not appear to be enough time for millions of borrowers who have yet to file their PSLF Form to do so.[109] This is true even for a borrower seeking PSLF who follows ED's explicit instructions. The remedial steps that ED designed to address well-documented abuses and failures are still inaccessible for too many.

Having framed this wrong, ED must preserve its remedy. ED should view these remedial steps as attaching and vesting in any members of the borrower class to whom they are extended, and as traveling with those borrowers' for the duration of their loans, not for an artificial window of time. If ED has concerns about operationalizing this long-term relief, it can do this by granting credit for all time, as discussed above, or by allowing current borrowers to raise their hand to claim their remedy through the Hold Harmless provision.

Third, the Hold Harmless provision requires payments or $0 IDR payment eligibility based on the borrower's circumstances at the time of the deferred or forborne payment. This will require borrowers to document their financial circumstances for periods of time that could be several years in the past, and therefore presents an administrative burden. Particularly given ED's recognition of its servicers' steering practices, ED should not put the onus on individual borrowers to recuperate credit for past time.

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[107] *See*, *e.g.*, Letters from FedLoan Servicing and Aidvantage to Borrowers, https://protectborrowers.org/wp-content/uploads/2022/08/servicer-waiver-letters.pdf.
[108] Letter to James Steely, CEO of Pennsylvania Higher Education Assistance Agency from Student Borrower Protection Center regarding Continued, Unlawful Mistreatment of Public Service Workers in Violation of Federal and State Consumer Protection Law (Nov. 2, 2021), https://protectborrowers.org/wp-content/uploads/2021/11/FOR-TRANSMITTAL-Demand-Letter-to-PHEAA.pdf.
[109] Ben Kaufman, The PSLF Waiver Has Been a Huge Success, and It May Be Just Hitting Its Stride. Why End It? Student Borrower Protection Center (July 21, 2022), https://protectborrowers.org/the-pslf-waiver-has-been-a-huge-success-and-it-may-be-just-hitting-its-stride-why-end-it/ (reflecting that fewer than 15 percent of likely PSLF-eligible borrowers have filed forms with ED).

Fourth, by requiring a present payment based on past financial circumstances, the Hold Harmless provision fails to offer relief to borrowers whose financial circumstances have worsened since the time of their deferred or forborne payment. What could have been affordable in the past may no longer be manageable, which would leave presently-low income public service workers with no way to recuperate past missed payments. For low-income households, especially those that do not qualify for $0 payments, making what is in effect a double payment in a given month to buy back past months may be impossible.
Fifth, the proposal does not include an option for borrowers to recuperate time spent in default. For the reasons discussed above, this is an oversight, and a shortcoming. The same is true for months when the borrower was enrolled in an ineligible payment plan. The Hold Harmless proposal would only apply to deferred or forborne months, but could just as easily apply to time spent in PSLF-ineligible payment plans.

Finally, although well-intentioned, with its Hold Harmless proposal, ED seeks to introduce yet another procedure to the PSLF administration, which has already proven to be overly complex and a barrier to entry for too many borrowers. To the extent ED plans to rely on its student loan servicers—or the sole PSLF-dedicated servicer—to administer this procedure, these companies' track records for implementing ED's programs do not bode well. Adopting a policy of granting credit for time spent in forbearance or deferment, as discussed above, is both sound policy and is administratively more feasible than a case-by-case and paperwork-heavy Hold Harmless procedure.

c. ED should extend the same relief to FFEL program borrowers as it has proposed for Direct Loan borrowers.

We applaud ED's proposal to grant credit toward PSLF for a Direct Consolidation Loan based on qualifying payments previously made on any underlying Direct Loan. We also applaud ED's proposal to communicate more directly with FFEL program borrowers.[110] However, we urge ED to use the full breadth of its authority to provide the same pre-consolidation credits as it proposes for Direct Loan borrowers to FFEL program borrowers who have consolidated their loans. ED did not fully explain in its preamble its rationale for limiting this relief to existing Direct Loan borrowers, other than to suggest that the statute limits its ability to include payments made on a FFEL program loan.[111] This understates ED's authority over the federal student loan system.

Although ED's current PSLF Waiver is an historic and powerful means of delivering PSLF credit and/or cancellation to FFEL program borrowers working in public service, its limited timeframe means that not all eligible borrowers are likely to benefit and a significant population of FFEL program borrowers are likely to remain. If, as discussed in detail above, ED treats these

[110] *Id.* at 41936.
[111] *Id.*

benefits as remedial rights that attach to individual borrowers, rather than temporary opportunities for relief, it can continue to offer FFEL program borrowers a path to PSLF cancellation without losing pre-consolidation time. Since the FFEL program has ended, this is a fixed and diminishing population of borrowers.

ED can also use its authority to compromise or modify federal student loans to codify this component of the Waiver in the PSLF regulations and ensure that public service workers with at least ten years of service and payments have their loans cancelled.[112] As will be described in greater detail, the Congress granted the Secretary authority in the HEA to promulgate regulations; sue and be sued; to include terms, conditions, and covenants related to repayment; and to compromise and modify student loan debts.[113] These authorities apply equally to the FFEL program, the Direct Loan program, and Perkins Loan program, and should be incorporated into this rulemaking to effectuate ED's stated policy objective of continuing the Waiver in the PSLF regulations.[114]

First, the Secretary has statutory authority to compromise federal student loan debts pursuant to the HEA.[115] The only limitation on this authority is that the Secretary must request review by the Attorney General of a settlement that exceeds $1,000,000.[116] The Secretary promulgated regulations regarding his authority to compromise a debt, which were amended in 2016.[117] These specify that, "under the provisions of [the FCCS found at] 31 CFR part 902 or 903," the Secretary may "compromise a debt in any amount, or suspend or terminate collection of a debt in any amount" if these arise under the Title IV program.[118] While this provision contains a cross-reference to the FCCS, this provision seems to clarify that the Secretary is not required to follow procedures outlined in the FCCS, which generally limits amounts that an agency can compromise without seeking approval from the Attorney General to $100,000.[119] To the extent ED interprets § 30.70 as limiting the Secretary's authority, it should consider amending its own regulation to remove the cross-reference to the FCCS, as no such reference is contained in the HEA or the FCCA, and the FCCS does not reference ED's regulations.

