



PROPOSED ACTION
MEMORANDUM

Improving the Public Loan Forgiveness Program

Department of Education
November 2020

I. Summary

In response to the skyrocketing cost of higher education that made it difficult for public servants to obtain degrees necessary to serve in their professions while also paying back their student loans, a bipartisan Congress created the Public Service Loan Forgiveness (PSLF) Program in 2007.¹ This Program provides loan forgiveness to borrowers engaged in qualifying public service work who make ten years of on-time payments. Because of the ten-year (*i.e.*, 120 months) requirement, borrowers first became eligible for PSLF in 2017. Almost immediately thereafter, the Program's failures became self-evident.

To correct these failures, which we describe in depth below, the U.S. Department of Education (Department) could take several executive actions under the next administration, including:

- (1) Forgive the loans of certain categories of borrowers pursuing PSLF.
- (2) Make administrative reforms to the PSLF application and decision-making process.
- (3) Instruct its exclusive loan servicer for PSLF to improve the enrollment, re-certification, and application process for borrowers.
- (4) Issue specific instructions to all Title IV student loan servicers to improve their communications with borrowers interested in PSLF.

These changes, which could be accomplished through an internal directive, would ensure that our nation's public servants receive the loan forgiveness that Congress intended.

II. Background and Current State

In 2007, Congress enacted the College Cost Reduction and Access Act of 2007 (CCRAA), which amended the Higher Education Act of 1965 (HEA), 20 U.S.C. § 1070 *et seq.*, and created the PSLF Program. *See* CCRAA, Pub. L. No. 110-84, § 401, 121 Stat. 784, 800–01 (2007). The CCRAA altered the William D. Ford Direct Student Loan Program² (the Direct Loan Program)—through which the federal government makes loans directly to borrowers—by providing that the United States Secretary of Education (Secretary) “shall cancel the balance of interest and principal due . . . on any eligible Federal Direct Loan not in default” for borrowers who meet certain eligibility requirements. 20 U.S.C. § 1087e(m). Section 455 of the CCRAA spells out those requirements, which include:

- Making 120 on-time payments³
- On an eligible federal Direct Loan after October 1, 2007⁴

¹ *See* 20 U.S.C. § 1087e(m). We note that then-Senator Biden voted in support of the legislation, which was part of the College Cost Reduction and Access Act when the legislation passed in the Senate in July 2007. *See* Senate Roll Call Vote No. 272 (July 20, 2007).

² Direct and Federal Family Education Loan (“FFEL”) loans are two types of federal student loans. As part of the HEA, Congress established the FFEL loan program in which commercial lenders loaned money to students and their families under favorable terms, which were then guaranteed by guaranty agencies and reinsured by the United States government. *See generally* 20 U.S.C. § 1078(a)–(c). Effective in 2010, Congress ceased the origination of new FFEL loans and transitioned entirely to a Direct Loan program wherein the United States serves as the lender and contracts with non-governmental entities to service loans the Department issues. 20 U.S.C. § 1071(d); *see also* Health Care & Educ. Reconciliation Act of 2010, Pub. L. No. 111–152, § 2201 *et seq.*, 124 Stat. 1029, 1074 (2010). Although borrowers are still repaying FFEL loans, no new FFEL loans have been issued since June 30, 2010. In addition, in 2008, Congress—through the Ensuring Continued Access to Student Loan Act (“ECASLA”), Pub. L. No. 110–227—authorized the Department to purchase FFEL loans from commercial lenders for a limited period of time. That period was subsequently extended. Many of those loans are still owned by the Department today.

³ 20 U.S.C. § 1087e(m); *see also* 34 C.F.R. § 685.219(c).

