

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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AMERICAN BAR ASSOCIATION, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION,  
*et al.*,

Defendants.

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) Civil Action No. 16-2476-TJK  
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**PLAINTIFFS’ MOTION FOR SCHEDULING  
OF STATUS CONFERENCE OR, IN THE ALTERNATIVE, ORAL ARGUMENT**

Plaintiffs, the American Bar Association (“ABA”) and Geoffrey Burkhart, Michelle Quintero-Millan, Jamie Rudert, and Kate Voigt (the “Individual Plaintiffs”) respectfully move the Court to schedule a status conference on the pending cross-motions for summary judgment and motions for extra-record review within 30 days of the filing of this motion, or at the Court’s earliest opportunity thereafter. In the alternative, should the Court deem it necessary, Plaintiffs request that the Court set a date for oral argument on these motions.

In violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, and the Due Process Clause, Defendant the U.S. Department of Education (“Department”) changed its prior determinations, and has now refused to recognize the Individual Plaintiffs’ public interest work as counting toward the required ten years of qualifying employment for eligibility for the Public Service Loan Forgiveness (“PSLF”) program. The Department has also revoked its prior determination that the ABA was a qualifying employer for PSLF purposes. After Plaintiffs’ attempts to resolve the issues with the Department proved fruitless, Plaintiffs filed this lawsuit in December 2016. The Department required multiple extensions of time to complete briefing on the

parties' cross-motions for summary judgment, but briefing was finally completed on September 8, 2017. At the parties' joint request, oral argument was scheduled for October 6, 2017, but was vacated when the case was reassigned. The case has remained pending since then.

As explained in the accompanying Memorandum, Plaintiffs are suffering serious harms that can be remedied only through final resolution of this case. The ABA has struggled to recruit and retain qualified individuals to serve its crucial public interest mission because ABA employees cannot ascertain their PSLF status at present. The Individual Plaintiffs have been kept in a state of uncertainty, unable to make major financial and life decisions until they know when, or if, their loan balances will be forgiven as promised. In effect, Plaintiffs' only option is to wait for a final decision from this Court. Plaintiffs believe that the scheduling of a status conference or a date for oral argument is an important step toward resolving this case. A proposed order is attached hereto.

Dated: March 2, 2018

Respectfully submitted,

/s/ Chong S. Park

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**LOCAL CIVIL RULE 7(m) STATEMENT**

Undersigned counsel for Plaintiffs conferred in good faith with counsel for Defendants regarding the substance of this motion. Defendants take no position on the motion.

/s/ Chong S. Park

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of March, 2018, I electronically filed the foregoing motion with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all Counsel of Record.

/s/ Chong S. Park

Chong S. Park

**UNITED STATES DISTRICT COURT  
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**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF MOTION FOR SCHEDULING  
OF STATUS CONFERENCE OR, IN THE ALTERNATIVE, ORAL ARGUMENT**

Plaintiffs respectfully request that the Court schedule a status conference on the pending cross-motions for summary judgment and motions for extra-record review in this case within 30 days of the filing of this motion, or at its earliest opportunity thereafter. In the alternative, should the Court deem it necessary, Plaintiffs request that the Court set a date for oral argument on these motions.

When the parties jointly moved for an oral argument date in June 2017, they indicated it was necessary given Plaintiffs’ concern that delay in resolution of the case would “exacerbate the adverse consequences they [were] suffering.” ECF No. 19. Oral argument was scheduled for October 6, 2017, but ultimately vacated when the case was reassigned.<sup>1</sup> In the months since then, Plaintiffs have continued to suffer severe consequences from Defendant the U.S. Department of Education’s (“Department”) refusal to recognize their eligibility for the Public Service Loan Forgiveness (“PSLF”) program. This is an extraordinary case given the convergence of the

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<sup>1</sup> See Minute Orders, June 26, 2017 & Sept. 15, 2017.

mounting institutional harm to the American Bar Association (“ABA”), the major financial uncertainty for the Individual Plaintiffs, and the length of time that has passed since this case was filed. Justice delayed will surely be justice denied.

