IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES, Plaintiff, v. ARNE DUNCAN, in his official capacity as Secretary of the Department of Education, *et al.*, Defendants.	Civil Action No. 1:14-cv-01870(JDB)

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants Arne Duncan, in his official capacity as Secretary of the Department of Education, and the Department of Education respectfully move for summary judgment in their favor on all of plaintiff's claims pursuant to Fed. R. Civ. P. 56(b), as there is no genuine issue of material fact precluding judgment in defendants' favor.

Accompanying this motion is a memorandum of law in support of defendant's motion and in opposition to plaintiff's motion for summary judgment (Docket # 13). Defendants respectfully request that the Court grant their motion for summary judgment, and deny plaintiff's motion for summary judgment, for the reasons described in the memorandum.

Dated: March 6, 2015

Respectfully Submitted,

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Under Title IV of the Higher Education Act of 1965 ("HEA"), the entities that ultimately receive the billions of dollars of federal student loan money—the educational institutions—are not obligated to pay the money back if their programs are ineffective; the risk of defaults on student loans is borne entirely by the students and taxpayers. While Congress does not require schools to repay student loan proceeds if the students are unable to, it does impose restrictions on schools to hold them accountable for the services provided, to safeguard the enormous federal investment in student aid, and to prevent abuse of the Title IV program. Among those restrictions is a requirement that certain postsecondary programs—specifically, vocationally oriented programs—"prepare students for gainful employment in a recognized occupation." *See* 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i). The Department of Education ("Department") has reasonably interpreted this statutory requirement to mean providing training that will lead to earnings that will allow students to pay back their student loans.

In this lawsuit, plaintiff Association of Private Sector Colleges and Universities ("APSCU") challenges that interpretation and the Department's regulations implementing it, known as the Gainful Employment rules, 79 Fed. Reg. 64890 (Oct. 31, 2014). Plaintiff's goal is clear: to prevent this statutory requirement from having any force whatsoever, arguing that its plain meaning is merely to prepare students for any job that pays any nominal amount of money. This goal becomes even clearer when plaintiff's motion for summary judgment is compared with positions this same plaintiff took in challenging the Department's prior Gainful Employment rules. In 2012, this Court upheld the Department's authority to determine whether programs prepare students for gainful employment in a recognized occupation by reference to students' earnings and debt levels, but invalidated the rules because the cut-off point for one of the tests

the Department relied upon—the repayment rate metric—was found to be unsupported by evidence. *Ass'n of Private Sector Coll. & Univ. v. Duncan* ("*APSCU I*"), 870 F. Supp. 2d 133 (D.D.C. 2012). In response to that decision, the Department re-regulated, fixing the problems noted by the Court. Plaintiff has sued again, taking contradictory positions that show that it is playing a gotcha-game with the Department. For example, when the Department eliminated the repayment rate metric after plaintiff argued that it was arbitrary, plaintiff switched course and now argues that the Department's decision to eliminate the repayment rate metric and utilize a single test, the debt-to-earnings rates measure, is arbitrary. Although the Department eliminated a 50% increase in the debt-to-earnings rates after plaintiff argued that the increase was arbitrary, plaintiff now argues that the Department's decision to eliminate the purportedly arbitrary increase is itself arbitrary. When the Department limited the definition of student in the new rules to only those students receiving Title IV student aid after plaintiff argued it was illegal to collect loan data on non-Title IV students, plaintiff now argues that this limitation is arbitrary.

Plaintiff should lose this game because the Department has promulgated thoughtful regulations, aimed at a vexing problem in its area of expertise, that demonstrate reasoned decisionmaking. The Court should reject plaintiff's many challenges and uphold the regulations.

BACKGROUND

The Statutory Requirement. Under Title IV of the HEA, 20 U.S.C. § 1070 *et seq.*, the Department can enter into agreements with postsecondary schools that allow students at those schools to receive federal grants and loans. Students must repay any federal loans they receive. The loans are guaranteed by the United States government, and the Department (and thus the taxpayer) is ultimately responsible for paying off defaulted student loans with federal funds. *See*

APSCU v. Duncan, 681 F.3d 427, 433 (D.C. Cir. 2012). In award year 2013-14, the Department provided some $164.2 billion in Title IV aid to almost 13.4 million students.[1]

As originally enacted, the HEA provided loan eligibility only for the college-bound student—that is, for students earning traditional degrees at traditional colleges and universities. Congress extended loan eligibility to students at for-profit trade and vocational schools through the National Vocational Student Loan Insurance Act of 1965, Pub. L. 89-287, 79 Stat. 1037 (1965) ("NVSLIA"). Congress was concerned, however, that these students would not be able to repay their loans after graduating. Congress voted in favor of extending loan eligibility to these students after receiving assurances that a high percentage of them completed their training and found jobs related to their training that paid wages sufficient to allow them to repay any loans. S. Rep. No. 89-758, at 3-12 (1965); H.R. Rep. No. 89-308, at 3-9, 11 (1965). Reflecting these concerns, the NVSLIA defined an "eligible institution" as one providing "a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations." Pub. L. 89-287, § 17(a). The NVSLIA loan insurance program has since been merged into the HEA, which conditions eligibility for Title IV aid for vocationally oriented programs on their "prepar[ing] students for gainful employment in a recognized occupation." *See* 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i).

