What's Wrong with Public Service Loan Forgiveness and How to Fix It

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SUMMARY

In the first two years of the Public Service Loan Forgiveness (PSLF) program almost 100,000 student loan borrowers have applied, and the Department of Education's contractor has denied roughly 99,000 of those applications. The administration blames Congress for an unduly complex program design, and borrowers for applying without understanding the eligibility rules. Given that PSLF has only four basic eligibility tests, and that applicants are college graduates who can presumably read and count, this narrative seems implausible to explain a 99% denial rate. Evidence from oversight agency reports, state attorney general and class action lawsuits, and thousands of borrower complaints logged by the CFPB tell a different story, a story of agency failure to implement and oversee the program, and of widespread contractor errors and misrepresentations. Until Congress, the Department or an independent agency (such as the CFPB) does a comprehensive audit of the program it is impossible to know the rate of erroneous denials or discharge failures caused by servicer misrepresentations and bad practices. Proper implementation of PSLF will require a combination of contract oversight and design, regulatory, and legislative fixes. In particular, USED must adequately compensate its servicer, relax its unduly strict on-time payment rule, make better use of technology and data sharing with the I.R.S. to confirm eligible public service employment, and offer borrowers effective audit and appeal rights to review servicer errors. Congress should allow all borrower payments under all payment plans on all types of Federal loans to count.

I. INTRODUCTION: EDUCATION DEPARTMENT REJECTS NEARLY ALL PSLF APPLICATIONS

A program on the books for more than ten years that could serve as a model to alleviate the student loan crisis is instead serving as a model of contractor incompetence and agency failure. Public Service Loan Forgiveness (PSLF) was adopted by a bipartisan majority in Congress and was signed into law by President Bush. PSLF was originally conceived as a niche benefit with little or no significant budgetary cost.[2] As the program and higher education financing have evolved, PSLF could serve in the future to cancel student loan debt for the one in five borrowers who work for public and nonprofit employers, enabling them to buy houses and cars, start small businesses, and otherwise reenter and massively stimulate the economy. To date, more than 1.1 million borrowers in repayment have submitted approved public service employer certifications.

In the two years since borrowers began applying for loan forgiveness, fewer than one percent (845 out of 90,962) have been approved. Education Secretary Betsy DeVos and the Republican administration have no love for the program, proposing in each annual budget to eliminate it, but the failure to implement this law results from a perfect storm of misaligned contract incentives, agency and contractor indifference and neglect, poor contract oversight, and cumbersome agency regulations, in addition to flaws in the original legislative design.

Congress created the Public Service Loan Forgiveness Program ("PSLF") as part of the College Cost Reduction and Access Act of 2007 in order to forgive eligible public servants'

[2] Because borrowers would need to be in Federal Direct loans to qualify, cost estimates assumed borrowers in FFEL loans would consolidate into Direct Loans, thus increasing Direct Loan share of the portfolio. Federal Direct loans have lower net cost to the Treasury than FFEL loans. In 2009 the Obama administration eliminated new FFEL loans and made all federal loans Direct Loans.

loans after 120 on-time qualifying payments.[3] To qualify for PSLF, borrowers must 1) have Direct Loans, or consolidate Federal Family Education Loans ("FFEL") into Direct Loans; 2) be employed full-time by a qualifying public service employer or employers; 3) make 120 on-time qualifying payments, 4) on a qualifying repayment plan; and 5) complete the PSLF Application for Forgiveness. In other words, borrowers must have the right loans, the right employer, and be in the right repayment plans, all while making 120 on-time payments. Eligible borrowers could begin making qualifying payments as of October 1, 2007. October 1, 2017 was the earliest borrowers could theoretically apply for PSLF. The U.S. Department of Education (USED) contracted with the Pennsylvania Higher Education Assistance Agency (PHEAA, and its servicing arm FedLoan) to administer all student loan accounts of borrowers applying for PSLF, and to evaluate PSLF applications.

Since borrowers have been eligible to apply for forgiveness, the rate of successful applications has been shockingly low. Federal Student Aid ("FSA"), the office of USED responsible for administering federal student loans, issued the latest PSLF Program Data report[4] covering the period through June 30, 2019. FSA reports that 90,962 unique borrowers had submitted PSLF applications, covering 110,729 loans. Of those loans, 102,051 have been processed, and 1216 (representing 845 unique borrowers) have been approved for discharge by the loan servicer. The successful applications account for barely 1% of processed PSLF applications overall. A spate of news outlets have reported stories of borrowers who believed they qualified for PSLF loan discharge yet are being rejected at an alarming rate.[5] PHEAA is

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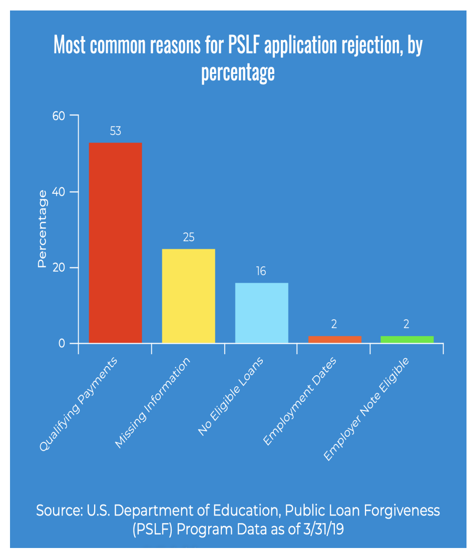
[3] 20 USCA § 1087e(m).
[4] June 2019 Public Service Loan Forgiveness Program Data Report ("Data Report"), ¶ 8-9. https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/pslf-june-2019.xls..
[5] See: Danielle Douglas-Gabriel, *Education Department rejects nearly all applications for a student loan forgiveness program*, LA Times (April 3, 2019), https://www.latimes.com/business/la-fi-student-loan-forgiveness-education-department-betsy-devos-20190403-story.html; Cory Turner, *Why Public Service*

defending lawsuits filed by several state attorneys general and borrower class actions alleging systematic misrepresentations and malfeasance in its admistration of PSLF. Many of the rejected applicants had been told by their student loan servicers that they were meeting all the requirements and on track to having their loans forgiven. As a matter of simple logic, it seems unlikely that tens of thousands of former college students, representing 99% of applicants, would knowingly apply for a program whose eligibility rules they do not meet. This paper draws on federal agency reports, media narratives, litigation documents, and a survey of our own institution's graduates to detail the reasons for the PSLF failures and recommend oversight, contractual, regulatory and legislative fixes.

