AccessLex INSTITUTE®

June 28, 2021

Vanessa Gomez
U.S. Department of Education
400 Maryland Ave. SW
Room 2C179
Washington, DC 20202

Re: Higher Education Act Title IV regulations

Docket Number: ED-2021-OPE-0077

Dear Ms. Gomez:

I am writing on behalf of AccessLex Institute in response to the May 26, 2021, 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 for revising specifically the regulations governing the Public Service Loan Forgiveness program, income-driven repayment plans, and Total and Permanent Disability 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.

Public Service Loan Forgiveness

The Public Service Loan Forgiveness (PSLF) program, enacted with bipartisan support in 2007 under the College Cost Reduction and Access Act of 2007 (P.L. 110-84), encourages individuals to pursue and persist in public service careers that benefit communities across this country. The program allows eligible Direct Loan borrowers employed by a government entity or qualifying nonprofit organization to have their loans forgiven after making 120 separate monthly payments.[1]

PSLF has been a vital recruiting tool for incentivizing the best and the brightest to serve millions of Americans, especially in high-need and rural areas. However, despite the benefits, confusing eligibility requirements, poor communication and implementation challenges have resulted in only two percent of

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[1] *See* 34 C.F.R. §685.219(c).

applicants receiving forgiveness.[2] ED has an opportunity to correct these failings and should strengthen the PSLF program in the following ways:

Improve Communication and Efficiency

A 2018 Government Accountability Office report on PSLF implementation issues found that there were potential inconsistencies in the information provided to servicers regarding borrowers' loan payment history.[3] In addition, borrowers were provided with little to no guidance regarding how to identify payment counting errors critical for determining their forgiveness eligibility.[4] To remedy this, ED should **give borrowers better up-front information about whether they qualify for PSLF, how many payments are counted and why, and what they can do to dispute any issue with how their progress is determined**. Providing borrowers with more transparency regarding their eligibility for forgiveness and the means to dispute and correct issues that may arise would undoubtedly reduce the number of denials the program currently experiences.

ED should also **establish a database of qualifying federal and state employers to help automatically qualify borrowers.** To date, ED has not provided servicers or borrowers with reliable information for determining employers that qualify a borrower for loan forgiveness.[5] The lack of information only complicates the ability of a borrower to determine whether certain employers qualify them for forgiveness and hampers their ability to make informed decisions regarding their employment.

Borrowers wishing to pursue PSLF are also forced to switch to the sole federal loan servicer administering the PSLF program. The result for some borrowers has been an inaccurate transfer of information resulting in fewer payments being counted toward eligibility than were made. To mitigate these types of errors, ED should **allow borrowers to file employment certification forms through any student loan servicer or platform that ED uses to process loan payments.** This will help to limit inconsistencies, such as when data is transferred between servicers.

In addition to the gaps in clear and accurate information that borrowers receive, the process for applying for PSLF is complicated and outdated. Borrowers are required to complete PSLF forms, track down all their qualifying employers, and have them complete and sign the forms. Some borrowers must then send the forms by mail to the PSLF servicer. This process is unnecessarily complicated and time-consuming, and ED should instead **make the processing of all PSLF forms electronic.** Providing borrowers with a fully electronic system to upload and process all forms would ensure a more streamlined and efficient process.

ED should stop **issuing retroactive denials of a borrower that has previously been certified as having satisfied monthly payment obligations**. Navigating the current PSLF process is difficult enough and borrowers who rely on servicers to provide them with critical information should not be penalized for inconsistencies between a servicer and ED after an approval has already been made.

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[2] Off. of Federal Student Aid Data Center, Combined Public Service Loan Forgiveness Form Report (April 2021).
[3] 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).
[4] *Id.*
[5] *Id.*

Finally, ED should **allow borrowers to consolidate their loans without losing credit toward forgiveness.** When a borrower consolidates multiple federal student loans into a Direct Consolidation Loan, any payments made prior to consolidation no longer count toward PSLF. This creates a situation whereby a borrower meets the requirements of the PSLF program, including making 120 payments, but does not earn forgiveness. This is yet another inefficiency that frustrates progress toward forgiveness for eligible public servants in direct opposition to the spirit and requirements of the program.