The Recent Need For Regulatory Action. Programs that are subject to the gainful employment requirement ("GE programs") provide training for occupations in fields such as cosmetology, business administration, medical or dental assisting, and massage therapy. 79 Fed. Reg. at 65025. While institutions of higher education in all sectors—public, private nonprofit, and private for-profit—offer GE programs, private for-profit schools enroll a disproportionately

[1] Fiscal Year 2015 Budget Summary, U.S. Department of Education, http://www2.ed.gov/about/overview/budget/budget15/summary/15summary.pdf.

large share of the students attending such programs. *Id*. at 65028-29. The Department determined that the challenged regulations, which give teeth to the "prepare students for gainful employment in a recognized occupation" requirement, were necessary because a number of factors, discussed below, suggested that many programs, particularly those offered by for-profit schools, are not preparing students for gainful employment in a recognized occupation, leaving them instead with debts they cannot afford and poor employment prospects, and leaving the federal government on the hook for their unpaid loans. *Id*. at 65031-35.

For-profit schools typically offer flexible course schedules and online programs that serve nontraditional students. *Id*. at 65032. But they are generally more expensive to attend than their public counterparts. *Id*. Students attending two-year for-profit schools face an average tuition and fee charge that is about four times that of their peers at public schools of the same length. *Id*. Higher tuition makes students significantly more likely to assume debt to attend a for-profit school than other types of colleges or universities. *Id*. at 65033. Two-thirds of students at for-profit schools borrowed to finance their education in 2011-12, compared to only 20% of students at two-year public schools. *Id*. Students at for-profit schools borrow at a greater rate and in larger amounts than their peers at two-year public schools, on average. *Id*. The median loan amount borrowed during 2011-12 for students enrolled in associate degree programs at for-profit schools was $7,583, as compared to $4,467 at public schools. *Id*.

Students who attend for-profit schools also have lower earnings, and are more likely to be idle (*i.e.*, not working or in school), six years after beginning their education than students who attend other types of colleges or universities. *Id*. at 65034. Students at for-profit schools are less likely than their peers at other schools to complete their programs and graduate. *Id*. at 65033.

And many for-profit schools devote greater resources to recruiting and marketing than to instruction or student support services. *Id*.

As a result of these factors, students at for-profit schools have worse repayment outcomes than their peers at other schools. Approximately 19% of borrowers at for-profit schools default on their loans within 3 years of entering repayment as compared to about 13% of borrowers at public schools. *Id*. The average lifetime default rate is 50% for two-year for-profit schools as compared to 35% for other schools of the same length. *Id*.

The consequences for students of defaulting on their loans are severe. They include substantial collection and interest charges; adverse credit reports that hinder their ability to rent or buy a home, buy a car, or get a job; garnishment of wages; and the loss of tax refunds and even Social Security benefits. *Id*. at 65031. The consequences of student loan defaults for schools, on the other hand, are nil. Their revenues are based on how many students they enroll, not on whether those students are able to repay their loans. The schools get the benefit of the loans being made without bearing any of the costs of students not being able to repay the loans.[2]

The 2011 Rules. The Department first promulgated regulations regarding the "prepare students for gainful employment in a recognized occupation" statutory requirement in 2011. *See* 76 Fed. Reg. 34386 (June 13, 2011) ("2011 Rules"). The 2011 Rules and the regulations challenged here set minimum standards to assess the ability of students to repay their loans as an indication that a program prepares students for gainful employment in a recognized occupation, reflecting the common-sense idea that if students have to spend an undue amount of their income to pay back loans, their employment is not truly gainful. The 2011 Rules established a

[2] In rare instances, a school may lose eligibility if, for three consecutive years, at least 30% of its students default within two years after the year they enter repayment, but it still would not have to pay back students' loans. *See* 20 U.S.C. § 1085(a)(2).

repayment rate metric, a debt-to-discretionary income rate metric, and a debt-to-annual earnings rate metric. *APSCU I*, 870 F. Supp. 2d at 144. A program that failed all three metrics for three out of four years would lose eligibility. *Id.*

In a challenge brought by plaintiff here, the court determined that the 2011 Rules fit well within the Department's statutory authority as a reasonable interpretation of the ambiguous statutory command to provide Title IV funding only to vocationally oriented programs that prepare students for gainful employment in a recognized occupation. *Id.* at 145-49. The court also concluded that the passing thresholds chosen by the Department for the debt-to-discretionary income rate and the debt-to-annual earnings rate were the product of reasoned decisionmaking. *Id.* at 152-54. The baseline percentages, which the Department had increased by 50%, were supported by "experts [who] suggested that 20 percent was the maximum affordable ratio of debt payments to discretionary income" and that "8 percent is a commonly used industry standard for a manageable ratio of debt to total income." *Id.* at 152.