II. REASONS FOR PSLF DENIALS

Although borrowers are denied PSLF based on all four criteria (wrong loan, wrong payment plan, wrong employer, not enough payments) the evidence so far suggests that most of the problem results from a combination of servicing failures, USED's unduly rigid rules for counting payments, and flaws in the process to certify employment. Some of the blame may also be attributed to design flaws in both the legislation. To identify the causes of PSLF denials, we draw on USED's skimpy data reports, the Inspector General, CFPB[6] and



Loan Forgiveness Is So Unforgiving, National Public Radio (October 17, 2018). https://www.npr.org/2018/10/17/653853227/the-student-loan-whistleblower; Jillian Berman, *This government program has rejected 99% of borrowers so far*, MarketWatch (September 23, 2018), https://www.marketwatch.com/story/this-government-loan-forgiveness-program-has-rejected-99-of-borrowers-so-far-2018-09-20

6 U.S. Consumer Fin. Protection Bur., Staying on track while giving back, The cost of student loan servicing breakdowns for people serving their communities (June 2017).

GAO[7] reports, state attorney general suits[8] borrower class actions,[9] and borrower surveys and narratives.

USED provides limited information in its data report on the reasons so many PSLF applications were denied.[10] The report divides denials into five categories: [insufficient] Qualifying Payments (53%), Missing Information (25%), No Eligible Loans (16%), Employment Dates (2%), and Employer Not Eligible (2%). These report categories do not align with the four eligibility criteria, because "Qualifying Payments" conflates three criteria: 120 on-time payments, payments made while working full-time for a qualifying public service employer, and payments made under the eligible repayment plans (right plan, right employer, on-time payments.) Moreover, the "No Eligible Loans" category appears to include only borrowers who have no Direct Loans at the end of ten years when they apply. Borrowers who started with ineligible loans, but consolidated into eligible Direct Loans during the 120 months, and did not realize the pre-consolidation payments don't count, are likely included in the "[insufficient] Qualifying Payments" category.

Denials based on "Missing Information" are not broken down by category as to which the borrower did not provide information. However, it seems likely that most missing information would concern the borrower's employers during the 10-year period, because servicers ought to

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[8] See Comm. of Penn. v. Navient Corp., (3:17-CV-1814 M.D. Pa. 2015); Illinois v. Navient Corp., No. 2017-CH 761 (Cir. Ct. Cook Cty IL); People v. Navient Corp., Case No. CGC-18-567732 (Cal. Super. Ct. Dec. 20, 2018); State of Washington v. Navient Corp., Case No. 17-2-01115-1 SEA (Wash. Super. Ct. July 7, 2017); State of Penn. V. Navient Corp., 354 F. Supp. 539 (M.D. Penn. 2018).

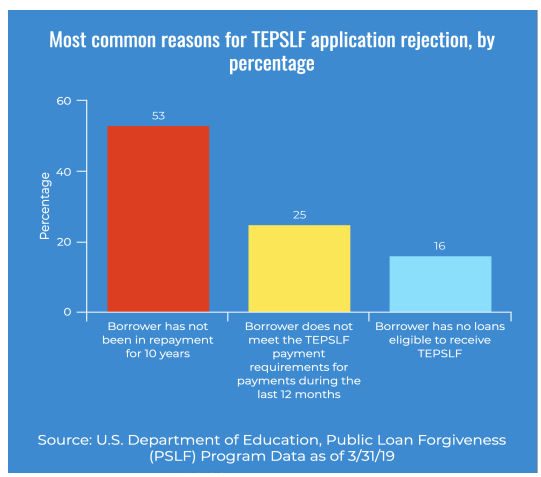
[9] See In re FedLoan Student Loan Servicing Litigation Multidistrict Transfer Order, MDL 2833 (June 18, 2018);

[10] U.S. Dept. of Ed., Public Service Loan Forgiveness Data, https://studentaid.ed.gov/sa/about/data-center/student/loan-forgiveness/pslf-data (report dated March 31, 2019).

have all necessary information to establish the other three criteria (right loan, right plan, 120 on-time payments.)

Congress attempted to fix the PSLF in 2018 by focusing on only one of these issues, namely, borrowers whose payments didn't qualify because they were in the wrong payment plan. The Temporary Expanded Public Service Loan Forgiveness program (TEPSLF) relaxed one of the four PSLF requirements, that borrowers made their payments under a qualifying income-based repayment plan. Some borrowers doing qualifying public service work and making on-time payments for ten years did not qualify for PSLF because for some of the ten years they were on graduated or extended repayment plans instead of standard or income-based repayment. TEPSLF applicants must have applied for PSLF and have been rejected, and meet the other three eligibility tests. TEPSLF essentially allows payments made under the wrong plan to retroactively count. The borrower must still have qualifying Direct loans, must have had their public service employment certified annually for all ten years, and have made payments under the otherwise nonqualifying payment plans on time, i.e. within 15 days of the due date.

The TEPSLF fix has not worked. As of April 2019, 38,460 borrowers applied for TEPSLF, but only 262 applicants have successfully had their loans discharged.[11] Congress authorized $700 million for the program, but so far, only $10.6 million has been forgiven.[12]



[11] Danielle Douglas-Gabriel, *Education Dept. rejects vast majority of applicants for temporary student loan forgiveness program*, Washington Post (Apr. 2, 2019), https://www.washingtonpost.com/education/2019/04/03/education-dept-rejects-vast-majority-applicants-temporary-student-loan-forgiveness-program/?utm_term=.46fa368e4d1c
[12] *Id.*

USED reported the following reasons for TEPSLF application denials: 1) borrower has not been in repayment for 10 years (39%), 2) the borrower does not meet the TEPSLF payment requirements for payments during the last 12 months (21%), 3) and the borrower has no loans eligible to be discharged under the TEPSLF (12%). Data Report, ¶ 21.