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[112] *See* Claire Torchiana & Winston Berkman-Breen, "Revisiting Relief for Borrowers Who Fall Through the Cracks in Discharge Programs" in *Revisiting Debt Relief: Scoring Biden Administration actions to Cancel Student Debt on DAy One and Beyond* 40 (Dec. 2021), https://protectborrowers.org/wp-content/uploads/2021/12/final_Revisiting_Debt_Relief_12_16_2021.pdf#page=40.
[113] 20 USC § 1082(a) *et seq*.
[114] NPRM, 87 Fed. Reg. at 41936.
[115] 20 USC § 1082(a)(6).
[116] *Id.* at § 1082(b).
[117] 34 CFR § 30.70.
[118] *Id*. at § 30.70(e)(1).
[119] The FCCS outlines procedures for compromise of loans above a certain dollar amount, while section § 30.70 provides that the Secretary has authority to compromise debts in "any amount." Additionally, § 30.70 was amended to reflect the Secretary's broader authority -- not to limit it, meaning a limiting reading would contract the regulation's underlying purpose. *See* Letter to Senator Elizabeth Warren from Eileen Connor, Deanne Loonin, Toby Merrill 5 (Jan. 13, 2020), https://static.politico.com/4c/c4/dfaddbb94fd684ccfa99e34bc080/student-debt-letter-2.pdf.pdf ("Warren Letter").

Second, the Secretary may also "consent to modification, with respect to rate of interest, time of payment of any installment of principal and interest or any portion thereof, or any other provision of any note or other instrument" of any loan made under the Title IV program.[120] The Secretary may modify a loan to a $0.00 balance.[121] This authority is not limited by the Congress's appropriations power, nor by the FCCS.[122]

The Secretary could use either of these compromise or modification authorities to faithfully execute the spirit of PSLF for public service workers who currently or previously have FFEL program loans. Although there are likely several ways that ED could operationalize these authorities, one such option would be to compromise or modify to a $0.00 balance any loan for any public service worker after 10 years of work and payments, regardless of their loan type. Alternatively, ED could modify the payment history for any Direct Consolidation Loan to reflect time for work and payments made on an underlying FFEL program loan. Either of these would effectively continue the Waiver's ability to credit FFEL program borrowers for PSLF upon consolidation, and are within ED's authority.

d. ED's proposed reconsideration time frame should be lengthened to allow borrowers to adequately respond.

ED proposes a formal "reconsideration" or appeals process for borrowers whose employer or payments are deemed ineligible or are miscounted.[123] Codifying this previously informal process is an important way to improve transparency and accountability mechanisms in the PSLF program. Historically, denials were vague and failed to provide borrowers with sufficient information to identify their grounds for denial, which made any appeal, formal or otherwise, all the more challenging. We are encouraged to see that ED proposes that in any instance of denial, ED must provide a notification that will include the basis for denial.[124] We urge ED to provide as specific and granular a basis as possible so that borrowers can adequately respond through the new reconsideration process.[125]

Additionally, in order to ensure that borrowers can effectively use this proposed procedure, we recommend that ED extend the proposed deadline to file a claim from 90 days to 180 days. This extension should allow borrowers to better review ED's stated justification for the rejection, review accounts, obtain documentation in support of their position, and seek legal counsel. Not

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[120] 20 USC § 1082(a)(4).

[121] *See* Warren Letter, *supra* n 119, at n 21 (citing *Carr et al. v. DeVos*, Case No. 19-cv-6597 (S.D.N.Y.), Dkt. No. 15-1 (Decl. of Cristin Bulman), 16 (Stipulation of Dismissal) (Secretary modified DLP and FFELP loans of Plaintiffs pursuant to 20 USC § 1082(a)(4) resulting in balances of $0.00)).

[122] *Id*. at 6.

[123] NPRM, 87 Fed. Reg. at 41935, 42002.

[124] *Id*. at 42002 (proposed § 685.219(e)(8)).

[125] We also wish to call to ED's attention a potential typographical error in the proposed regulation. As proposed, § 685.219(e)(8) provides: "If the Secretary determines that the borrower does not meet the eligibility requirements for loan forgiveness under this section, [sic] grants forbearance of payment on both principal and interest for the period in which collection activity was suspended." A word appears to be missing from prior to "grants forbearance."

only does 180 reflect a more realistic timeframe for borrowers to coordinate with potentially several different stakeholders—present employers, past employers, loan servicers, legal services attorneys—it is also a worthwhile tradeoff for ED to allow more time for a well-run administrative appeals process than to make final agency determinations in short order that would then be appealed in federal court. Particularly given the history of uncertain and opaque reconsideration, ED should err on the side of allowing borrowers more time to file a claim.

4. Conclusion

Even with ED's historic Waiver program, too few public service workers with federal student loans can currently access PSLF. Through the present rulemaking process, ED has the opportunity to reduce unnecessary and extra-statutory bureaucratic barriers to entry, and finally deliver the promise of debt cancellation to these borrowers. It has the legal authority to do so, and when in doubt, it should opt for more expansive than restrictive regulations. We would be happy to discuss this content and ED's ongoing work related to PSLF.

Please contact Winston Berkman-Breen, Policy Counsel and Deputy Director for Advocacy, at winston@protectborrowers.org.