In contrast, the court determined that the Department had not adequately supported its choice of a passing threshold for the repayment rate with any expert studies or industry practices. *Id.* at 154. Moreover, because the Department had explicitly and "repeatedly emphasized the ways in which the [three gainful employment metrics] were designed to work together," the court concluded that it could not sever the repayment rate measure from most of the remaining portions of the 2011 Rules. *Id.* The court, therefore, vacated the 2011 Rules in large part.[3] *Id.*

The Current Gainful Employment Regulations. Because of continuing concerns about these programs, the Department conducted another negotiated rulemaking. *See generally* 79 Fed. Reg. 16426 (Mar. 25, 2014) (Notice of Proposed Rulemaking ("NPRM")). The resulting

[3] The court upheld portions of the 2011 Rules' disclosure requirements. *See APSCU I*, 870 F. Supp. 2d at 155-57; *Ass'n of Private Sector Coll. & Univ. v. Duncan* ("*APSCU II*"), 930 F. Supp. 2d 210 (D.D.C. 2013).

gainful employment requirements have three goals: (1) to assess whether programs indeed prepare students to earn enough to repay their loans, or are sufficiently low cost, such that students are not unduly burdened with debt, (2) to ensure that schools have a meaningful opportunity and reasonable time to improve their programs after the regulations take effect, and (3) to safeguard the federal investment of Title IV student aid dollars. 79 Fed. Reg. at 64891.[4]

The regulations establish two debt-to-earnings rate measures to assess whether a program prepares its students for gainful employment in a recognized occupation. The D/E rates in the current rule are very similar to the 2011 Rule's debt-to-discretionary income and debt-to-annual earnings rates approved by the court in *APSCU I*. The D/E rates evaluate the amount of debt students who completed a GE program incurred to attend that program in comparison to those same students' discretionary and annual earnings after completing the program. 34 C.F.R. § 668.404. The amount of debt is the lesser of only those borrowing costs under a school's control (tuition, fees, books, equipment, and supplies) or the actual loan amount. 79 Fed. Reg. at 64918.[5]

A program need only pass one of the two D/E rates to satisfy the gainful employment requirements. 34 C.F.R. § 668.403(c). A program passes if its average annual loan payment is less than or equal to 20% of discretionary income or 8% of annual earnings. *Id*. A program fails if its average annual loan payment is more than 30% of discretionary income and 12% of annual

[4] The regulations also have a transparency component, which requires schools to disclose certain information about their programs to students and prospective students. 79 Fed. Reg. at 64890. The disclosures are intended to benefit students, the public, and schools by increasing the quality and availability of information about the outcomes of students enrolled in GE programs.

[5] D/E rates for a particular award year are calculated based on the debt and earnings of students who completed the GE program during what the regulations define as the "two-year cohort period." 34 C.F.R. § 668.404(b), (c). For most programs, the "two-year cohort period" encompasses the third and fourth award years prior to the award year for which D/E rates are being calculated. *Id*. § 668.402. For example, D/E rates for award year 2014-15 will be calculated based on the debt and earnings of students who completed the GE program during award years 2010-11 and 2011-12. *Id*.

earnings. *Id*. A program that does not pass and has at least one D/E rate in between these figures is in the zone. *Id*. A program loses eligibility for Title IV funds if it fails the D/E rates for 2 out of 3 consecutive years, or has a combination of D/E rates that are in the zone or failing for 4 consecutive years. *Id*. § 668.403(c)(4).

ARGUMENT

I. THE DEBT-TO-EARNINGS RATE MEASURES DO NOT EXCEED THE DEPARTMENT'S AUTHORITY UNDER THE HEA

Plaintiff argues that the D/E rates exceed the Department's statutory authority under the HEA, contrary to the well-reasoned determination of the *APSCU I* court. Pl.'s Mot. for Summ. Judgment ("Pl.'s Mot.") at 12-20. As were the 2011 Rules, the challenged regulations are a permissible interpretation of an ambiguous statutory requirement, and should therefore be upheld under the analysis in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, a court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If Congress has done so, that is the end of the inquiry, as the court "must give effect to the unambiguously expressed intent of Congress." *Id*. at 843. If the court determines the statute is silent or ambiguous on the precise question at issue, it must uphold the agency's construction of the statute it administers so long as it is reasonable. *Id*. at 843-44. Such deference is warranted "because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, . . . and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (internal quotations and citations omitted).[6]

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[6] The Department has broad authority to promulgate regulations to implement Department programs, including federal student aid programs. 20 U.S.C. §§ 1221e-3, 3474. With respect to Title IV programs

