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May 26, 2016

The Honorable Ted Mitchell
Under Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Mr. Mitchell:

I write to seek your immediate assistance with a difficult problem confronting the American Bar Association (ABA) that was recently created by the Department of Education (“the Department”) when it changed policies relating to the Public Service Loan Forgiveness (PSLF) program.

For several years, employment at the ABA has been approved by the Department as eligible “public service” for purposes of the PSLF program. ABA staff members have relied on these historical and uniformly affirmative approvals when they accepted their positions with our non-profit entity, and the PSLF program also contributes to their decisions to remain with us. This year, however, without warning or explanation, the Department has categorically rejected employment certification applications for our employees. Adding insult to injury, applicants renewing their certifications for their same position were notified that the rejections were being applied *retroactively* -- instantly wiping out years of public service employment accrued under PSLF. These actions by the Department lack any due process and are patently inconsistent with the governing law. They have caused real harm to our workplace and our ability to attract and retain talent, as well as causing lost time and money for the borrowers directly affected. And at a very fundamental level, these actions are simply not fair.

I respectfully request your immediate intervention to (1) suspend any further use of what appears to be a novel, secret evaluation of employer eligibility under PSLF; (2) take action to reverse any denial of employment certification decided solely on the basis of ABA employment; and (3) retract the rescission of prior years’ approvals. I would appreciate an opportunity to meet with you to discuss this matter in person.

Following the rejections of eligibility received by our employees, we tried unsuccessfully to obtain information about the basis for the Department’s change of course. Last month, for example, I met with Assistant Secretary Lynn Mahaffie to inquire about the reasons for the reversals. I very much appreciated the respect Ms. Mahaffie accorded me by meeting, but the only relevant information I learned in the meeting was that the policy change that resulted in the use of new eligibility criteria did not originate in her office. I was given no additional

The Honorable Ted Mitchell
May 26, 2016
Page Two

information about why the policy changed, how the decisions to make the changes were reached, and why the changes were adopted without any public discussion or notice or other public process. While I cannot understand the lack of transparency by the Department on this matter, the retroactive application of these unexplained decisions is simply unconscionable. The borrowers complied with the law in every way. They proactively sought and in many cases obtained assurances of eligibility from the Department. And they relied in good faith on the assurances they received through the very process the Department created to provide certainty for participants in the program. Your prompt intervention is needed.

We have never been provided an explanation for even questioning the ABA's qualification as a public service employer under PSLF. We clearly satisfy the legal requirements. Public service work is central to our mission, and we provide public law services funded by the government as well as public education services. Neither the statute nor the regulations provide any litmus test or other guidance that could justify the Department's reversals of long-standing PSLF approvals.

Public Service Loan Forgiveness Program Eligibility

Of course, the Department of Education administers PSLF, a program that offers cancellation of the balance of eligible federal student loans in exchange for borrower's long-term commitment to public service. Borrowers become eligible to have their qualifying student loans cancelled once they have made 120 timely payments on the qualifying loans while working full-time in public service. Under the Department regulations, the definition of public service includes government, 501(c)(3) organizations and certain non-501(c)(3) organizations. The ABA is a 501(c)(6) organization with a number of public services programs, including those supported by our 501(c)(3) fund. Department regulations deem employment at a non-501(c)(3) organization to be eligible for PSLF purposes if the organization provides any of a list of public services. The text of the regulation reads as follows in relevant part (emphasis added):

34 CFR 685.219 - Public Service Loan Forgiveness Program

(b) *Definitions.* The following definitions apply to this section:

Public interest law refers to **legal services provided by a public service organization that are funded in whole or in part by a local, State, Federal, or Tribal government.**

Public service organization means:

(5) A private organization that—

(i) Provides the following public services: Emergency management, military service, public safety, law enforcement, **public interest law services**, early childhood education (including licensed or regulated child care, Head Start, and State funded pre-kindergarten), public service for individuals with disabilities and the elderly, public health (including

nurses, nurse practitioners, nurses in a clinical setting, and full-time professionals engaged in health care practitioner occupations and health care support occupations, as such terms are defined by the Bureau of Labor Statistics), public education, public library services, school library or other school-based services

Not only does the ABA explicitly qualify under the law as a public service organization -- it does so in more than one way.

ABA Satisfies Public Service Employer Requirements under PSLF

The ABA is charged with serving the public as well as our own members. For example, our corporate mission is (emphasis added): “To serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” To support this mission, the ABA has four goals. Among them, ABA Goal II expressly promotes pro bono and public service by the legal profession, and Goal IV is to “[i]ncrease public understanding and respect for the rule of law, the legal process, and the role of the legal profession” These goals are, in turn, made real through our staff and services. This public-oriented work is not incidental to our purpose -- it is integral to our existence.