Most denials are for not making enough qualifying payments. This could result from difficulties in certifying full-time qualifying employment, as well as simply not having made on-time payments, or other servicing problems with payment tracking, discussed in detail below.

A. Qualifying Payments

The USED servicer denied 55% of PSLF applications on the grounds that the applicant had made an insufficient number of qualifying payments. The data report defines this reason for rejection as follows:

> The borrower submitted a completed application and was reviewed to determine if the payments made qualify based on [three of] the criteria for the program (on-time, in full, on a qualifying repayment plan, while working at a qualifying employer). The results show the borrower has not made 120 qualifying payments. The borrower is informed they do not qualify because they have not yet made enough qualifying payments. The borrower is instructed to continue making qualifying payments and to resubmit the forgiveness application once 120 payments have been made.

Superficially it may seem that borrowers are simply jumping the gun, applying before they have been in repayment for 10 years. However, this category also includes borrowers who have paid for 10 years, but whose payments are not all counted as qualifying. Borrowers who have not made 120 **qualifying** payments comprise at least five (5) distinct problems identified by the CFPB, USED Inspector General, GAO, and borrower complaints, discussed in detail below:

1) Payments made may not be counted because they were made too early or too late, i.e. not within 15 days of the due date.

2) Payments may not be counted because the servicer could not match an otherwise qualifying payment (right amount right loan right plan) with a employment certification form (ECF). Payment matching may fail because the borrower's employer did not qualify as public service during some months, the start and end dates on the ECF did not match the payment date(s), the ECF was rejected as not properly filled out, the ECF reflects less than full-time employment, i.e. fewer than 30 hours/week, or the borrower is unable to obtain an employer certification covering some months.

3) Payments may not be counted because of various servicer errors, including placing accounts in administrative forbearance when recertifying income-based payments, payments misrecorded due to servicing transfers, or because of other errors.

4) Payments made under a non-qualifying repayment plan or during forbearance or deferment do not qualify.

5) The borrower incorrectly believed that payments made prior to consolidating FFEL or Perkins loans into Direct Loans counted, therefore applied before making 120 payments after consolidating.

1. The "on-time" payment issue

To qualify as on time, a payment must be made within fifteen days of the due date.[13] USED apparently interprets this to mean that a payment made either after the 15th of the month, or before the 15th of the prior month, is not a qualifying payment, even if the borrower has paid

[13] 34. C.F. R. §685.219(c)(1)(iii). Note that this is a regulatory requirement, not a statutory one. The statute only requires that the borrower "has made 120 monthly payments" under a qualifying payment plan. 20 U.S.C. §1087e(m)(1)(A). This issue is discussed further in Recommendations-Regulatory Reform, below.

120 total payments when they apply. There are a variety of reasons a borrower might pay early, or late.

Borrowers who received third-party loan repayment assistance (such as employer repayment assistance) complain that when their monthly benefit is more than their monthly payment the servicer may advance their monthly payments, which can render future payments as non-qualifying, because early payments, like late payments, do not count as "on time".[14] Alternatively, borrowers may not receive subsidies to help make payments promptly enough to submit the payments within fifteen days after the due date. A borrower could have made total payments aggregating more than the required 120 payments, but have some payments disqualified because of the timing issue. As one borrower reported in a CFPB complaint:

> I consolidated my loans in XXXX of 2009 to become eligible for the public service loan forgiveness (PSLF) program. . . . Despite documentation from XXXX that my loans were consolidated as income contingent in XXXX 2009, . . . I continued to argue for income contingent between XXXX and XXXX 2009, and documentation supporting that my payment should have been {$0.00} and qualified for PSLF, the current servicer XXXX has taken over a year to review my appeal. I have provided supplementary material twice and requested to see the documents provided by XXXX demonstrating I requested a forbearance when it would not be in my best interest and I have proof to the contrary. My requests for documentation have been ignored. . . .
> I know there are XXXX other individuals facing similar issues with the PSLF program stationed in my area alone. For instance, if a servicemember pays just XXXX dollar more than what is owed, the payments don't count and they tack months on the back end towards forgiveness.

Borrowers who make a payment after the 15th of the month will not get credit, whether the lateness was due to borrower negligence or servicer miscommunications. Numerous borrower complaints in the CFPB database concern borrowers' inability to get timely instructions about payments amounts and due dates from their servicers, especially when changing servicers or repayment plans.

[14] CFPB report at 41.

2. The employer certification issue

A borrower must be employed full time by a public service employer, at the time each of the 120 payments are made, for the payments to count.[15] For the first five years of the program USED failed to provide any means by which borrowers or their servicers could determine whether an employer qualified. Beginning in January 2012, USED developed an employer certification form (ECF) that borrowers could submit periodically to verify that they met the "right employer" criteria for PSLF.[16] After having an employer sign the form, the borrower submits it to their servicer, who transmits it to PHEAA/FedLoan. FedLoan then reviews it, checks a list of employers provided by USED, and in the case of nonprofit employers, escalates the approval decision to USED itself. Once the form is approved, FedLoan instructs the other servicer to transfer servicing to FedLoan and notifies the borrower.[17] USED and PHEAA have not given borrowers clear instructions about how frequently ECF's should be submitted.

USED has never created a list of qualifying employers. PHEAA attempted to compile an employer database from approved ECFs, but USED faulted PHEAA's process for vetting employers in the PHEAA database.[18] The USED regulation also requires PHEAA to exclude "organizations engaged in religious activities", an exclusion not mentioned in the governing statute.[19] This requires the servicer to do additional evaluation of employer certifications beyond checking for tax-exempt status. To further complicate the task, USED requires PHEAA to carefully match the employment start and end dates appearing on ECF forms to qualifying

[15] 34 C.F.R. §685.219(c)(2).
[16] Am. Bar. Assn. v. U.S. Dept. of Ed., 370 F. Supp. 3d 1, 12-13 (2019).
[17] Id.
[18] House Committee on Ed. And Labor, Broken Promises: How the Department of Education Failed America's Public Servants (October 2019)(exhibit 1, Oct. 25 2016 audit report by USED).
[19] 34 C.F.R. §685.219(b), cf. 20 USC §1087e (m)(3)(B). The regulation, but not the statute, also excludes labor unions and partisan political organizations.

payments, month by month. Any payment that falls outside the start and end dates on an ECF does not count.