Clarify Employment Eligibility

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 because ED's current interpretation of 34 C.F.R. § 685.219 does not recognize them as eligible employees.

For example, in places where public defense services are provided by a 501(c)(3) organization, or where attorneys are employed by a state or local government, public defenders are eligible for PSLF. However, in many jurisdictions the public defense system is not set up that way. 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. Likewise, some healthcare providers working at public or nonprofit healthcare facilities are prohibited by state law from being employed directly by the healthcare facility, making them also ineligible for the PSLF program.

We ask that ED **clarify that the nature of a borrower's verified source of full-time income may be used to determine that borrower's eligibility for PSLF**, if they would otherwise be considered ineligible on the basis of Employer Identification Number or other criteria not required by 20 U.S.C. § 1087e. We do not believe that this requires changes to the regulations, but rather can be done through sub-regulatory guidance.

Support Expanding Forgiveness Criteria

Beyond its authority to issue regulations and sub-regulatory guidance, there are also indirect ways in which ED can help improve the PSLF program. First, ED should support any legislation that would **provide 50 percent forgiveness to borrowers after five years of public service and 100 percent after 10 years.** While providing loan forgiveness after 10 years of public service is a generous policy, the length of time before forgiveness can be requested creates its own set of issues. Specifically, borrowers may find themselves unable to track down 10 years' worth of employment history or bank information to confirm eligibility if any issues arise. Additionally, because of the high percentage of denials, borrowers may be reluctant to enter into a 10-year public service career out of fear of being denied loan forgiveness. Staggered forgiveness will allow borrowers to be partially rewarded after a shorter period in public service and help to lessen any issues that may arise from having to track 10 years' worth of qualifying information.

ED should also support any legislation that would **expand eligibility to Federal Family Education Loans and all loan repayment plans.** The goal of the PSLF program has always been to incentivize people to enter into public service careers and borrowers should not be treated differently based on the type of loans they receive, or the type of repayment plan they enter.

Revising PSLF program regulations and guidance in these ways would go a long way in ensuring that the promise Congress made to public servants nearly 15 years ago is kept.

Income-Driven Repayment

There are currently five federal income-driven repayment (IDR) plans that tie a borrower's monthly loan payment amount to their income and forgive any remaining balance after a set number of years. These plans were created to help federal student loan borrowers better manage repayment. However, the availability of five different plans with slightly different terms can be confusing for borrowers. Also, some of the features of the existing plans can cause debt to increase over time, creating not just a financial burden but also a psychological one for the very borrowers these plans are designed to help.

ED should revise its regulations to improve the existing IDR plans to better assist low-income borrowers. In addition to the changes suggested below, ED should (1) keep the 10-year standard, graduated and extended plans for all borrowers, (2) keep the five current IDR plans for existing eligible borrowers, and (3) make the new IDR plan available to all existing Direct Loan borrowers who wish to enroll and the *only* income-driven option for new borrowers.

The new IDR plan elements should include:

Monthly payment amounts

The percentage of **discretionary income paid (defined as income over 150% of the poverty line) should be based on level of income**:

Borrowers making:	**Pay:**
Less than $100,000	10% of discretionary income
Between $100,000 - $150,000	12.5% of discretionary income
More than $150, 000	15% of discretionary income

Basing the percentage of discretionary income paid each month on a sliding scale will ensure that higher income borrowers, who may still need to be in an IDR plan due to high levels of debt, pay more each month. These borrowers are likely in a better financial position to pay a little bit more of their discretionary income. This approach could also result in the federal government collecting more through this new IDR program than it does in the current Revised Pay As You Earn (REPAYE) plan which requires all enrolled borrowers, regardless of income, to pay 10 percent of their discretionary income.

Additionally, there should be **no partial financial hardship requirement** in this new plan. In other words, any eligible borrower with a qualifying loan can enroll, even if it means their monthly payment is higher than under the 10-year standard plan. This is how the current REPAYE plan is structured.