A. The Statutory Language Is Ambiguous As To The Precise Question At Issue

The precise question at issue here is whether the Department may require that, for a program to meet the statutory requirement that it "prepare students for gainful employment in a recognized occupation," the program should prepare students for employment that allows them to repay the debt incurred to attend the program in the first place. 79 Fed. Reg. at 64893. Plaintiff claims that the plain, unambiguous meaning of the phrase "gainful employment" is "a job that pays," even one that pays $1.00 a year. Pl.'s Mot. at 12. Plaintiff points to dictionaries, conceding that *Congress* provided no definition of the phrase "prepare students for gainful employment in a recognized occupation," or any of its subparts. Plaintiff's dictionary definitions, moreover, include a definition of "gainful" as "productive of . . . profit," (*id*. at 13 n.14);[7] profitable, in turn, means the excess of returns over expenditures, or having something left over after one's expenses are paid.[8] This definition supports the idea that "gainful employment in a recognized occupation" is not just any job that pays a nominal amount but a job that pays enough to cover one's major expenses, including student loans. Moreover, "employment" itself is defined as "a job that pays wages or a salary,"[9] making "gainful" superfluous under plaintiff's definition. *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574

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specifically, the Department is authorized to prescribe regulations related to "the establishment of reasonable standards of financial responsibility and appropriate institutional capability for the administration by an eligible institution of a program of student financial aid . . . , including any matter the Secretary deems necessary to the sound administration of the financial aid programs." *Id*. § 1094(c)(1)(B). The Department relies on these provisions in conjunction with the gainful employment authority found in 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i). *See* 79 Fed. Reg. at 64892.

[7] Other dictionaries also define "gainful" as "profitable" or "lucrative." *See* Black's Law Dictionary 807 (4th ed. 1951); Webster's New International Dictionary 1026 (2d ed. 1958); New Standard Dictionary 1000 (Funk & Wagnalls Co. 1946); Oxford English Dictionary Volume IV 13 (1978); Webster's New Collegiate Dictionary 469 (1975).

[8] Black's Law Dictionary 1376; Webster's New International Dictionary 1976; New Standard Dictionary 1979; Webster's New Collegiate Dictionary 919.

[9] Webster's New Collegiate Dictionary 373. *See also* Black's Law Dictionary 618 (4th ed. 1951) (employment defined as "the act of hiring, implying a request and a contract for compensation"); Webster's New Int'l Dictionary 839 (2d ed. 1958) ("employ is used to emphasize the idea of . . . wages to be paid").

(1995) (court should avoid a reading of a statute that renders a word redundant). As the district court determined in *APSCU I*, there is "no unambiguous meaning of what makes employment 'gainful': the phrase need not mean 'any job that pays.'" 870 F. Supp. 2d at 146. *See also Amer. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 14-16 (D.D.C. 2013) (Bates, J.) (statute requiring disclosure of annual reports was ambiguous as to whether disclosures must be public).

Plaintiff recognizes the importance of statutory context (Pl.'s Mot. at 14) but ignores entirely the phrase "in a recognized occupation" that modifies "gainful employment." Significantly, this phrase connotes employment in an established occupation, not just any job that pays. 79 Fed. Reg. at 64894. Plaintiff instead emphasizes "prepare," but "the Department's regulations are an attempt to assess whether certain programs in fact provide such preparation," which the statute does not tell the Department how to determine. *APSCU I*, 870 F. Supp. 2d at 146. The modifying language "in a recognized occupation" also distinguishes the phrase from other provisions of the HEA that just use the words "gainful employment," *see* Pl.'s Mot. at 13 & n.16, and that, in any event, serve different purposes, such as providing requirements for fellowships for graduate study, as opposed to for entrance into a recognized occupation.[10] *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997) ("that the term 'employees' may have a plain meaning in the context of a particular section [does not mean] that the term has the same meaning in all other sections and in all other contexts"); *APSCU I*, 870 F. Supp. 2d at 146.[11]

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[10] The fact that a loan program for schools affected by disasters defines "institution of higher education" with reference to 20 U.S.C. § 1001 merely signifies Congressional intent to limit the loans to institutions participating in federal student aid programs, not any intent about the meaning of the phrase "prepare students for gainful employment in a recognized occupation." *See* Pl.'s Mot. at 13 n.16 (citing 20 U.S.C. § 1161l-3(b), (g)(4)).

[11] Nor does the Department's ruling in *In re Acad. for Jewish Educ.*, 1994 WL 1026087 (Dep't of Educ. Mar. 23, 1994), that because the aim of a program in Jewish culture was assimilation, not preparation for a specific area of employment, it did not prepare its students for gainful employment in a recognized occupation, conflict with its current interpretation. *See* Pl.'s Mot. at 14. Given the facts of that case, the Department had no need to evaluate the debt and earnings of the program's students to assess whether the program was preparing students for gainful

Prior to the promulgation of the 2011 Rules, the Department had not issued regulations defining or describing what this requirement means. *See* 75 Fed. Reg. 43616, 43619 (July 26, 2010). But this is not the damning fact plaintiff makes it out to be. *See, e.g.*, Pl.'s Mot. at 14. "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941); *see also id.* at 359 (Douglas, J., dissenting) ("Mere non-use does not subtract from power which has been granted. The host of practical reasons which may defer exhaustion of administrative powers lies in the realm of policy."). An agency may change, or even reverse, a longstanding position so long as it provides a reasoned explanation. *See, e.g.*, *Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014). Here, the Department never formally expressed a view one way or the other until recently, when it "decide[d] that a growing problem warrant[ed] more oversight than was previously necessary"—a prerogative within an agency's discretion. *Assoc. Dog Clubs of N.Y. State v. Vilsack*, 2014 WL 5795207, at *6 (D.D.C. Nov. 7, 2014).

