AccessLex INSTITUTE®

July 22, 2022

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Ave. SW
Room 2C172
Washington, DC 20202

Re: Higher Education Act Title IV regulations

Docket Number: ED-2021-OPE-0077

Dear Mr. Gaina:

I am writing on behalf of AccessLex Institute in response to the July 13, 2022, Federal Register notice soliciting comments on the U.S. Department of Education's (ED) evaluation of its regulations for programs authorized under Title IV of the Higher Education Act of 1965, as amended (HEA). Thank you for the opportunity. Below you will find AccessLex Institute's recommendations regarding the Public Service Loan Forgiveness (PSLF) program, interest capitalization and Total and Permanent Disability (TPD) discharge.

AccessLex Institute, in partnership with its nearly 200 nonprofit and state-affiliated ABA-approved member law schools, has been committed to improving access to legal education and to maximizing the affordability and value of a law degree since 1983. We advocate for policies that make legal education work better for students and society alike; conduct research on the most critical issues facing legal education today; seek to expand access to legal education for underrepresented students through research, grantmaking, data analysis, and the dissemination of information and resources; and aim to increase first-time bar exam passage nationwide.

<u>Public Service Loan Forgiveness</u>

In our comment letter to ED on June 28, 2021 regarding programs authorized under Title IV of HEA, AccessLex made a number of recommendations regarding PSLF and how ED could improve its communication with borrowers, operate the program more efficiently, clarify confusing employment eligibility requirements, and expand the program's forgiveness criteria. Below are our thoughts on the proposals contained in the current Notice of Proposed Rule Making (NPRM).

AccessLex supports ED's proposal to codify a formal reconsideration process that will allow borrowers to appeal a denied application. It is no secret that the PSLF program has been wrought with issues related to inconsistencies and servicer error. In addition, borrowers are provided with little to no guidance regarding how to identify payment counting errors critical for determining their forgiveness eligibility.[1] This landscape, coupled with the lack of transparency around what a borrower could do to dispute any issue with how their progress toward PSLF was determined, has no doubt contributed to the program's high denial rate. Providing borrowers with a formal reconsideration process will give borrowers an opportunity to dispute a denial that may have come from an invalid error.

We applaud ED's proposal to use data matching to increase flexibility and efficiency in order to not require an application when feasible. In our initial letter, we asked ED to make the processing of all PSLF forms electronic because the process for applying for PSLF is complicated and outdated. As ED is aware, borrowers are required to complete PSLF forms, track down all their qualifying employers, and have them complete and sign the forms. This entire process is unnecessarily complicated and time-consuming. The step that ED is taking toward automating the PSLF program process for borrowers for whom ED has employment data, such as from the Office of Personnel Management, will ensure that ED is moving toward a more streamlined and efficient process.

AccessLex supports ED's proposal to count lump sum payments, payments made in multiple installments, payments made on a Direct Loan prior to consolidation, and certain periods of forbearances and deferments as qualifying payments. Of the many implementation issues borrowers experienced with PSLF, unclear instructions regarding qualifying payments were at the top.[2] When the program began accepting applications, many borrowers were shocked to learn that the only types of payments permitted were those made for the full scheduled installment amount. This meant that ED would not consider payments made in installments or as a lump sum as meeting PSLF eligibility criteria. In addition, payments made prior to a consolidation were also not counted as a qualifying payment. This led many borrowers who worked in public service careers for 10 years to lose out on forgiveness they had earned. Correcting this issue by providing a more generous framework for qualifying payments will help to restore the original intention of the program, which is to provide forgiveness to public servants who dedicate 10 years of their lives to public sector work.

AccessLex supports ED's proposal to eliminate the need to be employed by a qualifying employer at the time of forgiveness. Another frustrating issue with the PSLF program is that applicants must be employed in a public service job *at the time* that forgiveness is received. For applicants who have devoted 10 years of their lives to public service careers, this requirement makes them ineligible for forgiveness if they change employers during the often-lengthy period between when they apply for forgiveness and when they receive it. Removing the requirement of continued public service employment at the time of forgiveness would simplify the PSLF application process and improve applicant success rates, which would in turn incentivize more Americans to pursue public service jobs. This move would also strengthen the promise of PSLF and help to ensure that the federal government provides the student loan forgiveness that Congress promised in recognition of the tremendous benefits that public servants provide.

ED should provide forgiveness to otherwise eligible borrowers who engage in public service work through a contract with a qualifying employer. Certain independent contractors and others engaged in public service work whose employer does not qualify them for the PSLF program, including public defenders or healthcare workers, are ineligible for forgiveness. These borrowers who work full-time in job categories that are eligible for PSLF (i.e., those listed in 20 U.S.C. § 1087e) are excluded from forgiveness

[1] U.S. Gov't Accountability Off., GAO-18-547, Public Service Loan Forgiveness: Education Needs to Provide Better Information for the Loan Servicer and Borrowers (2018).
[2] *Id.*

because ED's current interpretation of 34 C.F.R. § 685.219 does not recognize them as eligible employees. For example, attorneys representing indigent clients on a full-time basis who are compensated directly by courts on an hourly or flat fee per case basis or by an organization that is not a 501(c)(3) which is contracted with a court are not eligible for forgiveness, despite doing public service work.

We appreciate that ED raised this issue in the NPRM and is open to finding a solution that will ensure that public servants receive the forgiveness they have earned. ED's proposal to have qualifying employers certify periods of employment of a contractor who does public service work is a sound one. State agencies, courts, and other organizations that contract with bar advocates, such as public defenders, track the hours worked by these contractors. This allows them to easily certify that the contractor has worked the 30 hours a week required by PSLF. For those that may not have the needed systems in place today, the July 1, 2023 implementation date gives them time to make necessary changes.