According to the CFPB report, borrowers complained that servicers may be slow to provide them with accurate guidance regarding their ECFs, with servicers taking months to respond to questions. Borrowers also complained of their ECFs being denied, and servicers not providing sufficient information to understand the reason for their denial.[20] One CFPB complaint relates the following:

> My servicer, FedLoan/PHEAA, is alleging that dozens of my Public Service Loan Forgiveness payments do not qualify toward my 120 qualifying payments. I have worked for XXXX and I have submitted forms each year according to the instructions on the form. The form clearly stated at one point that if an employee is still at her current job she should write "today 's date" on the form. It now has a box that users can check that says "still employed." I filled out my forms each year according to the instructions, either putting "today 's date" or checking the box, and now my servicer is not counting each certification as if I [was] employed at that employer. Rather, they are using the "current" date as my "end" date.
>
> After filing annual employer certifications for five years, it is astounding to me that my servicer, FedLoan, has been miscounting my certifications all along. Nobody notified me about any of five forms I submitted. I only found all of this out when I had a separate problem with FedLoan. They are now saying that I must go back to my previous employers to have them re-certify my employment.
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> After calling FedLoan, they instructed me to only submit forms when I leave employers, rather than submit forms each year. Now I don't know which advice to follow -- to submit annual employer certifications or just wait until I think my 120 payments is up. What is the point of trying to stay current with my PSLF certifications if I am just going to have to go back and do this all over again?

Similarly, the plaintiff in *Love v. PHEAA*, a Georgia class action, asserts that she worked for 10 years for a district attorneys' association and various public defender offices, had her ECF approved in 2012, only to be told by FedLoan in 2018 that it issued its prior approval of her ECF

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[20] CFPB report at 37. *See also* Am. Bar. Assn. v. U.S. Dept. of Ed., *supra* (finding that USED arbitrarily reversed its approval of the American Bar Association as a public service employer, to the detriment of several borrowers whose prior ECFs had been approved.)

in error. It is impossible at this point to determine whether and to what extent employer certifications are erroneously rejected.

If a borrower did not submit ECFs each year during all ten years, they must obtain written verification of qualifying employment for the entire repayment period or for any missing periods when they apply for loan forgiveness at the end of the ten years. It is likely that some denials based on "qualifying payments" are attributable to PHEAA determinations not to count periods of employment for which it disapproved one or more ECFs.

3. Administrative forbearance, servicing transfers and lost payments

Borrowers frequently report that servicers are not keeping accurate records of fully qualifying payments. As one borrower wrote, her loan servicer "has miscalculated my qualifying payments over the last two years, initially telling me I had only made 8 qualifying payments, then 21, then that they had to 'further review' my account after I had complained a number of times, indicating that I had, in fact, made closer to 60."[21] When the same borrower followed up to check the status of her payment calculation, she was told it could take up to a year for the servicer to get back to her.[22]

The CFPB report includes a variety of examples of servicer and borrower errors leading to incorrect qualifying payment counts. Borrowers complained that once they submit their ECF, the servicer gives inaccurate counts of qualified payments made by borrowers, and when they

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[21] Cory Turner, *'I Am Heartbroken': Your Letters About Public Service Loan Forgiveness*, NPR.org (October 18, 2018), https://www.npr.org/2018/10/18/658447443/i-am-heartbroken-your-letters-about-public-service-loan-forgiveness.

[22] *Id.* Another borrower writes in an email: "When I first asked for a review of how many qualifying payments I'd made well over 6 or 7 years into my public service career, I was told the number was only 17 lol (so 1yr 5mos of payments). Incredulous, I called up, and a lady explained they'd misapplied a payment a while back and so subsequent payments hadn't counted in their initial review. She assured me they'd recalculate soon. That was seriously probably two years ago. I've called a few times and just get told it takes a while."

seek correction borrowers struggle to have their servicer correct the error or give reasons for why they provided the number that they did.[23] Borrowers also complained that when servicers fail to process a borrower's income-based repayment (IBR) annual recertification on time, they remove borrower's loans from IBR, which delays qualifying payments, increases monthly payments, and allows the loan to accrue more interest.[24] One CFPB complaint illustrates how a simple borrower error in recertifying IBR each year can disqualify the borrower's payments:

> I am currently repaying under the income driven repayment plan. My repayment is under the Income Based Repayment (IBR) and I am seeking the Public Service Loan Forgiveness as I currently work for a qualifying XXXX. My loan servicer is FedLoan. My IBR requires me to certify my income yearly using my adjusted gross income (AGI) from my federal tax return. This year (XXXX) I was shocked to discover that my monthly payment jumped from {$140.00} per month in XX/XX/XXXX to {$1000.00} in XX/XX/XXXX. It is not even the XXXX XXXX, which I assumed I would have until at least that date to certify my income since that is the date taxes are due. Well I was wrong. My current IBR is still valid until XX/XX/XXXX, however there is some requirement that is hidden in some fine print somewhere that requires me to certify my income 90 days before my current IBR expired. As a result, all of my qualifying payments made toward my public service loan forgiveness have been wiped out, {$5000.00} of accrued interest that was not being added to my balance due to my IBR plan immediately got added on taking my balance from {$97000.00} to over {$100000.00}, and there is no willingness of FedLoan to reverse any of this in light of the fact that I immediately submitted my income certification and they received the request prior to my payment due date and well prior to the actual expiration of my prior year IBR plan. This is absolutely depressing. All progress I made toward paying my loans on time and working toward the Public Service Loan Forgiveness is gone, my balance is even higher, and there just seems to be no end in sight . . . . . I looked back and it appears I received XXXX notice giving me until XX/XX/XX to certify my income which came to my parent 's house (listed as my permanent address since I enrolled in college in XX/XX/XXXX). I had not even received all of my tax info by then and XXXX is before the date taxes are even due to the IRS.