- Pursuant to an income-driven, income-contingent, or standard repayment plan⁵
- While being employed in a qualifying public service job during the period when each of the requisite 120 payments are made
- While remaining employed in a qualifying public service job at the time of the borrower's application and when the borrower receives forgiveness⁶

The 120 payments must be made within fifteen days of the due date for the full scheduled installment amount to be considered qualifying, but they do not have to be made consecutively.⁷ However, all payments must be made while the borrower is working a qualifying public service job, that can include one of the following: (1) federal, state, local, or tribal government; (2) a public child or family service agency; (3) a 501(c)(3) nonprofit organization that is exempt from taxation under § 501(a) of the Internal Revenue Code and does not engage in religious activities, unless the qualifying activity does not include religious instruction, worship services, or any form of proselytizing; (4) a tribal college or university; and (5) a nonprofit that provides certain types of public service, excluding labor unions, partisan political organizations, and organizations engaged in religious activities.⁸

Many of the PSLF Program's current problems are the result of these nuanced eligibility requirements and borrower confusion around these requirements. They are also due in part to the Department's failure to provide comprehensive guidance to its Title IV federal student-loan servicers about how to administer the PSLF Program. For example, for years until a ruling in litigation brought by the American Bar Association,⁹ the Department took the position that determinations made to borrowers on employer certification forms were not final and regularly reversed decisions from prior years. Many borrowers spent years making payments while working in a job they thought the Department determined was eligible public service employment, only to be later told that the employer did not qualify.

In response to the Program's failures, Congress enacted one narrow fix in 2018—known as the Temporary Expanded Public Service Loan Forgiveness (TEPSLF) Program—by appropriating \$700 million to expand PSLF eligibility to forgive the loans of borrowers who had used the wrong type of repayment plan.¹⁰ But that too has had little success. As reported by the Government Accountability Office (GAO), by September 2019, 99% of TEPSLF applications had also been denied.¹¹ The problems have not improved much in the past year either. As of March 2020, although 145,758 borrowers had submitted applications for PSLF, only 1,831 (or 1.26%) had received it.¹² Similarly, only 1,768 borrowers requesting TEPSLF had received it.¹³

Without significant intervention, confusion about the PSLF Program's eligibility requirements—and borrowers' growing frustration with the Department's denial of their applications—will continue. For example, the Department still does not provide written determinations to PSLF applicants, or explain why

⁴ Eligible Direct Loans include: (1) Federal Direct Stafford Loans; (2) Federal Direct Plus Loans; (3) Federal Direct Unsubsidized Stafford Loans; and (4) Federal Direct Consolidation Loans. *See* 20 U.S.C. § 1087e(m)(3); *see also* 34 C.F.R. § 685.219(b). Parent PLUS Loans do not qualify for forgiveness unless they are first consolidated into a Federal Direct Consolidation Loan. 20 U.S.C. § 1087e(m)(3).

⁵ 20 U.S.C. § 1087e(m)(1)(A); 34 C.F.R. § 685.219(c)(1)(iv).

⁶ 20 U.S.C. § 1087e(m); 34 C.F.R. § 685.219(c).

⁷ 34 C.F.R. § 685.219(c)(1)(iii).

⁸ 34 C.F.R. § 685.219(b).

⁹ *Am. Bar Ass'n v. United States Dep't of Educ.*, 370 F. Supp. 3d 1, 20 (D.D.C.), *motion for relief from judgment denied*, 388 F. Supp. 3d 23 (D.D.C. 2019), *appeal dismissed*, No. 19-5213, 2020 WL 1487734 (D.C. Cir. Feb. 24, 2020) (holding that determinations made and provided to individual borrowers regarding PSLF eligibility constituted final agency actions under the Administrative Procedure Act).

¹⁰ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 315, 132 Stat. 348, 752 (2018); Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, § 313, 132 Stat. 2981, 3107 (2018).

¹¹ U.S. Gov't Accountability Office, GAO-19-595, *Public Service Loan Forgiveness: Improving the Temporary Expanded Process Could Help Reduce Borrower Confusion* 11 (Sept. 2019), <https://www.gao.gov/assets/710/701157.pdf>.

¹² U.S. Dep't of Educ., Fed. Student Aid, *March 2020 PSLF Report* (Mar. 31, 2020), <https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data> (select "March 2020 PSLF Report" from the dropdown menu and hit "GO") (last visited June 1, 2020).

¹³ *Id.*

applications are denied, making it increasingly difficult for borrowers to fix issues with their eligibility or applications. In addition, the Department has provided little guidance to servicers on how to communicate with student loan borrowers that may be interested in the PSLF program, and administrative errors continue to persist on many borrower accounts during the process of making qualifying payments.

III. Proposed Actions

Apart from existing legislative proposals to expand relief for public servants, as well as advocacy efforts to achieve targeted or broad-based student-loan debt forgiveness (which would presumably reach borrowers pursuing PSLF), the Department has ample administrative authority to improve both PSLF and TEPSLF. Such authority carries little to no litigation risk, and can be accomplished without congressional action or negotiated rulemaking.

