July 11, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re Comments re Application and Employment Certification for Public Service Loan Forgiveness
(Agency/Docket no. ED-2023-SCC-0079; Docket ID no. 2023-10191)

Dear Secretary Cardona:

The California Medical Association (CMA), the Texas Medical Association (TMA), the California Hospital Association, and the Texas Hospital Association – for themselves and on behalf of their membership collectively comprising more than 100,000 physicians, residents, and medical students, and nearly 1,000 hospitals – thank you for the opportunity to comment on the above-described matter regarding the Application and Employment Certification for Public Service Loan Forgiveness (PSLF) (Application Materials). *See* 88 Fed. Reg. 30732, 30732 (May 12, 2023).

We have been engaged with the Department and have closely examined its amendments to PSLF eligibility requirements through a final rule, "Institutional Eligibility Under the Higher Education Act of 1965, as Amended" (87 Fed. Reg. 65904 (Nov. 1, 2022) (the Final Rule), to address the problem of unequal treatment of physicians in states such as Texas and California who work full-time in a private, nonprofit hospital but, unlike similarly situated physicians in other states, cannot qualify for PSLF because state laws prohibit these physicians from being directly employed by their hospitals. The Final Rule amended an earlier regulatory definition of "employee or employed" to squarely remedy this problem, and we truly appreciate the Department's willingness to address our issues. It will make an enormous difference in patient access to health care in our states. We follow up with the comments below to offer minor but important modifications to the Application Materials. Our suggestions are necessary to ensure that these PSLF Program documents

accurately and fully conform to the amendments made in the Final Rule to put qualified Texas and California physicians on equal footing as all other qualified physicians in other states who have access to PSLF but are not constrained by state laws that directly impair their eligibility.

To be consistent with the Final Rule, which expanded the definition of "employee or employed," the Application Materials must clearly explain that an individual is eligible for PSLF if the individual either (1) is or was employed under a contract or by a contracted organization in a position that, under applicable state law, cannot be filled by a direct employee of the organization or (2) is or was providing services under written legal authorization (such as through hospital clinical privileges) that, under applicable state law, cannot be provided by a direct employee of the organization. The relevant instructions and definitions in the Application Materials do not adequately distinguish these two separate and independent scenarios, both of which fall within the amended definition of "employee or employed" that the Department adopted in the Final Rule to make Texas and California physicians eligible for PSLF if they work full-time in a nonprofit hospital or clinic. Instead, as currently drafted, the Application Materials will confuse qualified applicants and certifying employers while also having the potential to deter them from applying or certifying, respectively. This is because they may wrongly perceive that certain physician borrowers do not qualify for PSLF because they are not employed by a contracted organization that has a written agreement with a private, nonprofit hospital or clinic. Many physicians in our states do not fall within that category and instead personally and independently work at private, nonprofit hospitals under the written legal authority of hospital clinical privileges that have been granted by the hospital and its organized medical staff. Many physicians in this class may be misled to believe that they do not qualify for PSLF. Of equal concern, if the language remains ambiguous, many hospital CEOs or other Authorizing Officials will not understand that the qualifications have been narrowly tailored to address state laws prohibiting physician employment and may be hesitant or unwilling to attest to a physician's work in the hospital as defined in the Application Materials.

If left unaltered, the current Application Materials would set us back and frustrate the purpose of the Final Rule, putting California and Texas at a severe disadvantage in recruiting young physicians who may choose to practice in other states where their substantial medical student loan debt can be forgiven. The Department already has committed to fixing the problem, and it is now imperative that it fully carries out the regulatory and policy decisions that have been made and are fully supported by our coalition of providers and our bipartisan state Congressional delegations. Our organizations are proposing revisions to the Application Materials to clarify physician borrower eligibility and ensure conformity with the amendments to "employee or employed" made through the Final Rule.

I. EXPANDING PSLF ELIGIBILITY TO CALIFORNIA AND TEXAS PHYSICIANS WORKING IN PRIVATE, NONPROFIT HOSPITALS

The Department's Final Rule was the culmination of deliberative and methodical rulemaking that first framed the problem of unequal and unfair treatment of Texas and California physicians working at nonprofit hospitals, clinics, and other facilities and then adopted a solution that was both narrowly tailored but also universal. A brief review is warranted to properly evaluate the proposed Application Materials, which would carry out the relevant amendments made in the Final Rule.