B. The HEA's Structure And Purpose Support The Department's Construction

The Department's construction does not conflict with, but rather fits comfortably within, the HEA's structure and purpose. *See* Pl.'s Mot. at 16-19. The purpose of the HEA is not, as plaintiff claims, to provide federal funding for any program of higher education no matter how poor its quality or outcomes for students. To the contrary, the HEA seeks to expand access to higher education while preventing abuses of the federal student aid program, safeguarding the federal investment in it, and protecting students. For example, the HEA denies eligibility to institutions whose students have chronically high default rates, 20 U.S.C. § 1085(a)(2) (Cohort

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employment in a recognized occupation—something the administrative law judge recognized is "difficult to objectively assess." 1994 WL 1026087 at *2. *See also APSCU I*, 870 F. Supp. 2d at 150.

Default Rate ("CDR") provision); prohibits schools from compensating employees based on recruiting prospective students, to prevent recruiters paid by the head from "sign[ing] up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans," *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *see also* 20 U.S.C. § 1094(a)(20); and requires that proprietary institutions derive no more than 90% of their revenue from Title IV funds, to ensure that they attract students based upon the quality of their programs, not solely because they accept federal student financial aid. *See* 20 U.S.C. § 1094(a)(24) ("90/10 provision"); *Ponce Paramedical Coll., Inc. v. U.S. Dep't of Educ.*, 858 F. Supp. 303, 307, 311 (D.P.R. 1994).

In particular, the Department's construction complements, rather than conflicts with, the CDR provision. *See* Pl.'s Mot. at 17. The GE rules reach a broader range of students who are struggling to repay their debt, not just those who are in default at the high rates of the CDR provision, and do so at the program, as opposed to institution, level, but serve the same general goal as the CDR provision. Plaintiff claims that Congress would not have enacted the CDR provision if the Department already had the authority to terminate a school's eligibility based on excessive student debt. The reality, however, is that Congress enacted the CDR provision to direct the Department to increase its regulatory and oversight activities in this area, not to provide it with authority it lacked. The Department had actually promulgated regulations strengthening administrative sanctions, up to and including termination of eligibility, for institutions with excessive student default rates, *before* Congress enacted the CDR provision. *Compare* 53 Fed. Reg. 36216 (Sept. 16, 1988), and 54 Fed. Reg. 24114 (June 5, 1989), *with* Student Loan Default Prevention Initiative Act of 1990, Pub. L. 101-508 § 3001, 3004, 104 Stat. 1388 (1990) (CDR provision). *See also Career College Ass'n v. Riley*, 74 F.3d 1265, 1273-74

(D.C. Cir. 1996) (Department has statutory authority to measure an institution's administrative capability by reference to student default rates); *APSCU I*, 870 F. Supp. 2d at 147. Congress enacted the CDR provision to codify and strengthen these efforts and to ensure that the Department would not revert to what Congress viewed as ineffective management of the student loan program, particularly with respect to the for-profit sector. *See* S. Rep. No. 102-58, 1991 WL 153999, at *25 (1991) (criticizing the Department for "rarely revok[ing] eligibility for reasons other than the loss of a license or accreditation").[12]

Plaintiff also argues the Department's construction conflicts with the role the HEA assigns to private accrediting agencies to assess the quality of programs. Pl.'s Mot. at 18. The HEA does not, however, make accreditation the exclusive means of ensuring program quality, nor do the GE rules specify the substantive qualities a program should have; rather, they measure student outcomes. In addition, accreditation largely means only that an institution meets its own standards and the standards set by the institutions that make up the accrediting agency's membership, not that the school's programs prepare students for gainful employment in a recognized occupation (the Department's role in accreditation is limited to recognizing accrediting agencies, 20 U.S.C. § 1099b(a)).[13] Accreditation was never intended to supplant or

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[12] Thus, this case is distinguishable from *Loving v. IRS*, 742 F.3d 1013, 1020 (D.C. Cir. 2014), where the subsequent statutory amendments would have been unnecessary under the IRS's interpretation of the statute. *See* Pl.'s Mot. at 17 n.23. *Loving* is also distinguishable because the IRS's statutory interpretation would have empowered it for the first time to regulate hundreds of thousands of individuals in the tax-preparation industry, 742 F.3d at 1021, whereas schools that receive Title IV funds are subject to a "host of requirements" imposed by the HEA. Pl.'s Mot. at 4. The *Loving* court concluded that "Congress did not intend to grow such a large elephant in such a small mousehole." 742 F.3d at 1021 (citing *Brown & Williamson*, 529 U.S. at 160). The *APSCU I* court rejected this very argument made by plaintiff about the 2011 Rules. 870 F. Supp. 2d at 148 ("Although the Department's regulation is significant, it does not approach the scale of the elephantine interventions described [in *Brown & Williamson* and other cases]. . . . Concerned about inadequate programs and unscrupulous institutions, the Department has gone looking for rats in ratholes—as the statute empowers it to do.").

