



August 12, 2022

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

Re: Docket Number ED-2021-OPE-0077

On behalf of the National Association of Criminal Defense Lawyers (NACDL), we submit this letter in support of many of the Department's proposed amendments to 34 CFR 685. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members – and affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

NACDL supports amendments to the Public Service Loan Forgiveness (PSLF) program that will provide greater flexibility for qualifying payments and establishing a process for reconsideration when an application for forgiveness is denied. We also strongly support additional changes contemplated by the Department that would allow more lawyers providing full-time public defense services (a job function explicitly listed in the Higher Education Act as qualifying employment) access to PSLF. We encourage amendments to the proposed regulation that will make this critical resource available to more public defense attorneys by ensuring the definition of "qualified employment" is reflective of the ways the majority of public defense services are provided in the United States.

Our nation's constitution promises every person accused of a crime access to counsel. To help fulfill that promise, state and local governments rely on more than just attorneys working in



institutional public defender offices and agencies¹. Whether working under contracts², within managed assigned counsel (MAC) programs, or individual case appointments, individual attorneys are a central component in state and local public defense delivery systems. In some states (such as Colorado, Massachusetts, and Wisconsin) these lawyers are indispensable supplements to institutional public defender offices and agencies, providing representation when the institutional defender has a conflict or lacks the capacity to handle a case.³ In other states (such as Indiana, Maine, Pennsylvania, Texas, and Virginia) some jurisdictions do not have any institutional defenders and rely solely on contracts with individual attorneys and law firms or the appointment of individual lawyers to specific cases.⁴ Today, more than half of state and local public defense representation is provided by non-institutional defenders.

Yet despite providing the same public defense services as their government employed counterparts in institutional defender offices, these attorneys are currently denied access to PSLF solely because of the way they are compensated. Appointed and contract lawyers already work at severely reduced rates, from which they must cover their operating expenses, while getting none of the healthcare, retirement, or other benefits that their government employed, prosecution and institutional defender counterparts receive. Being excluded from accessing the PSLF program further adds to this financial burden, making it increasingly difficult for lawyers to afford to provide public defense services.

Today our country is in the midst of a public defense crisis unlike any that has been seen in the nearly 60 years since the Supreme Court decided *Gideon v. Wainwright* and made clear that states are responsible for ensuring public defense representation. Across the nation, states and

¹ The term “institutional defender” as used in this document refers to individuals employed as a salaried, full-time employee of either a state or local government, or a not-for-profit organization paid by a state or local government and devoted exclusively to providing representation for individuals unable to afford counsel for themselves in a pending criminal accusation.

² Contract attorneys typically contract with their local court, local unit of government, or with a state public defense oversight agency.

³ Capacity limitations can be a result of institutional attorneys having reached their caseload limits, a public defense agency lacking attorneys with sufficient expertise to handle a particular case type, or lacking funding to continue to provide representation.

⁴ In these states, even in those counties served by public defender offices, there is still a substantial stream of cases that will go to contractors due to direct conflicts (such as being appointed to represent the co-defendant) as well as caseload and/or expertise limitations. In Maine, public defense representation is provided wholly by contractors as the state having no institutional defenders.



localities are struggling to retain enough lawyers to provide representation to those facing criminal accusations. From large urban centers ([Milwaukee](#)) to small towns ([New Hampshire](#)), courtrooms across the country are experiencing backlogs because there are not enough public defense lawyers to handle all the people in need of representation. For rural communities, which rely almost exclusively on contract and court appointed lawyers to provide public defense services, the challenge is especially acute. The rise in law school debt, coupled with low levels of court appointed compensation and the inability to access loan forgiveness programs, has made it cost prohibitive for young lawyers to open practices in rural jurisdictions, [leaving many communities without any lawyers](#).

Loan forgiveness programs are critical to helping ease the financial burdens shouldered by those who are providing public defense representation to some of the most vulnerable of our community members and those who work on a full-time equivalent basis to provide public defense services should be eligible for PSLF regardless of the form of their employment.

The Department states it is considering allowing qualifying employers to certify periods of work performed by contractors. To that end, NACDL encourages the Department to amend the provisions of 34 CFR 685 to ensure that contractors, attorneys working in MACs, and other court-appointed attorneys can access public service loan forgiveness by allowing courts, units of government making payments on behalf of courts or state agencies, or agency/program leaders (such as the heads of MAC programs) to certify the work of contractors on PSLF forms. These agencies routinely track the number of hours and cases handled by individual lawyers as part of their monitoring and oversight for payments.

To ensure that non-institutional public defenders become eligible for PSLF, the Department should ensure that its definition of “employee,” for the purposes of PSLF, does not require individuals to receive a W-2 form. The Department should also make any necessary changes to the PSLF Form that would enable contractors to report that they provided qualifying work (whether on a full-time equivalent basis⁵ or on aggregate if they provide public defense services in multiple jurisdictions) and have that work certified. PSLF relief will then be available to the thousands of lawyers working tirelessly to fulfill the needs of their local communities.

⁵ Other similar steps can be taken for those attorneys whose work (and payment) is not measured by hourly units, but by case units.



Equally important, amendments to the rules must avoid overly restrictive language that inhibits access to the PSLF benefits, are of step with current practices for providing public defense services or would compromise the independence of the public defense function. To this end, restricting eligibility to only those whose job site is co-located with the qualifying employer, as suggested by the Department, will all but negate any efforts to make PSLF available to non-institutional public defense lawyers. One of the foundational hallmarks of an effective public defense delivery system is its independence.⁶ Thus, while public defense lawyers may work *with* courts or even receive case assignments and payments *through* the courts, they do not work *for* or *at* the court. Avoiding co-location or similar types of requirements will ensure that public defense lawyers maintain their core duty, i.e., being a zealous advocate for their individual clients, while still allowing courts, public defense commissions, and MAC administrators to certify the service providers' hours/caseloads and therefore their eligibility for PSLF.

The Department should amend the regulations and forms to be more inclusive of those providing critical public defense services. The amendments should provide guidance to employers, and other certifying agencies, that they are permitted to sign PSLF forms for contractors. Finally, the amendments should allow such qualifications to apply retroactively for those with prior years of public defense service that are newly qualifying. In making these changes, the Department can help ensure that public defense service providers are able to continue doing this important work and that our nation's promise of the right to counsel is kept.

Thank you for your consideration of this important issue.

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⁶ See Principle 1 of the [ABA Ten Principles of a Public Defense Delivery System](#), (Feb. 2002), "The public defense function, including the selection, funding, and payment of defense counsel, is independent."



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