A. The Department Properly Recognized the Unfair and Unequal Treatment of PSLF-Eligible Physicians in California and Texas

The PSLF Program is intended to encourage individuals to meaningfully engage in public service work by forgiving the remaining balance of their federal student loans if they meet the statutory requirement of being "employed in a public service job" and satisfy all loan payment requirements. *See* 20 U.S.C.

§1087e(m)(1)(B)(i). There is no statutory definition of "employed in," so the Department in an earlier regulation specified that "employee" and "employed" simply meant an individual is "hired and paid by a public service organization." 34 Code Fed. Reg. §685.219(b) (eff. July 1, 2021, through June 30, 2023). In originally proposing this definition, the Department only indicated a desire to exclude "individuals who are contracted to work for the organization or individuals who are hired by a for-profit company that has a contract with the public service organization." 73 Fed. Reg. 37694, 37705 (July 1, 2008).

In early 2022, leading up to the Final Rule, the Department explained in its notice of proposed rulemaking that it heard from "public commenters who expressed concerns about the presence of laws in certain states that prevent physicians from being directly employed by private, nonprofit hospitals. The result is that those doctors are legally unable to get access to PSLF as employees." 87 Fed. Reg. 41878, 41966 (July 13, 2022). The Department thereupon announced it was "considering whether this issue could be addressed by creating a separate eligibility test for situations such as these." *Id.* Based on comments received, the Department announced in the Final Rule that it had solidified its decision to indeed amend PSLF eligibility criteria to address this specific problem. *See* 87 Fed. Reg. 65904, 65977 (Nov. 1, 2022).

The prior definition of "employee or employed" resulted in the inadvertent disqualification of certain physician applicants in Texas and California who work fulltime in a nonprofit hospital or clinic (which is a "qualified employer" for purposes of PSLF eligibility) but due to state law cannot be directly employed by the nonprofit hospital or clinic. As the American Health Lawyers Association (AHLA) explains, "a long-standing principle, the corporate practice of medicine (CPOM) doctrine, seeks to prohibit a non-physician from interfering with a physician's professional judgment by prohibiting corporations not owned or controlled by physicians from employing physicians to practice medicine and charge for those professional services." AHLA, *Corporate Practice of Medicine: A Fifty State Survey*, Amer. Health Lawyers Assn (2020) at preface. CPOM laws touch on the relationships between physicians and corporations to shape the contours of integration and influence between the parties over how medical care can be delivered. California and Texas have CPOM laws that generally prohibit private, nonprofit hospitals (among some other legal entities) from directly employing physicians. *See Conrad v. Medical Board,* 48 Cal. App. 4th 1038, 1041 (1996) (local health care district hospitals cannot employ physicians under CPOM); 11 Ops. Cal. Atty. Gen 236 (1948) (private, nonprofit hospital may not employ physicians and charge patients for services); *Gupta v. E. Idaho Tumor Inst., Inc.*, 140 S.W.3d 747, 752 (Tex. App. 2004) ("Under the Medical Practice Act, when a corporation comprised of lay persons employs licensed physicians to treat patients and the corporation receives the fee, the corporation is unlawfully engaged in the practice of medicine").

Consequently, the Department's prior definition of "employee or employed" inadvertently excluded California and Texas physicians working full-time in private, nonprofit hospitals because they cannot meet the Department's regulatory definition of being "hired and paid by" their hospitals. To be sure, the Department in the Final Rule acknowledged that there are borrowers "who provide an eligible service for PSLF but are prohibited from being a full-time employee of an otherwise qualifying employer due to State law [and that] this situation exist[s] for physicians at some nonprofit hospitals in Texas and California, where rules that have been in place for decades prevent their direct employment by the hospital" 87 Fed. Reg. 65904, 65977. **However, as the Department explained, "Congress intended to support certain organizations and their employees by providing PSLF but limited the benefit to employees. These State laws mean that certain borrowers in these States are barred from PSLF solely because of the State law."** ***Id.*** **Accordingly, "the Department has decided to address this unequal treatment by allowing borrowers in the narrow and specific situation of a borrower who [1] works as a contractor for a qualifying employer in a position <u>or</u> [2] providing services which, under applicable state law,**

cannot be filled or provided by an employee of the qualifying employer to qualify for PSLF." ***Id.*** **(brackets added).**