Finally, **joint spousal income should be used to determine monthly payments**, regardless of tax filing status. This element would also mirror the current REPAYE plan.

Forgiveness Terms

All borrowers enrolled in the new IDR plan should receive **forgiveness after 20 years in repayment**, regardless of whether they borrowed for an undergraduate or graduate degree. The disparate treatment of graduate and professional students in the REPAYE plan should not be repeated. Under that plan, simply by virtue of having one dollar of graduate education loans, borrowers are saddled with an additional five years of repayment in order to get forgiveness.

Today's job market increasingly requires a graduate degree for jobs that previously did not, thus pushing applicants to obtain a graduate degree to remain competitive in certain fields. Penalizing graduate borrowers also creates an equity issue: 79 percent of Black students rely on financial aid for graduate school compared to 56 percent of White students.[6] Black students must also earn a credential beyond a bachelor's degree to receive pay similar to their White peers who only hold a bachelor's degree. Currently, Black bachelor's degree-holders make 20 percent less than White bachelor's degree-holders.[7] Adding five years to the repayment term of graduate borrowers in IDR plans would penalize borrowers for structural issues outside of their control and would cut against the government's stated role in higher education: access.

ED should also support **making forgiveness tax-free**. The *American Rescue Plan Act* made federal student loan forgiveness tax-free until 2025, but it should be made permanent. Borrowers that utilize IDR plans and do not pay off their loan balances are the least likely to be able to afford a high tax bill.

Certification of Income

The *Fostering Undergraduate Talent by Unlocking Resources for Education (FUTURE) Act* allows for data sharing between ED and the Internal Revenue Service (IRS) to determine a borrower's repayment obligation while enrolled in an IDR plan. ED has not specified a date on which this data sharing for IDR purposes will begin, but recently they have said that data sharing between ED and IRS when a student fills out the Free Application for Federal Student Aid will not begin until 2024, a year later than Congress mandated, in order to update its technology system to support those changes.[8]

ED must not delay revamping its technology system to support the **automatic recertification of income**. Data released during the REPAYE negotiated rulemaking sessions show that between November 2013

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[6] Ben Miller, Center for American Progress, Graduate School Debt: Ideas for Reducing the $37 Billion in Annual Student Loans That No One Is Talking About (2020). https://cdn.americanprogress.org/content/uploads/2020/01/10090256/CollegeAffordabilityGap-report5.pdf.

[7] Anthony P. Carnevale, Stephan J. Rose, & Ban Cheah, Georgetown University Center on Education and the Workforce, The College Payoff: Education, Occupations, Lifetime Earnings (2011). https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/collegepayoff-completed.pdf.

[8] Michael Stratford, Education Department Delays Major Student Aid Overhaul, POLITICO (June 11, 2021). https://www.politico.com/news/2021/06/11/education-department-deadline-college-aid-493584.

and October 2014, nearly 60 percent of borrowers in an IDR plan failed to recertify on time.[9] Of those, over 30 percent went into a hardship-related forbearance or deferment. Enabling automatic recertification of income ensures that borrowers remain in IDR plans and avoid payment increases they cannot afford.

Treatment of Interest

ED should **eliminate interest capitalization**. Interest capitalization is the process of adding any 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. In REPAYE, interest capitalization is triggered when a borrower leaves the plan or exits a deferment or forbearance. In an attempt to mitigate this, REPAYE provides a subsidy for half the unpaid accrued interest each month when the monthly payment amount is less than the monthly interest amount. However, despite this protection, interest capitalization is still causing the loan balance of many borrowers to grow over time.

Seeing the balance of a loan increase while making full payments each month can create a psychological burden on borrowers and add to a sense of hopelessness of ever paying off their student loan debt. Large loan balances can also restrict a borrower's ability to invest in other ways, such as buying a home. It is also counterproductive to allow balances that will ultimately be forgiven to increase. According to the Congressional Budget Office, graduate and undergraduate borrowers in IDR plans will repay 82.5 percent and 84 percent of the original loan disbursement, respectively.[10] This means that the amount that will be forgiven, in many cases, is mostly accumulated interest. 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.