Borrower payments are also disqualified because of servicers' misuse of forbearance. Forbearance is an account status that does not require the borrower to make any payment, but during which interest continues to accrue. This practice is described in the *Winebarger v.*

[23] CFPB report at 39.
[24] *Id*., at 39-40.

PHEAA class action complaint,[25] and in the American Federation of Teachers class action against Navient.[26] The AFT suit alleges that Navient misdirected borrowers eligible for income-based repayment into forbearance instead. The Winebarger suit, as well as enforcement actions brought by various state attorneys general, assert that PHEAA puts borrowers into forbearance while it processes the servicing transfer of a PSLF aspirant's account, while it recertifies an income-based payment plan, or while researching a borrower disputes. During those months, payments the borrower makes are not counted, because technically no payments are due.

The CFPB sued one servicer, Navient, alleging that it systematically abused administrative forbearance in order to maximize servicing fees, when borrowers would have been better off in income-based repayment.[27] The class action complaint filed by American Federation of Teachers members also cites several instances of borrowers being told that income-based repayment was not available, and that their best option would be forbearance status.[28]

4. Ineligible payment plans (subject of the TEPSLF fix)

Borrowers who made payments under graduated or extended payment plans will not have payments made under those plans counted for PSLF. According to the CFPB report, borrowers complain of servicers enrolling them into non-qualifying repayment plans, despite expressing interest in PSLF.[29] Borrowers also reported telling their servicer that they work in public service, but their servicers never informed them about PSLF or the repayment plan requirements for

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[25] Complaint, (2:19-cv-01503 C.D. Cal. Feb. 28, 2019)
[26] Complaint, Hyland v. Navient, (No. 18-CV-9031 S.D. N.Y. 2018)
[27] https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/
[28] Complaint, *Kathryn Hyland, et al. v. Navient Corporation*, Case No. 1:18-cv-09031 (S.D. N.Y. Oct. 3, 2018) ¶¶67, 124.
[29] CFPB report, at 33.

PSLF. Rather than enrolling them into the requisite repayment plan for PSLF, servicers would enroll them into non-qualifying plans. Other borrowers reported servicers incorrectly denying their applications for a qualifying IDR plan, or the servicer not accepting their applications.[30] Also, borrowers who return to school with outstanding student loans complain of servicers preventing them from remaining in qualified repayment plans.[31]

5. Waiting too long to consolidate FFEL into Direct Loans

At inception only a minority of borrowers were eligible for the PSLF program. The first borrower cohorts eligible for PSLF, those entering repayment in 2007 and 2008, mostly took out FFEL loans. Only about 20% of federal student loans in those years were Direct Loans eligible for PSLF.[32] The majority of borrowers from those years had to use Federal Direct consolidation loans to convert ineligible FFEL loans to eligible Direct Loans to participate in PSLF. Ineligible FFEL loans were phased out by 2010. From that year onwards, the only student loans ineligible for PSLF were Perkins loans and private loans. The first borrowers to apply for PSLF in 2017 and 2018 report being confused or misinformed about the need to convert FFEL loans to Direct Loans before payments would begin counting towards the 120 for PSLF. An unknown number of denials for shortfalls in qualifying payments result from borrowers having made payments on FFEL loans prior to Direct Loan consolidation. Moreover, each time a borrower consolidates prior loans, payments made before the latest consolidation do not count towards PSLF.

[30] Id. at 33.
[31] Id. at 34-35.
[32] https://www2.ed.gov/about/overview/budget/budget11/justifications/t-loansoverview.pdf p. T13.

According to the CFPB, borrowers reported spending years making payments, "believing they were making progress towards PSLF, before servicers explain that their loans do not qualify for PSLF."[33] One consumer complaint in the CFPB database is typical:

> I worked full time for a qualifying public service organization from XX/XX/XXXX- XX/XX/XXXX. Fedloans Servicing refuses to honor payments made during this time for Public Service Forgiveness because I consolidated a XX/XX/XXXX XXXX along my previous consolidation done previously when XXXX serviced my loans. XXXX did not tell me that this would put my future . . . in jeopardy. I realize that this is not your problem, but this is what happened to me. Now, I am being made to pay for a mistake made by XXXX. They even denied counting my time to the Ombudsman.
>
> Representatives from FedLoan Servicing told me is that a new consolidation was created when I consolidated my new loan taken in XX/XX/XXXX with my existing consolidated loans (XXXX was servicing the loans at the time). As a result, they will not count any of my payments time that I worked for a public service organization from XXXX (my loans were consolidated at that time). I let them know that I was not told by XXXX that this would jeopardize my public service loan forgiveness. I remember telling the XXXX customer service representative that I needed to consolidate my XX/XX/XXXX loan with my existing consolidation so that I could get credit for my time worked for a XXXX from XXXX. So, I proceeded with the consolidation paperwork not realizing that I would be in this situation. I am not trying to get out of paying. I just would like the time to count as I am working for a XXXX.

Borrowers also reported delays and defects in the process of consolidating their FFEL loans into a Direct Consolidation Loan, which they must do to qualify for PSLF.[34] This process should only take 30 days, but borrowers report processing taking upwards of six months due to the original servicer not providing the requisite information to their future servicer, or a number of servicing errors in which a servicer leaves necessary loans out of the consolidation process.[35] These borrowers are understandably frustrated that payments they made before Direct Loan Consolidation do not qualify for PSLF credit.

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[33] CFPB Report at 29.
[34] *Id.* at 31.
[35] *Id*. at 32.

PSLF denials based on insufficient qualifying payments thus result from multiple causes. While it is possible that some borrowers simply miscounted and applied prematurely, borrower miscalculation seems an unlikely explanation for all 55,000 PSLF applications rejected based on insufficient payments. Our own survey of CUNY Law graduates found that 45 of 69 respondents intend to apply for PSLF, and nearly half (21/45) reported problems with their servicers, mostly involving proper counting of payments.[36] Servicer and servicing transfer errors are clearly a major factor. An unknown number of denials appear to result from overly rigid payment timing rules, servicer delays in consolidating ineligible loans and recertifying income-dependent payment plays, misinformation given to borrowers about eligible loans and payment plans, and perhaps erroneous rejections of employer certifications.