B. The Department's New Definition of "Employed" in the Final Rule Will Have a Significant Positive Impact on Accessibility and Equity in California and Texas

The Final Rule amends the definition of "employee or employed" for purposes of PSLF eligibility to mean, among other things, an individual "who works as a contracted employee for a qualifying employer in a position or providing services which, under applicable state law, cannot be filled or provided by a direct employee of the qualifying employer." *See* 87 Fed. Reg. 65904, 66064 (amended definition of "employee or employed" in 34 Code Fed. Reg. §685.219(b)). This new definition expressly recognizes two pathways to PSLF eligibility for borrowers who, due to state law, cannot be directly employed by a qualifying employer. The *first* is for those individuals who are contracted with the qualifying employer to fill a position that cannot be filled by a direct employee; and *second*, for those individuals who are providing services that cannot be provided by a direct employee. Of course, the services that are provided must qualify as eligible public service, such as health care services in a nonprofit setting. *See Id.* (definitions of "qualifying employer" and "public health"). And such services should be quantifiable to demonstrate compliance with the "full-time" requirement for PSLF eligibility.

The amendments in the Final Rule can help to ameliorate severe physician shortages in California and Texas that make it difficult for patients to access timely medical care. If California and Texas physicians working full-time in nonprofit hospitals were excluded from PSLF, our physician shortages could accelerate and our patient access to care challenges would grow demonstrably. We would be disadvantaged in recruiting and retaining young physicians in the future, as they may choose to practice in other states where they are eligible for PSLF. With the median medical school student debt reaching a staggering $200,000, in addition to undergraduate education debt, PSLF is essential to helping more students become physicians to address the nation's significant physician workforce shortages. PSLF is also needed to encourage physicians to practice in nonprofit hospitals and clinics in underserved urban and rural areas.

Ensuring PSLF eligibility for physicians in California and Texas and encouraging their full-time work in nonprofit hospitals or clinics — as may be furthered with the amendments to "employee or employed" in the Final Rule — will also improve access to health care in California's and Texas' underserved communities. The PSLF Program not only would help eligible student borrowers afford their medical school education, but it also would promote public service in nonprofit settings. California and Texas have some of the largest underserved health care regions in the nation, which makes the PSLF Program and its public health goals even more crucial for patients in our states. For instance, California and Texas have the most federally designated Health Professional Shortage Areas (HPSAs) — a geographic area, population, or facility with a shortage of primary care, dental, or mental health providers and services — in the nation. There are 1,760 HPSAs in California and 154 primary care physician HPSAs in Texas. Physicians practicing in these HPSAs or other low-income regions where most patients are uninsured or enrolled in the federal Medicaid program (which serves pregnant women, children, and low-income individuals, including the elderly and disabled), receive reimbursements that can be 50% less than their physician counterparts who practice in other regions with different private sector payers. PSLF eligibility is vital to maintaining and expanding access to care in underserved communities.

Finally, we anticipate that the amendments made in the Final Rule can help California and Texas improve racial gaps in the delivery of health care. Our states are two of the most racially and ethnically diverse in the nation. Based on the U.S. Census Bureau data from 2020, people of color make up 60% of California's

population and 55.2% of Texas' population. However, according to EducationData.Org, the racial diversity of our physician workforces comes nowhere near reflecting the diversity of our states. Studies show that patients are more likely to follow treatment plans from physicians who understand their race/ethnicity and culture. Moreover, it is well-documented that minority communities have suffered significant problems with access to care and health care disparities compared to their white counterparts because of a shortage of physicians. By ensuring PSLF eligibility, in spite of state laws that prohibit nonprofit hospitals from directly employing physicians, the Final Rule will aid our efforts to improve care for underserved communities by helping to remedy racial disparities in health care.