Some of the changes proposed above will cost money, while others will save money. But the federal government's role in student lending is not to make money; it is to help struggling borrowers. This support is a feature, rather than a bug, of any open access program offered by the government to remedy a shortfall in the market. As such, IDR should be viewed as a government program that invests in human capital, rather than an endeavor seeking to make a profit. The above changes will simplify the myriad repayment plans for new borrowers and structure the plan in a way that truly makes repayment manageable.

Total and Permanent Disability Discharge

Student loan borrowers who are determined by a medical doctor, the Social Security Administration (SSA) or the Department of Veterans Affairs (VA) to be totally and permanently disabled may receive a Total and Permanent Disability (TPD) discharge of their federal student loans. [11] Data matching between

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[9] U.S. Dep't of Educ., Sample Data on IDR Recertification Rates for ED-Held Loans (2015). https://www2.ed.gov/policy/highered/reg/hearulemaking/2015/paye2-recertification.pdf.

[10] 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.

[11] HEA § 437(a); 20 U.S.C. § 1087(a).

federal agencies[12] has partially streamlined the process and makes it clear to ED who is eligible for a TPD discharge.

While borrowers whom the VA finds eligible for TPD discharge automatically have their federal student debt discharged, [13] the same is not true for those considered disabled by SSA. [14] These borrowers must submit an application in order to obtain a discharge, [15] creating an unnecessary barrier to relief. As a result, nearly 400,000 eligible borrowers have not had their student loans discharged. [16] Borrowers that are unable to make their payments can fall into default, be placed into forced collections and have their federal disability benefits garnished, despite being qualified for a discharge.

In order to expeditiously provide the relief to which these borrowers are entitled, ED should revise its existing regulations to eliminate the need for borrowers to submit a TPD application and to **grant automatic discharges to those that are determined to be totally and permanently disabled by SSA.**

Automatically discharging the student loans of borrowers who are totally and permanently disabled is sound public policy that will alleviate the financial burden placed on a small subset of borrowers who may struggle to repay their loans. Additionally, doing so would put borrowers who are deemed eligible for TPD discharge by SSA on equal footing as those deemed eligible by the VA.

Thank you for considering our comments to revise and improve existing federal higher education regulations. If you have any questions or would like additional information, you can reach me at cchapman@accesslex.org. You can also contact Nancy Conneely, our Managing Director of Policy, at nconneely@accesslex.org.

Sincerely,

Christopher P. Chapman
President and Chief Executive Officer

[12] See Press Release, U.S. Dep't of Educ., "U.S. Department of Education and U.S. Department of Veterans Affairs Team Up to Simplify Student Loan Discharge Process for Disabled Veterans" (Apr. 16, 2018), *available at:* https://www.ed.gov/news/press-releases/us-department-education-and-us-department-veterans-affairs-team-simplify-student-loan-discharge-process-disabled-veterans; See Press Release, U.S. Dep't of Educ., "U.S. Department of Education Acts to Protect Social Security Benefits for Borrowers with Disabilities" (Apr. 12, 2016), *available at:* https://www.ed.gov/news/press-releases/us-department-education-acts-protect-social-security-benefits-borrowers-disabilities.
[13] See 84 Fed. Reg. 65,000 (Nov. 26, 2019), *available at:* https://www.govinfo.gov/content/pkg/FR-2019-11-26/pdf/2019-25813.pdf.
[14] See 34 C.F.R. § 685.213(b)(1).
[15] See 34 C.F.R. § 685.213(b)(1).
[16] See Office of the Inspector General, Social Security Administration Audit Report, "Social Security Administration Beneficiaries Eligible for Total and Permanent Disability Federal Student Loan Discharge," (Nov. 9, 2020), *available at:* https://www.oversight.gov/node/92106. (An audit found that nearly 400,000 borrowers have matched through the SSA process but have not received relief.)