[13] *See Marjorie Webster Junior Coll., Inc. v. Middle States Ass'n of Colls. and Secondary Sch., Inc.*, 432 F.2d 650, 657 (D.C. Cir. 1970) ("Accreditation means that the institution has achieved quality within the context of its own aims and program."); *Hatalmud v. Riley*, 1997 WL 223075, at * 1, 3 (S.D.N.Y. May 2, 1997) (even though

gut the statutory requirement that vocationally oriented programs prepare students for gainful employment in a recognized occupation. *See* S. Rep. No. 102-58, at *34 (criticizing the Department for "effectively abdicating its [guaranteed student loan program] oversight responsibilities to private accrediting bodies . . . .").

Nor does the Department's construction conflict with Congress's determination that the government not set tuition rates or control curriculum choices. Pl.'s Mot. at 18. The regulations do not require institutions to lower their tuition. While doing so may result in a program's meeting the D/E rates thresholds, there are many other ways to do so, including improving job placement efforts and better tailoring a program to existing job opportunities. *See* 79 Fed. Reg. at 64895. Nor would any voluntary lowering of tuition conflict with the 90/10 provision. *See* Pl.'s Mot. at 19. The Government Accountability Office found, in general, no correlation between an institution's tuition rate and its average 90/10 rate. *See* 79 Fed. Reg. at 64949. The Department concluded based on this study and its own data that most institutions could reduce their tuition for a program without risking violating the 90/10 rule. *Id.*

Similarly, the challenged rules do not dictate the content of educational programs but rather measure student outcomes. 20 U.S.C. § 1232a, which prohibits the federal government from exercising "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel" of any school system, "refers only to management, curriculum

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school had to be accredited to participate in student aid program, it did not have as its primary purpose the preparation of students for gainful employment in a recognized occupation); S. Rep. No. 102-58, at *17 ("[A]ccreditation is ill-equipped to prevent GSLP fraud and abuse, as evidenced by the fact that unscrupulous, dishonest, and/or inept school owners often acquire and retain accreditation with little, if any, difficulty."); *The Higher Education Amendments of 1992: Resolving the Conflict Over Diversity Standards and Institutional Eligibility for Title IV Aid*, 30 Harv. J. on Legis. 253, 268 (Winter 1993) ("[A]ccrediting associations do not view themselves as 'gatekeepers for student grants and loans.' Rather, they view themselves as peer-review organizations formed to encourage self-improvement through qualitative criteria and subjective judgments, as well as to ensure that institutions are achieving their individual goals and missions.").

dictation and other details of local school administration that the federal government is not equipped to handle." *Plaquemines Parish Sch. Bd. v. United States,* 415 F.2d 817, 830 (5th Cir. 1969) (interpreting predecessor statute, 20 U.S.C. § 884). Section 1232a was intended to prevent the Department from assuming the role of a national school board, not to prevent it from enforcing statutory requirements as a condition of receipt of federal student aid. *See Crawford v. Pittman,* 708 F.2d 1028, 1036 (5th Cir. 1983) (§ 1232a does not undermine requirement of the Education for All Handicapped Children Act that disabled children receive individualized consideration in state-run educational programs that receive federal aid).

C. Legislative History Also Supports The Department's Construction

The legislative history of what is commonly understood to be the predecessor to the gainful employment statutory requirement demonstrates Congress's intent that federal loans for business, trade, technical, and other vocational training be a sound credit risk. In 1965, Congress extended federal loan eligibility to for-profit schools but limited it to institutions providing "a program of postsecondary vocational or technical education designed to fit individuals for useful employment in recognized occupations." NVSLIA, § 17(a). This limitation on eligibility for institutions reflected Congress's concern that students who attend these types of programs, as opposed to traditional colleges and universities, be able to obtain skilled jobs that would enable them to repay the federal debt they incurred to attend the programs, thereby minimizing the risk of default to the taxpayers. *See* 79 Fed. Reg. at 64893.