We agree with the Department that the amendments to the definition of "employee or employed" in the Final Rule "relate[] to a relatively limited universe of borrowers" and that "[t]his change does not expand the range of qualifying employers, but rather who can be captured under a qualifying employer." 87 Fed. Reg. 65904, 65977. Though modest in scope perhaps, as shown above, the fix carefully adopted by the Department will have a significant positive impact on the delivery of health care in Texas and California. Thus, it is imperative to ensure that these changes are fully implemented.

II. THE PSLF APPLICATION MATERIALS DO NOT CONFORM TO THE FINAL RULE'S AMENDMENTS TO HOW "EMPLOYEE OR EMPLOYED" IS DEFINED

A. The PSLF Application and Employment Certification Recognizes Only One of the Two Pathways for California and Texas Physician PSLF Eligibility

We anticipate that, as a practical matter, the Application Materials will have a more prominent impact on borrower behavior than the Final Rule. Individual borrowers who are considering applying for PSLF must review and fill out these Application Materials; but they need not look to, and are highly unlikely to consider, the legal regulations that implement the PSLF Program. Indeed, the average borrower is not likely to even know the legal citation for the Final Rule. For this reason, it is critical that the Application Materials accurately reflect the important changes made in the Final Rule. We believe that borrowers will be misled, however, because the Application Materials do not fully and accurately reflect the new definition of "employee or employed."

As noted, the Final Rule clearly establishes two separate pathways to PSLF eligibility for borrowers like physicians in California and Texas who provide eligible services at qualifying employers and are fully eligible for PSLF except that state law prohibits them from being directly employed. The rule states that an individual is eligible for PSLF if the individual <u>either</u> (1) is or was employed under a contract or by a contracted organization in a position that, under applicable state law, cannot be filled by a direct employee of the organization <u>or</u> (2) is or was providing services under written legal authorization (such as through hospital clinical privileges) that, under applicable state law, cannot be provided by a direct employee of the organization. However, the Application Materials repeatedly highlight only the former of these two pathways. This would have the potential to deter many borrowers from even applying under the misconception that they are not eligible if they are not employed by a contracting organization that has a written agreement with their hospital. Section 5A of the document and the notes for completing section 5A in Section 6 appear to be consistent with the Final Rule in allowing certification if "the borrower . . . <u>is or was employed under a contract</u> or by a contracted organization in a position <u>or providing services</u> that, under applicable state law, cannot be filled or provided by a direct employee of the organization." (emphasis added) We believe it is necessary to more explicitly delineate the two pathways to PSLF eligibility in these sections, in order to eliminate confusion that could erroneously cause physicians to believe they are not eligible and prevent them

from applying for the PSLF program. And in any event, other sections of the Application Materials pose more significant problems because they clearly do not accurately reflect the amendments of the Final Rule:

- In defining "contracted organization," Section 7 explains that "if the direct employees of the contracted organization are in positions or providing services that, under State law, cannot be filled or provided by a direct employee of a qualifying employer, the Authorized Official of the qualifying employer can certify their employment as if those employees were direct employees of the qualifying employer." (emphasis added) **Section 7 thus appears to eliminate the second pathway to PSLF eligibility where any individual borrower, regardless of their employment situation, who provides services but cannot be directly employed by the qualifying employer would still be eligible.**

- Section 9 (providing "IMPORTANT INFORMATION ABOUT PSLF AND TEPSLF") states, "if you are a **direct employee of a contracted organization** that is in a position or providing services that, under applicable State law, cannot be filled or provided by direct employees of the qualifying employer, you can be treated as a direct employee of the qualifying employer where you perform your work." **As with Section 7, this statement will be read by potential applicants to exclude the secondary pathway for PSLF eligibility established in the Final Rule, where borrowers are eligible if they "provide services" for the qualifying employer where such services cannot be "provided" by a direct employee of the qualifying employer. Section 9 suggests inaccurately that borrowers are eligible if and only if they are direct employees of a contracted organization.**

B. Many Eligible California and Texas Physician Borrowers Under the Final Rule Will be Misled and May Not Apply for PSLF and Many Hospitals Will Not Attest to Their Eligibility Because of the Confusion