Upon taking office, the next administration could exercise that authority and take several executive actions to provide relief to PSLF-eligible borrowers, including:

(1) Forgive the loans of certain categories of borrowers pursuing PSLF

The Department could exercise its powers under the HEA's settlement and compromise authority, HEA § 432(a)(6), 20 U.S.C. § 1082(a)(6),¹⁴ to grant PSLF relief. To do this, the Secretary could issue a decision memo to FSA's Chief Operating Officer or the Undersecretary that proposes discharges for the following categories of borrowers. (Such a decision memo is not required by statute or regulation but often used in practice.)

- **Borrowers who have made 120 payments over ten years of public service, but who failed to qualify for PSLF, because they have FFEL Loans or consolidated an FFEL Loan into a Direct Loan during the ten-year period.**¹⁵ Normally, consolidation during the ten-year period would start (or restart) the clock for PSLF eligibility. But the Department could expand PSLF to provide relief to borrowers who would otherwise qualify, based on their payment and employment history, but who had the wrong type of loan.
- **Borrowers who have made 120 payments over ten years of public service on a qualifying Direct Loan, but who used the wrong repayment plan for all or part of the ten-year period.** Automatically discharging the loans of TEPSLF-eligible borrowers would expand PSLF eligibility by ensuring that no borrowers miss out on TEPSLF relief due to the possible exhaustion of the \$700 million Congress appropriated specifically for this purpose.
- **Borrowers who have made 120 qualifying payments for an employer that the Department initially certified as qualifying, only to subsequently reverse its position.** Providing PSLF to these borrowers would protect their reliance upon the Department's original certification and eliminate the need for individual borrowers to sue the Department over its reversals. To accomplish

¹⁴ Although section 1082(a)(6) applies to loans issued under the FFEL Loan Program only, the HEA makes Direct Loans subject to the "same terms, conditions, and benefits" as FFEL Loans, which includes the benefit of discharges pursuant to the Department's settlement and compromise authority. See HEA § 451(b)(2), 20 U.S.C. § 1087a(b)(2). See also Student Assistance General Provisions, Fed. Perkins Loan Program, Fed. Family Educ. Loan Program, William D. Ford Fed. Direct Loan Program, & Teacher Educ. Assistance for College & Higher Educ. Grant Program, 81 Fed. Reg. 39,330, 39,368 (June 16, 2016) (tying the Department's authority to compromise FFEL Loans under HEA § 432(a) to the "terms and conditions" language under HEA § 451(b)).

¹⁵ Senators Kirsten Gillibrand and Tim Kaine introduced a similar proposal to count payments made on FFEL Loans before those loans were consolidated into Direct Loans. See Jillian Berman, "2020 Democrats want to overhaul a student-loan forgiveness program for public servants," Market Watch (Apr. 13, 2019), available at: <https://www.marketwatch.com/story/2020-democrats-want-to-overhaul-a-student-loan-forgiveness-program-for-public-servants-2019-04-11>.

this, the Department could proactively conduct a review to identify these borrowers.

(2) Make administrative reforms to the PSLF application and decision-making process

Given the complexity of the program, and the lack of clarity surrounding its eligibility requirements, borrowers remain confused about how to pursue PSLF. To simplify and improve the application and decision-making process, the Secretary can issue a directive to the FSA Chief Operating Officer with instructions to take the following steps.