Additionally, these qualified employers already certify employment for the purposes of PSLF for employees that receive a W-2 so they are accustomed to this process. The reason they do not certify employment of contractors to whom they send a 1099 form is because ED does not currently allow it. Expanding the scope of certification to contractors engaged in public service work would simply require the employer to track contractors' hours (which they already do) and for ED to add an additional field to the PSLF application to indicate whether a borrower is an employee or a contractor.[3]

Under this process, ED should allow borrowers who contract with more than one qualifying employer to combine the hours worked at each employer to reach the 30-hour a week requirement.

Some may argue that allowing borrowers that contract with a qualifying employer to be eligible for PSLF is not what Congress intended when it created the program. However, this is not the case. The law requires that a borrower "has been employed in a public service job during the period in which the borrower makes each of the 120 payments."[4] Further, HEA defines a public interest job, in part, as "public interest law services (including prosecution or public defense or legal advocacy on behalf of low-income communities at a nonprofit organization)."[5] Therefore, a private attorney that contracts with a state or local government entity, a court system, or a non-profit organization to provide public defense services to indigent clients is working in a public service job.

ED might also receive pushback stating that contractors may earn high salaries outside of their contract work with qualifying employers and should not be eligible for PSLF. However, the requirement that borrowers must be enrolled in an income-driven repayment (IDR) plan, most of which require partial financial hardship to be eligible, mitigates against this. And under the Revised Pay As You Earn (REPAYE) plan, which does not require a showing of partial financial hardship, payments are not capped at the 10-year Standard Plan amount. This means that borrowers in REPAYE who earn more will pay more.

ED should extend the Limited PSLF Waiver that is set to expire on October 31, 2022. Because these regulations are scheduled to go into effect on July 1, 2023, there will be an eight-month period during which borrowers will not be eligible for flexibilities that are contained in the waiver and that will be codified by the regulations in July. This will lead to further confusion for borrowers in a program that has

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[3] ED could add language to the PSLF application to limit eligibility to those contractors performing a public interest job, such as: "a contractor performing a public interest job as defined in 20 U.S.C. § 1807(e)".
[4] 20 U.S.C. §1087e(m)(1)(B)(ii).
[5] 20 U.S.C. §1087e(m)(3)(B).

been plagued by confusion and poor implementation for years—confusion that ED is trying to alleviate through the waiver and these new rules. As such, ED should extend the Limited PSLF Waiver through July 1, 2023.

Interest Capitalization

In addition to our recommendations regarding the PSLF program, AccessLex also provided ED with a recommendation to eliminate interest capitalization, and we are pleased to see that ED is proposing to eliminate non-statutory capitalization on Direct Loans. Interest capitalization is the process of adding unpaid interest that has accumulated on a loan to the outstanding principal balance of a loan, increasing the amount that the borrower must pay back. Although IDR plans like REPAYE attempt to mitigate this by providing a subsidy for half of the unpaid accrued interest each month when the monthly payment amount is less than the monthly interest amount, interest capitalization is still causing the loan balance of many borrowers to grow over time.

In our initial comment letter, we argued that it was counterproductive to allow balances that would ultimately be forgiven to increase. We shared data from the Congressional Budget Office that stated that graduate and undergraduate borrowers in IDR plans would repay 82.5 percent and 84 percent of their original loan disbursement, respectively.[6] Meaning that the amount that would be forgiven, in many cases, is accumulated interest. It was our position then, and still remains, that since ED will forgive this interest in 20 to 25 years, it would benefit the borrower today for that interest to not capitalize in a way that makes repayment seem futile. So, we are heartened to see that ED heard us and is proposing to take this step to help struggling borrowers by eliminating interest capitalization for non-statutory capitalization events.

Total and Permanent Disability Discharge

In our June 2021 comment letter, we also asked ED to make changes to the process for discharging the student loans of borrowers that have been deemed eligible under a TPD discharge. Specifically, we proposed that ED grant automatic student loan discharges to those borrowers who have been determined to be disabled by the Social Security Administration (SSA), rather than requiring these borrowers to submit an application. Shortly thereafter, in August 2021, we were pleased to see that ED did just that.

The NPRM proposes further changes to make accessing TPD discharge easier and more streamlined for borrowers, such as: (1) allowing additional categories of disability determinations by SSA, (2) allowing additional types of medical professionals to certify that a borrower has a qualifying disability, and (3) removing the 3-year income monitoring period.

AccessLex supports these improvements to TPD discharge eligibility and process. Reducing the number of barriers that a borrower must overcome to receive benefits to which they are entitled is paramount when crafting policy, especially as it relates to student loan discharge. Unnecessary delays could result in falling into default, being placed into collections, and having wages or federal disability benefits garnished.

[6] Cong. Budget Off., Income-Driven Repayment Plans for Student Loans: Budgetary Costs and Policy Options (February 2020). https://www.cbo.gov/system/files/2020-02/55968-CBO-IDRP.pdf.

Thank you for your work on these issues and for making much needed changes to the PSLF program, interest capitalization, and TPD discharge. If you have any questions, please do not hesitate to contact me at cchapman@accesslex.org or Nancy Conneely Managing Director of Policy, at nconneely@accesslex.org.

Sincerely,

Christopher P. Chapman
President and Chief Executive Officer