The unwarranted emphasis on being employed by a contracted organization that has a written agreement with the qualifying employer in sections 7 and 9 of the Application Materials, to the exclusion of borrowers who "provide services" to the qualifying employer, is likely to confuse PSLF applicants and certifying authorities. Many physicians in California and Texas will feel excluded because they practice in private, nonprofit hospitals exclusively under the written legal authority of hospital clinical privileges but cannot be directly employed by the hospital due to state law and do not work for a "contracted organization" that has a written agreement with the hospital. Reading sections 7 and 9 — which are given greater prominence as providing "definitions" and "important information" — these borrowers will be misled and deterred from applying, even though the Department through its Final Rule explicitly intended to extend PSLF eligibility to them. Equally concerning, qualifying employers who must certify an applicant's eligibility may hesitate or refuse to sign the Employer Certification because they too could be misled to believe these borrowers are not eligible.

To be sure, California and Texas physicians who may not work for a "contracted organization" with a written agreement with a private, nonprofit hospital or clinic but who are "providing services" in that hospital or clinic are nevertheless subject to rigorous legal and clinical scrutiny. Under our state laws, while physicians need not directly contract with a hospital to practice in that hospital, all physicians are required to have been conferred written legal authorization to practice in the hospital through hospital clinical privileges. *See El-Attar v. Hollywood Presbyterian Med. Ctr.*, 56 Cal. 4th 976, 983 (2013) ("In order to practice at a hospital, a physician must be granted staff privileges"); *Garland Cmty Hosp. v. Rose*, 156 S.W.3d 541, 545-46 (Tex. 2004) ("The hospital's credentialing … is necessary …and an inseparable part of the health care rendered to

patients"); Tex. Health & Safety Code 241.101(a) (discussing hospital credentialing committee); 25 TAC § 133.41 (f)(1), (4)(F), (6); Tex. Ins. Code 1452.052(2) (requiring public and private hospitals to use a standardized form to credential physicians). Such written legal authorization by law must be periodically reviewed and is subject to restriction or termination through peer review processes. While many physicians working in nonprofit hospitals in California and Texas may not have a written contract with the hospital, they will invariably have been conferred written legal authorization to practice in that hospital through hospital clinical privileges. That is why the Department recognized this class of borrowers to be eligible for PSLF to the same extent as borrowers who are employed by a contracted organization that has a written agreement with the hospital. Both classes of borrowers are PSLF eligible under the Final Rule, but only borrowers who are employed by contracted organizations are recognized to be eligible under sections 7 and 9 of the Application Materials.

While physicians in other states may also be granted hospital medical staff privileges to provide services in a nonprofit hospital, the amendments to "employee or employed" in the Final Rule would not extend PSLF eligibility to these physicians if they are not directly employed by the hospital. In states besides California and Texas where CPOM laws are not as stringent or nonexistent, there is no legal prohibition against hospitals directly employing physicians. To the extent any physicians in other states have hospital privileges but are not directly employed by their hospitals, that is not the result of state law prohibitions but rather perhaps by personal/business choice. The new definition of "employee or employed" in the Final Rule is explicitly tailored to apply only to states like California and Texas where state law prohibits the qualifying employer from directly employing the borrower.

Many physicians and hospitals in the nation's two largest states had been unintentionally excluded from the national PSLF Program because the Department's prior definition of "employee or employed" was unnecessarily narrow. California and Texas were placed at a severe disadvantage in recruiting physicians, which harms access to patient care in our states' community hospitals, children's hospitals, and rural hospitals. Laudably, the Department recognized and has fixed that problem through the Final Rule. But the Application Materials have serious potential to thwart the effectiveness of the Department's solution. We have real concerns that, notwithstanding the good work done through the Final Rule, the Application Materials will once again lead to an inadvertent exclusion of eligible physicians from PSLF in California and Texas and disadvantage our physicians and hospitals and their ability to care for underserved patients. It is vital to avoid such an unfair result and make minor, but important, corrections to the Application Materials to ensure full conformity with the Final Rule's new definition of "employee or employed."