### **ARGUMENT**

Plaintiffs challenge the Department’s refusal to recognize the Individual Plaintiffs’ public interest work as counting toward the required ten years of qualifying employment for PSLF eligibility, as well as the Department’s determination that the ABA is not a qualifying employer for PSLF purposes. The Department’s actions violate the Administrative Procedure Act (“APA”) and the Due Process Clause because they are impermissibly retroactive, violate the APA’s procedural requirements, and are contrary to the PSLF program’s authorizing statute. The Department now takes the position that it never changed its positions or guidance, despite the existence of clear record evidence to the contrary in the sparse administrative record it certified. As such, Plaintiffs have proffered to this Court extra-record evidence that further confirms the Department’s unlawful actions. ECF Nos. 24, 35. The underlying cross-motions for summary judgment and the motions for extra-record review remain pending before this Court.

Plaintiffs have made clear from the outset that the Department’s actions have caused, and are continuing to cause, serious harm. The ABA is struggling to attract and retain staff for its critical *pro bono* efforts because of the uncertainty surrounding its employees’ ability to obtain PSLF credit while working for the ABA. Rives Decl. ¶¶ 21–26 (ECF No. 17-1). The Individual Plaintiffs are experiencing paralyzing financial uncertainty. Rudert Decl. ¶¶ 9, 14, 18 (ECF No. 17-2); Voigt Decl. ¶¶ 18-19 (ECF No. 17-3); Burkhardt Decl. ¶¶ 2, 11-12 (ECF No. 17-4); Quintero-Millan Decl. ¶¶ 16-20 (ECF No. 17-5).

Plaintiffs have nonetheless agreed to several extensions of time requested by the

Department. In February 2017, Plaintiffs agreed to allow the Department an additional 30 days to answer the Complaint. ECF No. 13. In May 2017, the parties agreed to a briefing schedule. Minute Entry, May 3, 2017. Plaintiffs filed their motion for summary judgment three weeks later, on May 24, in accordance with that schedule. ECF No. 17. The Department waited until June 20—three days before its June 23 deadline—to inform Plaintiffs that the Department required a 30-day extension of time to file its opposition and cross-motion. Plaintiffs consented to the full 30 days.<sup>2</sup> ECF No. 19.

But Plaintiffs also informed the Department that delays in the resolution of the case were compounding the serious harm Plaintiffs were suffering. The parties therefore agreed that they would jointly move to schedule an oral argument date in October 2017 as part of the joint motion to allow the Department additional time. *Id.* Oral argument was then scheduled for October 6, 2017, but was vacated when the case was reassigned.<sup>3</sup> Minute Orders, June 26, 2017 & Sept. 15, 2017.

As time has progressed since the filing of this action, Plaintiffs' injuries have continued to worsen. The ABA is struggling to recruit and retain staff for its critical *pro bono* legal work. As one example, the ABA's South Texas Pro Bono Asylum Representation Project ("ProBAR") has suffered a great deal of harm over the past year, to the point at which its ability to function and its very existence are threatened. In a declaration filed in August 2017, ProBAR's Director, Kimi Jackson, highlighted the uncertainty caused by the Department's changed position on the ABA's

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<sup>2</sup> On July 21, 2017, just three days before the expiration of this new extended deadline, the Department asked the Court for an *additional* two-week extension to file its opposition and cross-motion. ECF No. 20. Plaintiffs this time opposed any further delay, and the Court split the difference and granted the Department an additional week. ECF No. 21; Minute Order, July 22, 2017.

<sup>3</sup> The Department acknowledged in its motion to further extend the briefing schedule that oral argument need not be delayed beyond October 6 unless the Court deemed such rescheduling necessary. ECF No. 20. Accordingly, in partially granting the Department's motion, the Court explicitly maintained the October 6 date for oral argument. Minute Order, July 22, 2017.

PSLF eligibility. Not only has ProBAR been unable to fill three positions central to its *pro bono* legal services, but it has had numerous employees resign and applicants refuse job offers as a result of the Department's actions. Jackson Decl. ¶¶ 6-14, 19 (ECF No. 25-1).