B. Missing Information

25% of rejected PSLF applications were rejected on grounds that the applicant had not entered all necessary information in their application. The data report defines this reason for rejection as follows:

> The application for forgiveness submitted was incomplete or didn't have all the required information necessary to process the application. In this case the borrower is notified of what information is missing and requested to submit the missing information. Once the required information is resubmitted, the application is reviewed again to determine if the borrower now qualifies for forgiveness.

Because the servicer should have records of the amount and timing of all borrower payments, the repayment plan in effect and the type of loan, the only information needed from the borrower would logically be whether their employer(s) qualified as public service and

[36] For example, one graduate wrote: "It's been a year, and FedLoan will not certify over 30 payments I made at a particular employer (while my servicer was Navient)."

whether the borrower was employed full time. It is also possible that form design causes some borrowers to omit required responses.

Borrowers who submitted ECFs every year should not have this problem, but the ECF procedure is optional and voluntary. A borrower who did not submit annual ECFs for 10 years must go back and reconstruct employment histories, and those cases are the likely cause of this rejection category. This issue is closely related to the servicer's difficulties (described above) in matching ECFs with payment dates, resulting in payments not counting.

C. No Eligible Loans

16% of rejected PSLF applications were rejected on grounds that the applicant did not have any eligible loans. The data report defines this reason for rejection as follows:

> The borrower has requested forgiveness but the borrower does not have Direct Loans that are eligible to participate in the PSLF program. Typically these borrowers have FFEL [Federal Family Education Loans], Perkins or private/non-federal loans. The borrower is informed they do not have loans eligible for PSLF and informed that FFEL or Perkins loans could be consolidated into DL, BUT they would then need to make 120 qualifying payments on the new consolidation loan (no previous payments on the FFEL or Perkins loans would count).

These cases are similar to "insufficient payments" cases where the borrower consolidated FFEL or Perkins loans into eligible Direct loans during the ten-year period before applying, not realizing that pre-consolidation payments would not count towards the required 120. In these worst-case scenarios, borrowers have paid for the full ten years without realizing they could have converted ineligible loans to eligible loans. Borrowers have reported being rejected for this reason on twitter. As @NCFFjoe writes: "I was misled by my servicers...TWICE. I have already made more than 120 on time payments and there is no end in sight as I found out I am still in the wrong ‘type’ of loan.”[37] Borrowers complained of servicers failing to advise them that their loans were not eligible for PSLF, despite knowing that borrowers were in public service jobs or are actively pursuing PSLF.[38] Borrowers then make years of payments that do not count towards the PSLF.[39]

D. Employment Dates

2% of rejected PSLF applications were rejected on grounds that a part of their employment in public service took place prior to the PSLF program start date or prior to the disbursement of their loans. The data report defines this reason for rejection as follows:

> The borrower submitted an application and the underlying employment dates do not qualify for forgiveness due to employment dates prior to the PSLF program start date (October 1, 2007) or employment dates prior to the disbursement dates on the loans requested for discharge. The borrower is informed that the application is denied and the employment dates do not meet the program requirements for discharge.

These borrowers should be able to reapply after making additional qualifying payments, and this category should soon disappear with the passage of time.

E. Employer Not Eligible

2% of rejected PSLF applications were rejected on grounds that their (presumably current) employer was not eligible under the requirements of the PSLF. The data report defines this reason for rejection as follows:

> The borrower submitted an application that is requesting forgiveness based on an employer that has been deemed ineligible for the PSLF program. The borrower is informed their employer is not a qualified employer.

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[37] Joe Agresti (@NCFFjoe), Twitter (Apr. 29, 2019, 7:55 AM), https://www.twitter.com/NCFFjoe/status/1122876963985743874.
[38] CFPB 2017 report at 29-30.
[39] *Id*., 29-30.

There has been some litigation around the definition of eligible employer. The simplest cases are tax-exempt 501(c)(3) organizations and government employers, but “public service” is defined a bit more broadly in the statute and regulation. The statute and regulation include job types as well as employer types, such as health care professionals, so that some employer certifications do require judgment on the part of the servicer or USED. Borrowers with these gray area qualifying job cases should have some due process means to appeal adverse decisions. While obviously important for borrowers with a legitimate dispute about meeting the public service definition, this category accounts for a relatively small part of the overall PSLF failure.

III. RECOMMENDATIONS

Remedies for the PSLF failure to date should be both retrospective and prospective. There should be a comprehensive audit of applications rejected to date to discover the obstacles to PSLF approvals, and to identify categories of errors and unduly strict review processes. Borrowers from the pre-2017 cohorts should have their forgiveness applications reviewed for servicing delays and errors, and be given credit for resulting payments made under the wrong plan or wrong loan. USED should apply flexible approaches to certify past employment for periods when annual certification forms were unavailable. Prospectively, PSLF can be simplified and properly implemented with a series of contractual, regulatory and legislative fixes. In particular, the unduly strict and difficult to administer on-time payment rule should be relaxed, all payment plans and Federal loan types should be eligible, employer certification should be automated using IRS employer information and a database of qualifying employers, applicants should have access to an effective appeal process, and USED shold adequately compensate and incentivize its servicer for administering PSLF.

A. CONTRACT OVERSIGHT AND ENFORCEMENT

Many of the causes of PSLF failure result from the failure of servicers to properly perform their contracts with USED. USED currently has contracts with nine servicers to service the accounts of Direct Loan student loan borrowers. The servicers are: (1) Utah Higher Education Assistance Authority, (2) EdFinancial Services, (3) FedLoan, the servicing arm under the Pennsylvania Higher Education Assistance Agency ("PHEAA"), (4) Granite State Management and Resources, (5) Great Lakes Higher Education Corporation, (6) Missouri Higher Education Loan Authority, (7) Navient, (8) Nelnet, and (9) the Oklahoma Student Loan Authority. PHEAA/FedLoan has contracts to exclusively service all student loans for borrowers seeking a PSLF discharge. Once a borrower submits an Employer Certification Form and it is approved by the servicer, servicing of the borrower's eligible loans is transferred from the current servicer to PHEAA/FedLoan (if FedLoan is not already the borrower's servicer).