III. PROPOSED REVISIONS TO THE APPLICATION MATERIALS

To conform the Application Materials to the spirit and letter of the Final Rule and to dispel any confusion about borrower eligibility, we request the following revisions be made.

1. Amendment to Section 5A, instructing qualifying employers on certifying borrower eligibility:

   By providing an **acceptable signature** below, I certify that (1) the information in Section 4 is true, complete, and correct to the best of my knowledge and belief (see Section 6 for instructions), (2) I am an **authorized official** of the organization named in Section 4, and (3) the borrower named in Section 1 is or was a **direct employee** of the organization named in Section 4; or satisfies either one of the following conditions: the borrower (1) is or was employed under a contract or by a **contracted organization** in a position ~~or providing services~~ that, under applicable state law, cannot be filled ~~or provided~~ by a direct employee of the organization named in Section 4 or (2) is providing services through written legal

authorization that, under applicable state law, cannot be provided by a direct employee of the organization named in Section 4.

2. Amendment to Section 6, "INSTRUCTIONS FOR COMPLETING THIS FORM":

   The **Authorized Official** must . . . . ensure that . . . the employee named in Section 1 is or was a **direct employee** of their organization for the period being certified, OR satisfies either one of the following conditions: the borrower (1) is or was employed under a contract or by a **contracted organization** in a position ~~or providing services~~ for their organization that, under applicable state law, cannot be filled ~~or provided~~ by a **direct employee** of their organization or (2) is providing services through written legal authorization that, under applicable state law, cannot be provided by a direct employee of their organization.

3. Amendment to Section 7, definition for "contracted organization":

   A **contracted organization** is a separately organized employer that through a written agreement with a **qualifying employer** performs services for the qualifying employer. The direct employees of the contracted organization are not direct employees of the qualifying employer. However, if the direct employees of the contracted organization are in positions ~~or providing services~~ that, under State law, cannot be filled ~~or provided~~ by a direct employee of a qualifying employer, the Authorized Official of the qualifying employer can certify their employment as if those employees were direct employees of the qualifying employer. Separately, the Authorized Official of the qualifying employer can also certify the borrower's employment as if those borrowers were direct employees of the qualifying employer if the borrowers are or were providing services through written legal authorization that, under applicable state law, cannot be provided by a direct employee of the qualifying employer.

4. Amendment to Section 9, "important information" about "Employment Eligibility":

   To qualify for PSLF, you must be a **direct employee** of a qualifying employer. A direct employee is someone who is hired and paid by the employer, and who receives an IRS Form W-2 from the employer. You may physically perform your work at a qualifying or non-qualifying organization, as long as you are a direct employee of a qualifying employer.

   However, if you are either (1) a **direct employee of a contracted organization** that is in a position ~~or providing services~~ that, under applicable State law, cannot be filled ~~or provided~~ by direct employees of the qualifying employer, or (2) you are **providing services through written legal authority** that, under applicable state law, cannot be provided by direct employees of the qualifying employer, you can be treated as a direct employee of the qualifying employer where you perform your work.

IV. CONCLUSION

Thank you again for your willingness to consider our concerns and suggestions about the Application Materials. We appreciate the time the Department has taken to listen to us and then to adopt meaningful solutions that narrowly, yet effectively, extend PSLF eligibility to large numbers of physicians in our states who work full-time in nonprofit hospitals or clinics but cannot be directly employed by such facilities. We do not wish to see these physicians excluded from PSLF when their counterparts in other states do qualify and have received loan forgiveness. We urge the Department to adopt the suggestions we have made herein. It will make a difference in improving physician educational opportunities that address health equity and increase access to health care in California and Texas. Our primary contact is Elizabeth McNeil, Vice President, CMA at emcneil@cmadocs.org.

Sincerely,

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California Medical Association

Richard W. "Rick" Snyder, II, MD, President

Texas Medical Association

Carmela Coyle, President & CEO

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John Hawkins, President & CEO

Texas Hospital Association

cc: The Honorable Speaker Emerita Nancy Pelosi
The Honorable Josh Harder
California Congressional Delegation
Texas Congressional Delegation