Congress heard from several witnesses who testified that students who attend these types of programs, despite often being from lower-income socioeconomic backgrounds, were likely to be able to repay loans made to them if Congress authorized the loan program. *See* S. Rep. No. 89-758, at 3-11; H.R. Rep. No. 89-308, at 3-7. Dr. Hoyt, a professor of education

who ran a "national research program aimed at studying students who attend a trade, technical, or business school," S. Rep. No. 89-758, at 3; H.R. Rep. No. 89-308, at 2-3, posed two critical questions in his testimony: "If loans were made to these kinds of students, is it likely they could repay them following training? Would loan funds pay dividends in terms of benefits accruing from the training students received? It would seem that any discussion concerning this bill must address itself to these questions." S. Rep. No. 89-758, at 7; H.R. Rep. No. 89-308, at 4. Dr. Hoyt reported that over 95% of the students in his study who sought employment found it and that a large majority of the students found employment related to their training; he also detailed the median weekly income of students' first jobs post-training. S. Rep. No. 89-758, at 7-8; H.R. Rep. No. 89-308, at 4-5. Dr. Hoyt concluded:

> It seems evident that, in terms of this sample of students, sufficient numbers were working for sufficient wages so as to make the concept of student loan [repayment] to be rapid following graduation a reasonable approach to take. . . . [A]ll data presented here support the reasonableness of making loan funds available to students attending trade, technical, and business schools. I have found no reason to believe that such funds . . . would represent a poor financial risk.

S. Rep. No. 89-758, at 8; H.R. Rep. No. 308, at 5-6 [first alt. in Hse. version]; *see also* 79 Fed. Reg. at 64893. Portions of Dr. Hoyt's testimony were reprinted at length in otherwise brief congressional reports, both subcommittees emphasized the influence of his remarks, and Dr. Hoyt's research was highly relevant to Congress. *See APSCU I*, 870 F. Supp. 2d at 139; *NVSLIA Hearings Before the Select Subcomm. on Educ. of the Comm. on Educ. and Labor*, 89th Cong. 37 (1965) (statement of Representative Scheuer) (to Dr. Hoyt: "I think all of us will give [your testimony] great weight. . . . It is fascinating and most compelling.").

The committee reports also summarized similar assurances Congress received from industry representatives. S. Rep. No. 89-758, at 11 ("the students receiving loans will, in almost

every case, be enabled to repay them out of the added income resulting from their better educational status."); *id*. at 9 ("[t]he relatively short enrollment period in most private trade and technical schools coupled with the demonstrated effectiveness of their placement departments assures the lending agency of a better than average credit risk."). And Congress received data from the New York Higher Education Assistance Corp., which was operating a guaranteed loan program in New York for students attending postsecondary vocational institutions, showing that less than 1% of the total amount of loans guaranteed were in default. H.R. Rep. No. 89-308, at 6.

This legislative history negates plaintiff's argument that Congress intended to authorize loans to institutions providing vocational training programs that prepared their students for any job that pays, no matter how little. Plaintiff argues that the legislative history relates to the NVSLIA, not the HEA (Pl.'s Mot. at 20), but as the *APSCU I* court pointed out, the change in the language from requiring that vocationally oriented programs be "designed to fit individuals for useful employment in recognized occupations," to the current requirement that they "prepare students for gainful employment in a recognized occupation," was not substantive. 870 F. Supp. 2d at 140. Nor does any general aspiration that students be able to attend for-profit schools undermine the force of this legislative history. *See* Pl.'s Mot. at 20. Dr. Hoyt's testimony also clearly concerned the ability of students attending *these types of programs* to repay their loans, and so cannot be dismissed as concerning only student, not program, quality. *See id*. at 20 n.30.

Accordingly, the HEA is ambiguous as to how the Department is "to determine which programs actually prepare their students [for gainful employment in a recognized occupation] and which programs do not." *APSCU I*, 870 F. Supp. 2d at 146. The challenged regulations are a reasonable interpretation of the ambiguous statutory command, for all of the reasons above, *id*. at 149, and for all of the reasons describing the need for these regulations. *See* pp. 3-5, *infra*.

II. THE DEBT-TO-EARNINGS RATE MEASURES ARE NOT ARBITRARY OR CAPRICIOUS

"A party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed." *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (quotation marks and citation omitted). Under the APA's "highly deferential" standard of review, the Court "presumes agency action to be valid," setting it aside only if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 997-98 (D.C. Cir. 2008) (quotation marks and citations omitted).

Plaintiff initially claims that the Department "never offered a rational explanation of how debt and earnings metrics measure whether programs prepare students for gainful employment [in a recognized occupation]." Pl.'s Mot. at 21. This contention is baseless and ignores multiple pages of the final rule and NPRM in which the Department explained the reasoning behind measuring whether a program prepares students for gainful employment in a recognized occupation by looking at the earnings and debt of its students. The Department explained that the D/E rates measure is "tied to Congress's historic concern that vocational and career training offered by programs for which students require loans should equip students to earn enough to repay their loans." 79 Fed. Reg. at 64893, 64913; *see also* 76 Fed. Reg. at 34392. The Department also discussed at length the connection between debt and earnings, and students' ability to repay their loans, as evidenced by default and repayment rates. *See, e.g.*, 79 Fed. Reg. at 64920-21. Moreover, there is an inherently rational connection between the quality of education and training a program provides and the type of jobs its students are able to obtain.