In the months since early October, when oral argument was originally scheduled, the harms to the ABA have become even more acute. ProBAR continues to suffer staffing challenges at a time when demand for its services is rapidly increasing. *See* Decl. of Kimi Jackson (2d) ¶¶ 6-16, attached hereto as Exhibit A. For example, despite the potential availability of additional funding to help address the rising demand for ProBAR's services, ProBAR is a poor candidate for such funding given its inability to attract qualified attorneys to apply and fill its vacancies. *See id.* ¶ 16. ProBAR currently has two funded vacancies for attorneys, one of which is the Legal Director for ProBAR's Children's Project, a division that currently employs 28 staff members. *See id.* ¶¶ 8-10. This position has remained vacant for more than one year. *Id.* ¶ 9. The other vacancy has placed ProBAR at risk of losing funding given ProBAR's inability to fill the position thus far. *See id.* ¶ 14.

The ABA's status as a PSLF-ineligible employer continues to dissuade otherwise suitable and interested candidates from applying to these positions. As recently as January 2018, Ms. Jackson received a phone call from a highly qualified attorney who expressed interest in applying to a vacancy. *See id.* ¶ 17. The candidate currently works for a PSLF-eligible employer in Texas. *Id.* Despite her expressed interest in ProBAR's work, after inquiring about the financial implications of working at ProBAR, the candidate decided not to apply for the position. *Id.* In fact, since the beginning of 2016, ProBAR has experienced a notable 33 percent decline in the average number of applicants to open staff attorney positions compared to prior years. *Id.* ¶ 15.

In addition to the impact the lack of resolution has on recruitment efforts, the status quo



poses a serious threat to ProBAR's ability to retain existing employees. *See id.* ¶ 10. ProBAR employees frequently request updates from Ms. Jackson on the status of their eligibility. *Id.* ¶ 18. Ms. Jackson worries that the current state of limbo will further harm morale, which is already low, given that staff are overworked due to the rising demand for their services and the above-described staffing challenges. *Id.* ¶ 10.

ProBAR is not the only ABA initiative to experience serious challenges as result of the Department's actions and the lingering uncertainty of this case's outcome. Certain key staff at the ABA's Commission on Domestic & Sexual Violence ("Commission") have likewise departed in response to the sudden revocation of the ABA's eligibility for PSLF. Decl. of Vivian Huelgo, ¶ 6, attached hereto as Exhibit B. These departures, and the lengthy delay in filling the positions that ensued thereafter, severely hampered the Commission's ability to complete mission-critical, grant-funded projects involving the provision of training and resources to attorneys representing victims of domestic violence, the drafting and providing of educational materials for trainings, and the identifying of resources to assist in representation of victims of domestic and sexual violence. *Id.* ¶¶ 3, 7-8. There is real concern that the current lack of ABA eligibility for PSLF has restricted and will continue to restrict the pool of Commission applicants to those who are fortunate enough not to have outstanding student loan balances, thereby effectively cutting off an untold number of talented would-be applicants. *Id.* ¶ 9.

Meanwhile, the passage of time continues to harm the Individual Plaintiffs as well. The longer the uncertainty remains as to their progress toward loan forgiveness, the more difficult it becomes for the Individual Plaintiffs to make crucial professional and life decisions. *See Rudert Decl.* ¶¶ 16-17; *Voigt Decl.* ¶ 19; *Burkhart Decl.* ¶ 12; *Quintero-Millan Decl.* ¶¶ 18-20. Without a resolution in this case regarding the eligibility of their contested employment, there is no way to

know when or if they will qualify for loan forgiveness. In the meantime, the Individual Plaintiffs' loan debt continues to mount under their Income-Driven Repayment plans, with interest accumulating faster than they can pay it off. *See* Rudert Decl. ¶¶ 2-3, 18; Voigt Decl. ¶¶ 8, 18; Burkhart Decl. ¶¶ 2, 9, 11; Quintero-Millan Decl. ¶¶ 16-17.

Accordingly, Plaintiffs respectfully request that the Court schedule a status conference within 30 days of the filing of this motion, or as soon as possible thereafter, so that the parties can discuss a timeline for resolving this case. In the alternative, Plaintiffs respectfully request that the Court set a date for oral argument to resolve the pending cross-motions for summary judgment and the motions for extra-record review.

Dated: March 2, 2018

Respectfully submitted,

/s/ Chong S. Park

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of March, 2018, I electronically filed the foregoing memorandum with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all Counsel of Record.

/s/ Chong S. Park

Chong S. Park