Specific servicer errors identified in borrower complaints that contribute to PSLF program failure include:

1. Misusing administrative forbearance for PSLF participants (ECF filers) caused by delays in certifying or re-certifying income-based repayment or misinforming borrowers of their payment options.

2. Inaccurate payment records, especially after servicing transfers.

3. Failing to promptly process employer certification forms and treat all ECF submitters as PSLF prospects.

4. Delaying Direct Consolidation loans for months.

5. Not training personnel to correctly inform borrowers of PSLF eligibility rules and of borrowers' status in the PSLF program, so that borrowers remained in the wrong payment plan or wrong loan after certifying a public service job.

USED should use all available contract enforcement tools to correct servicer contract breaches. USED should require audits of all or a large sample of rejected PSLF applications,[40] should require PHEAA to reprocess those reflecting servicer errors, and should establish an administrative review or appeal process for rejected PSLF applicants. USED should require non-PHEAA servicers to audit accounts for which ECFs were submitted to identify those that were not promptly advised to enter an eligible payment plan, consolidate ineligible loans if necessary, and transferred to PHEAA for servicing. In those cases servicers should be required to compensate borrowers for delay in qualifying for loan forgiveness. Borrowers misled by servicers into making non-qualifying payments should have those payments counted as qualifying, or be compensated for the delayed forgiveness, either as an administrative or court-ordered remedy.

USED's Office of Inspector General ("OIG") issued a critical audit report on FSA's oversight of servicers on February 12, 2019.[41] Like the CFPB report, the OIG report documents how servicers failed to tell borrowers about repayment options and miscalculated borrower

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[40] A 2016 review by USED FSA sampled 34 PSLF loan accounts from a population of 449,640, to review employer certifications and qualifying payment counts. The review found that 53% of the sample had no qualifying payments, because the borrower had no current approved ECF, the borrower was on an ineligible payment plan, or the borrower had consolidated recently. The review did not require PHEAA to take any action to assist those borrowers; the focus of the review was solely on verifying the accuracy of payment counts. Exhibit 1 to House Committee on Ed. And Labor, Broken Promise, *supra* note 18.

[41] U.S. Dept. of Education Office of Inspector General, *Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans*, 2 (February 12, 2019) ("OIG Report"). The report was reissued on March 5, 2019, with some minor clarifications.

payments in IDRs, in violation of servicing contracts. The audit found that (1) FSA had failed to establish policies and procedures that provided reasonable assurance that the risk of servicer noncompliance with requirements for servicing federally held student loans were mitigated; (2) FSA's oversight activities regularly identified instances of servicers not servicing federally held student loans in accordance with Federal requirements, and FSA failed to produce an analysis adequate to identifying recurring trends and instances of servicer noncompliance; (3) FSA management rarely used available contract accountability provisions to hold servicers accountable for noncompliance, and failed to incorporate a performance metric relevant to servicer compliance into its methodology for assigning loans to servicers; and (4) FSA employees did not always follow policy when evaluating the quality of servicer representatives' interactions with borrowers, and FSA failed to provide OIG with reports of failed calls to servicers.

In the OIG report, the office recommends that the FSA CEO track all instances of noncompliance identified during FSA oversight activities and use records to identify trends and recurring noncompliance for each servicer and across all servicers; use the contractual accountability provisions available to hold servicers accountable for noncompliance, such as requiring the return of funds or reducing future loan volume; and regularly share the results of any FSA loan servicing oversight activities with servicers.[42]

USED knew by 2016 that hundreds of thousands of student loan borrowers planning to apply for PSLF were headed for rejection as they started applying in late 2017. The Department concluded its own review of PHEAA's administration of PSLF on October 25, 2016, about a year before the first cohort of borrowers would become eligible for loan cancellation. At the time of the review, 449,860 borrowers were designated as PSLF participants, presumably because

[42] Id at 3.

they had at least one approved public service employer certification form (ECF). The reviewers audited a sample of 34 borrower loan files, and found that 53% had ZERO qualifying payments. Of those, about 40% were in a non-qualifying payment plan and 60% had ECFs with employment periods ending more than one year prior to the review date, in other words, no current evidence of qualifying employment. Given that all of these borrowers submitted at least one ECF, it is reasonable to assume that most if not all of them were unaware that they were making no progress towards the required 10 years of repayment.

Instead of faulting PHEAA for a situation in which half of borrowers were in danger of not getting PSLF credit for their payments, USED delved into the minutiae of PSLF payment counting, and found two instances of payment-counting errors resulting from servicing transfers. In their recommendations, the USED reviewers stress "it is imperative that Fedloan Servicing and FSA partner to ensure only those truly eligible for forgiveness receive this benefit." No mention is made of any need to get in touch with the 53% of borrowers who are in the wrong payment plan or do not have up-to-date employer certifications.[43]

USED has failed to oversee and enforce its PSLF contract with PHEAA. This may be due to an agency culture that views the mission as maximizing student loan collections, and does not value delivery of loan cancellation or payment relief. It may be due to the inherent conflict between those two missions. It may be due to inadequate agency resources devoted to making PSLF a reality for millions of potentially eligible former students. Regardless of the cause,

[43] House Committee on Education and Labor, Broken Promises: How the Department of Education Failed America's Public Servants, Exhibit 1 at 3 (Oct. 2019). The authors of the October 25, 2016 review (Debbe Johnson, Larry Porter, and Christian Lee Odom of SFA) note on the first page that it is for internal USED use only and is a policy deliberation document, presumably to shield it from FOIA release. It became public when the House Education and Labor Committee released the review as an exhibit to the committee's October 2019 report on the PSLF fiasco.

USED must dramatically improve its contract oversight and enforcement for PSLF to function as Congress intended.