- **Provide borrowers who are denied PSLF with detailed, written explanations of the reasons for their denial.** Currently, the Department's denial letters contain very cursory explanations of the reasons for their denial, pointing borrowers to problems with, for example, their type of loan, repayment plan, or number of qualifying payments. More detailed explanations would enable borrowers to raise any potential errors, such as missing qualifying payments or employment periods, with the Department. Such explanations should include a month-by-month breakdown for each loan with an explanation regarding whether the Department counted a particular payment and, if not, why it was considered non-qualifying. These denial letters should also explain the evidence the Department relied upon in denying the application. This is one of the remedies currently being sought in *Weingarten v. DeVos*, No. 1:19-cv-2056-DLF (D.D.C. July 11, 2019). In that lawsuit, the plaintiffs have asserted that more detailed explanations are required as a matter of the Administrative Procedure Act (APA) and constitutional due process.
- **Provide borrowers who are denied PSLF with an administrative appeals process so they can submit additional information demonstrating their eligibility and address any errors identified in the Department's denial letter.** Currently, there is no formal appeals process for borrowers. *Weingarten v. DeVos* also seeks this remedy.
- **Create a public database of employers that qualify for PSLF, which all servicers can access as they process Employment Certification Forms (ECFs).** This database should include: (1) all federal, state, local, and tribal government employers; (2) all 501(c)(3) nonprofits, excluding those engaged in religious activities; (3) all tribal colleges and universities; and (4) any other employers that have been determined to qualify for the purposes of PSLF. Servicers and borrowers should be instructed that the presence of a particular employer in the database means that an employer *does* qualify, but that the absence from the database does not necessarily mean that the employer does *not* qualify. Rather, the servicer—in consultation with the Department—should assess whether that particular employer should qualify and, if so, add that employer to the database. The Department should update this database regularly.
- **Establish a new office at the Department's Office of Federal Student Aid (FSA) to oversee PSLF.** This office would be responsible for reviewing questions about a borrower's eligibility once escalated by loan servicers or borrowers.

(3) Instruct its exclusive loan servicer for PSLF to improve the enrollment, re-certification, and application process for borrowers

Because borrowers seeking PSLF are typically transferred to the Pennsylvania Higher Education Assistance Agency (PHEAA), which conducts its federal student loan servicing as FedLoan Servicing (FedLoan), the Department can instruct—via Dear Colleague letter or instructions given by the Department to its servicers—FedLoan to make certain changes to its processing of ECFs, income-driven repayment plans, and PSLF applications. For example, the Department could:

- Develop a new, detailed tracking sheet for all loan servicers to use when transmitting a borrower's payment history to FedLoan for the purpose of counting qualifying payments;
- Instruct the borrower's original loan servicer to break down that borrower's payment history by month and by loan, showing the borrower's repayment plan, total monthly payment amount, payment due date, and how much of each monthly payment was applied to each loan. The Department should require servicers to provide this same payment history to the borrower in case there are any future disputes about qualifying payments made prior to the transfer to FedLoan;
- Establish deadlines for FedLoan to process ECFs and PSLF applications;
- Instruct FedLoan to immediately begin counting qualifying payments when it accepts a transferred loan from another servicer, rather than placing the borrower into administrative forbearance;
- Hold servicers accountable for failing to process income-driven repayment applications and annual re-certifications within a certain timeframe; and
- Require FedLoan to provide student loan borrowers with detailed information, broken down by loan and by month, explaining how their qualifying payments have been counted.

(4) Issue specific instructions to all Title IV student-loan servicers to improve their communications with borrowers interested in PSLF

The Department can instruct—via Dear Colleague letter or instructions given by the Department to its servicers—all Title IV student loan servicers to:

- Send all borrowers annual reminders and instructions on how to submit (and re-certify) their income and family size for income-driven repayment plans.
- Remind borrowers who have not yet completed their annual certification about the need to do so, and provide clear instructions to those that missed deadlines on how to re-certify their income and family size to get back on track for PSLF.
- Clearly communicate to borrowers at least once per year how to submit an ECF to confirm the number of qualifying payments they have made during specific time periods.
- Finally, the Department should create a checklist of eligibility requirements needed for PSLF and require all servicers to share this checklist with borrowers regularly. The goal of the checklist would be to make it easier for borrowers to determine their eligibility for PSLF before accepting job offers or enrolling in repayment plans.

IV. Justification

As of March 2019, the Department had forgiven the loans of fewer than 1% of all borrowers who had applied for PSLF.¹⁶ Unquestionably, that is in part the result of the Department's own failure to implement the PSLF program effectively.

¹⁶ U.S. Dep't of Educ., Fed. Student Aid, March 2019 PSLF Report (Mar. 31, 2019),

The next administration will face immense pressure from state, local, and tribal governments; military and veterans organizations; first responders; and numerous other advocacy groups to dramatically improve the Program by ensuring that thousands of Americans are granted the relief they were promised after dedicating a decade of their lives to public service. As important as these issues were before the COVID-19 pandemic, the pressure will only increase for the administration to take action with the country facing a possible economic recession.