Public Education

One example of the ABA’s public education services comes through the ABA Section of Legal Education and Admissions to the Bar (“the Section”). The Section was the ABA’s first, formed in 1893 to promote uniformity and quality in professional legal education. Since 1923, the ABA has issued standards for schools in administering legal education, and since 1953 the Section’s Council has been the federally recognized accreditor of American law schools. Beyond the Section, the ABA is also concerned with primary education. Through the apt-named Division on Public Education, we produce programs and resources for the public and for schools, including, for example, appropriate lesson plans for students and teachers K-12, and on a range of issues around civics and the rule of law. In addition to free materials, the Division also develops ABA Legal Guides for both civilian and military families. The Division is merely one of many entities within the ABA that have their own public education programs that produce publications, videos, curricula, resource websites, and more. Many of these public education activities are supported by our 501(c)(3) charitable fund, the ABA Fund for Justice and Education. Public Education is central to our work.

Public Law Services

In addition to public education, the ABA also provides direct legal services that are funded by government -- “public law services” under the Department regulations. A chief example of these is the South Texas Pro Bono Asylum Representation Project (ProBAR), which is the nation’s largest provider of legal services and legal rights education for detained unaccompanied immigrant children. Virtually 100% of the initiative’s operations are funded by the federal government. These legal services are federally required to be delivered within 7-10 days of a child’s arrival at the shelter, so our lawyers and staff are stationed near the U.S.-Mexico border, a

The Honorable Ted Mitchell
May 26, 2016
Page Four

location that presents major recruitment and retention challenges. Already serving over 10,000 children each year, the staff of 60 -- all ABA employees -- had been seeking to increase their number to meet expanding demand. Unfortunately, the employees now report feelings of being ambushed by the Department's reversal of PSLF eligibility. Managers report difficulty in filling positions, and, they are hearing some staff are seriously contemplating moves to other organizations solely on the basis of the Department's newly reversed position on PSLF. There is simply no distinction between the work of ProBAR and that of any other eligible 501(c)(3) legal services provider. Yet, in its ill-considered turn-around, the Department would undermine staff confidence at the largest, most stable provider of these legal services that directly carry out Administration objectives.

Beyond ProBAR, we provide additional programs such as the ABA Military Pro Bono Project that provides free legal services to low-income military personnel. We carry out this program in cooperation with the Armed Services, which by agreement are our exclusive source of case referrals. Last year we also launched the Veterans Claims Assistance Network, a project developed at the request of the White House Counsel's Office and involving a formal collaboration between the ABA and the Department of Veterans Affairs. This program provides representation to unrepresented veterans whose benefits claims were in, or at risk of entering, the daunting VA claims backlog.

Other ABA projects support direct representation on matters involving children, the elderly, victims of domestic and sexual violence, families recovering from natural disasters (pursuant to a Memorandum of Understanding between the ABA and FEMA), and similar constituencies. Past projects have also included pro bono services to rural communities, medical-legal partnerships, and even those in support of small business.

These education and legal public services are anything but sidelines. Each year, these initiatives are funded by our own general revenue and by approximately \$50 million in federal and private grants and contracts, charitable gifts, and donations. The total cost of the ABA commitment to these "good works" easily exceeds \$100 million annually.

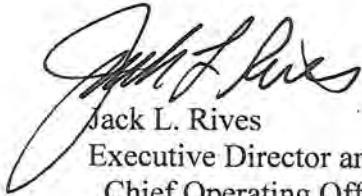
In sum, serving the public is central to the ABA's mission and is reflected in our goals. Perhaps the clearest evidence that we satisfy the definition of a "public service employer" under PSLF has been the continued recognition each year by the Department -- until now. We are at a loss to even imagine under what analysis -- consistent with the governing law -- the Department has reached a contrary conclusion. If the Department has prospective policy concerns about the program in general, we would be pleased to discuss those at another time. As original proponents of the legislation creating the PSLF program, we are committed to ensuring that needed changes do not undermine the value of the program to communities that benefit from PSLF nationwide.

A suggestion was made during our meeting with Ms. Mahaffie and her staff that the decisions by the Department were made because of historical errors by applicants. We have investigated those past applications and how they were filled out, and I can affirm that our employees' applications could *not* be the basis for the recent decisions. The changes seem to emanate wholly from within the Department and thus must be rectified by the Department.

The Honorable Ted Mitchell
May 26, 2016
Page Five

Thank you for your consideration and assistance in this very important matter. If you have any questions, you or your staff are welcome to contact Ken Goldsmith in the ABA Governmental Affairs Office (202-662-1789 or kenneth.goldsmith@americanbar.org) or me.

Yours truly,



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