B. CONTRACT DESIGN

USED's 10-year servicing contracts are due to expire at the end of 2019. These contracts should not be renewed for another 10 years without addressing the failure of the PSLF program. While USED could make better use of existing contract enforcement tools, the contract incentives and performance metrics should be redesigned. The teachers' union lawsuit describes in detail the disincentives servicers face under current contracts: any servicer other than PHEAA will lose the servicing income from any account once the borrower's ECF form is approved and the account is transferred to PHEAA, thus discouraging servicers from telling borrowers about PSLF or helping them qualify. The suit also points out that administrative forbearance is lucrative for servicers because it is lower cost and allows interest to continue accruing.

USED does not pay PHEAA to help borrowers successfully navigate PSLF and obtain their discharge. Based on our review of publicly available contract documents, the only payments USED makes to PHEAA are $5.00 for the first approved ECF submitted, and $2.50 for each disapproved ECF.[44] According to the New York Attorney General's complaint:

> Because FedLoan receives only the small flat fee to evaluate a borrower's initial eligibility and determine the number of PSLF-qualifying payments at that time, its incentive is to perform that task as quickly and cheaply as possible, regardless of quality of service.
>
> Further, since FedLoan is paid only for the initial eligibility determination and payment count, when a borrower submits a subsequent ECF, as borrowers are encouraged to do annually by the Department of Education, it receives no additional compensation for updating the borrower's payment count or for assisting borrowers with their ongoing

[44] Attachment A to USED Contract No. ED-FSA-09-D-0014, Task Order 0005.

participation in the program. FedLoan thus has an incentive to minimize the effort it expends updating payment counts every time a borrower files a new ECF.[45]

USED must compensate the PSLF servicer adequately for the work required to reivew and approve borrower applications. Performance measures and related incentives and penalties should reward servicers for helping borrowers certify public service employment and ultimately qualify for PSLF.

Contracts could also call for better technology to automate PSLF processes and facilitate borrower participation. For starters, borrowers should have an easy method to opt into the PSLF program when they first enter repayment. Initial communications to borrowers entering repayment should include a PSLF opt-in button and an employer certification form. Employers should be able to certify full-time employment and government or nonprofit status using a simple electronic form. Better yet, servicers should retrieve the borrower's employer ID number from the IRS together with income information for income-based repayment, using the IRS data retrieval tool. USED and IRS should provide an on-line lookup for servicers to identify government and 501(c)(3) exempt employers. The servicer's monthly billing statement should include a flag for any borrower who opted in to PSLF, should provide a running total of qualifying payments, and explain whether the most recent payment counted and if not, why not. Borrowers should be able to check their PSLF payment progress on line in real time.[46]

The CFPB report recommended that USED and its contractors make the following contract improvements: provide a review process for borrowers provided with inaccurate

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[45] Complaint, New York v. P.H.E.A.A., No 19-1955 (S.D.N.Y. Oct. 3, 2019).

[46] Contract documents that the National Consumer Law Center obtained from USED SFA under the Freedom of Information Act suggest that USED instructed PHEAA to provide borrowers with a running total of qualifying payments on-line and on periodic loan statements; borrower complaints suggest that this has not been implemented.

information, strengthen servicing standards for all borrowers, early servicer engagement with borrowers on the availability and benefits of IDR, protection from the negative consequences of processing errors and delays, timely and accurate reminders of upcoming recertification requirements, recertification assistance, and accurate/accessible payment and PSLF progress tracking. CFPB Report, 44-47.

C. REGULATORY FIXES

1. Qualifying Payments

The on-time payment requirement is not in the statute; the law only requires that the borrower "has made 120 monthly payments". USED could revise or eliminate its current within-15-days regulatory criterion for qualifying payments. While there may be policy reasons to prevent borrowers from making a large lump-sum payment to obtain a discharge, a more flexible rule would capture many early or slightly late payments allowing borrowers to qualify sooner. For example, a borrower should qualify if the account is current, was in qualifying payment plans for a total of 120 months, and does not reflect any single payment greater than 270 days late (the current definition of default). In addition, voluntary payments made during forbearance that are greater than or equal to the borrower's payment in their previous qualifying plan should be counted as made under the previous plan.

2. Eligible Employers

The statute defines public service job broadly, to include government, military, nonprofit 501(c)(3) organizations, and various occupational categories such as health care practitioners, social workers and public interest law services.[47] The USED regulation defines the term "public service organization" in a manner essentially parallel to the statutory definition. The Census Bureau reports that there are about 5.6 million employers in the United States and about 1.5 million nonprofit organizations. The USED regulation would be more effective and easier to administer if it referred, in addition to easily identifiable government and tax-exempt 501(c)(3) employers, to objectively identifiable Department of Labor occupational categories covered by the statute. On the other hand, Congress created some of the complexity as to the "right employer" criteria in its lengthy statutory definition, which may need to be simplified. Senators Gillibrand and Kaine's proposed legislation would additionally require the USED to establish a database of qualifying federal and state employers to help some borrowers qualify automatically, which would streamline the certification process significantly.

D. LEGISLATIVE FIXES

Congress could make PSLF work better by addressing two problems: the restrictions on qualifying payments and the complicated definition of public service job. Borrower denials due to "wrong payment plan" or "wrong loan" could be readily avoided with simplifying legislation that would count all borrower payments under any repayment plan, and would retroactively include payments made on FFEL and Perkins loans. Consolidation loans should not restart the payment clock; in other words, pre-consolidation payments should count as well. Congress also made PSLF more cumbersome to administer by defining a lengthy list of public service jobs. The statutory definition may reflect some important policy choices, such as including nurses in for-profit as well as nonprofit hospitals, but at a high cost in terms of ease of administration. A

[47] 20 USC 1087e(m)(3)(B).

definition based solely on the identity of the employer, that USED can translate into a lookup table or database, would be more workable.

CONCLUSION

The student debt crisis is only amplified by the failure of USED and its servicers to implement PSLF. The broad terms of the program, which appropriately reduce debt burdens for lower-paid essential military, government and public service workers, represent a plausible compromise between complete student loan cancellation and an entirely student-funded system of higher education. The original concept was simple, and the statute and regulation can be simplified considerably. PSLF success, however, must depend on not only better legislative and regulatory design, but an organizational culture at USED and its contractors that regards granting of loan discharges to qualified PSLF applicants as an important measure of success.