

December 10, 2020

Linda Darling-Hammond, Team Lead  
Biden Education Transition Team

Via email to:

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Dear Ms. Darling-Hammond,

The Massachusetts Supreme Judicial Court formed the Standing Committee on Lawyer Well-Being to, among other things, address the mounting financial concerns of attorneys appointed to represent those unable to afford representation. As representatives of the Committee, we write on behalf of the undersigned to offer our thoughts on steps that could be immediately undertaken by the Biden administration to encourage private attorneys to perform public service work on behalf of the poor.

In Massachusetts, we face an acute shortage of attorneys to provide legal representation in matters in which the law requires the appointment of counsel. The Committee for Public Counsel Services (CPCS) is the Massachusetts state agency that serves those unable to afford an attorney. CPCS directly employs a number of staff attorneys; however, it relies on private lawyers to take on a substantial share of these cases in which an indigent person has a constitutional or statutory right to representation. It is increasingly difficult to draw enough private lawyers to handle such cases in light of the cost of education, student debt burdens, and inadequate pay under the state-set rates for appointed counsel.

The new Secretary of Education can take immediate action to ease student debt burdens by, under limited circumstances, allowing private counsel to participate in Public Service Loan Forgiveness. **Specifically, we urge the Secretary to clarify that the definition of “public service” codified in the Higher Education Act recognizes a public service job-function definition broader than the employer-status definition currently used and could include private bar counsel providing critical public interest law services.**

#### The Statute

To encourage individuals to enter and continue in full-time public service employment, Congress established a loan forgiveness program for public service employees. In 2007, the College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784

created Public Service Loan Forgiveness (PSLF) under which the Department must “cancel the balance of interest and principal” of qualifying student loans belonging to an individual who (1) is not in default on the loans, (2) makes 120 monthly payments after October 1, 2007, on the loans, and (3) is “employed in a public service job” at the time each payment is made and at the time of forgiveness. 20 U.S.C. § 1087e(m)(1).

The statute enumerates more than a dozen public service job-functions, including public interest law services, and defines a public service job as encompassing a series of specified professions, as well as specific categories of employer (government and 501(c)(3) nonprofits). Thus, the language of the statute clearly contemplates these public service job-functions being performed by borrowers not employed by government or nonprofit employers and is broad enough to cover private attorneys performing public interest law services.

### The Regulations

In October 2008, the Department imposed a regulatory requirement narrowly interpreting the statutory language “employed in a public service job,” 20 U.S.C. § 1087e(m)(1)(B), as requiring an eligible borrower to be “hired and paid by a public service organization,” 34 C.F.R. § 685.219(b). Under this interpretation, a borrower’s eligibility for the PSLF Program is not determined by the public interest nature of his or her job responsibilities, but by whether his or her employer qualifies as a “public service organization.”

Under the regulation, “public service organization” includes any government organization, not-for-profit organization classified under Section 501(c)(3) of the Internal Revenue Code, or not-for-profit private organization that is not classified under Section 501(c)(3) so long as it “provides public services” and does not engage in certain disqualifying activities. 34 C.F.R. § 685.219(b). The qualifying “public services” include, among others, “public interest law services.”

Although the tax status of an employer is a restriction not included in the Higher Education Act, the regulations define a “public service organization” as a class of employer that excludes any “business organized for profit,” even where a worker performs a public service job identified in the statute. The regulation’s exclusion of private attorneys who provide public interest law services is inconsistent with the PSLF statute.

### Application to CPCS Staff Attorneys vs. Private Bar Counsel

In Massachusetts, the Committee for Public Counsel Services (CPCS) provides legal representation for those unable to afford an attorney in criminal, delinquency, youthful offender, child welfare, mental health, registry cases, as well as related appeals and post-conviction matters. Representation is provided by a combination of approximately 450 staff attorneys and 2,800 private attorneys trained and certified to accept appointments. CPCS provides support for and supervision of the private attorneys within all divisions with training, mentoring and litigation support.

CPCS is certified as a qualified public service employer by the Department and as such, staff attorneys employed full-time by CPCS are permitted to benefit from PSLF; however, private bar counsel engaged in the same work are not recognized as eligible for loan forgiveness, despite clearly providing “public interest law services” and performing a “public service job” as identified in both the statute and its implementing regulations. 20 U.S.C. § 1087e(m); 34 C.F.R. § 685.219.

Private bar counsel are not directly employed by CPCS, a qualifying employer; however, they provide the same public services for the same needy populations as the CPCS staff attorneys and are working under the supervision a CPCS, a qualifying employer. CPCS relies on private bar counsel to provide these services, without them the Commonwealth of Massachusetts could not provide legal assistance in matters in which the law requires the appointment of counsel.

#### Request for Rewritten Regulations

For these reasons, we request that the Secretary pursue a negotiated rule making process on Public Service Loan Forgiveness to redefine qualifying public service employment more broadly. The resulting regulations should allow workers performing a statutory public service function full-time, such as public interest law services, under the direction of a qualified public service employer, such as CPCS, to participate in Public Service Loan Forgiveness.

We hope that the administration will take these steps and we stand ready to work with you to support whatever measures are necessary to accomplish this worthy goal.

Sincerely,

Honorable Margot Botsford (ret.) and Denise Murphy, Chairs  
Supreme Judicial Court Standing Committee on Lawyer Well-Being

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