The fact that there may be other ways of measuring whether a program prepares students for gainful employment in a recognized occupation is irrelevant; the Department's policy choice is entitled to deference under *Chevron* so long as it is reasonable. Plaintiff's other arguments against the D/E rates measure fail as well.

A. The D/E Rates Hold Programs Accountable For Student Outcomes Sufficiently Within Their Control.

The D/E rates do not seek to hold programs accountable for students' earnings and debt over which they have no control, nor do they "really measure student demographics." *See* Pl.'s Mot. at 22-24. The statutory requirement that GE programs must prepare students for gainful employment in a recognized occupation does not contain any exceptions for local market conditions or national recessions. It is therefore reasonable for the Department to expect GE programs to be responsive to regional labor market needs and prepare students for jobs that are obtainable in the present market. 79 Fed. Reg. at 64926. Nor does the APA require the Department to excuse programs from this statutory requirement during a lackluster economy. *See APSCU I*, 870 F. Supp. 2d at 151 ("[T]he fact that the debt measures may perform differently at different points in the economic cycle does not make them arbitrary on their face.").

The rules do, however, take account of market and economic conditions in several ways, lessening their impact on programs' eligibility. First, zone programs are given four years before they are determined to be ineligible. This is plenty of time for a well-functioning program to meet the baseline level of competence reflected in the modest D/E passing thresholds, *see* 79 Fed. Reg. at 64926, and it is reasonable for the Department to determine that a program is falling short of the statutory standard if it fails to obtain a passing score on either D/E test at least once in four straight years. *See id.* ("Most economic downturns are far too short to cause a program that would otherwise be passing to have D/E rates in the zone for four consecutive years," noting

that recessions have, on average, lasted 11.1 months since 1945).[14] Second, D/E rates are calculated on the basis of two- or four-year cohorts, which "reduces the impact of short term fluctuations in the economy that may affect a particular cohort of graduates but not others." *Id.* Third, the D/E rates are calculated as means and medians, which "mitigate the effects of economic cycles by measuring central tendency and reducing the influence of students who may have been most impacted by a downturn." *Id.; see also id.* at 64933.

Plaintiff also complains that the D/E rates measure student choices and circumstances regarding earnings and debt. Pl.'s Mot. at 22-24. The D.C. Circuit rejected this argument in upholding the CDR provision. *Ass'n of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 866 (D.C. Cir. 1992) (holding it was "clearly rational to solve the problem of increasing [student loan] defaults by eliminating schools evidencing a disproportionately large share of the defaults"); *see also APSCU I,* 870 F. Supp. 2d at 151. The Department also explained that the causes of excessive debt, high default rates, and low earnings of students at GE programs include factors that schools do in fact have some control over, such as aggressive or deceptive marketing practices, a lack of transparency regarding program outcomes, excessive costs, and a failure to satisfy requirements such as licensing, work experience, and programmatic accreditation requirements needed for students to obtain higher paying jobs in a field. 79 Fed. Reg. at 65032. Plaintiff's argument that student debt is largely a function of students' financial circumstances and lifestyle choices also ignores the fact that the Department limited the calculation of student debt to the amount of tuition, fees, books, supplies, and equipment—those cost items squarely within a program's control. *Id.* at 64918. Furthermore, the D/E rates do not measure whether

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[14] It was reasonable for the Department to rely on the average length of recesssions, as opposed to the "lingering effects" of recessions. *See* Pl.'s Mot. at 22 n.33; *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 225 (D.D.C. 2012) (consideration of averages, among other things, was not arbitrary or capricious).

each student who completed a program obtains a job that enables that student to pay back his or her loans, but rather measure this for a *cohort* of students, minimizing the impact of the outcomes of individual students. *Id*. at 64895.

Plaintiff's argument that the D/E rates really measure student demographics, not program effectiveness, is equally meritless. The Department responded to this concern in the rules by conducting multiple statistical analyses of the D/E rates. First, the Department reviewed the demographic composition of passing, zone, and failing programs, using, among other things, the 2012 GE informational rate data. *Id*. at 65043. This comparison showed that "passing, zone, and failing programs have very similar proportions of low-income, non-traditional, female, white, Black, and Hispanic students." *Id*. at 65045.

Second, the Department analyzed "the degree to which individual demographic characteristics might be associated with a program's annual earnings rate while holding other characteristics constant." *Id*. at 65052. The Department conducted a multivariable regression analysis using annual earnings rate as the dependent variable, and "percent white, Black, Hispanic, Asian, Indian, two or more races, female, zero EFC [Estimated Family Contribution, an indicator of socioeconomic status], independent [student status], and mother completed college, institutional sector and type, and program credential level" as independent variables. *Id.* at 65043. The analysis showed that programs whose students have certain characteristics had slightly lower annual earnings rates (including programs with greater proportions of Hispanic graduates, Asian graduates, or graduates with no expected family contribution), and programs whose students have certain other characteristics had slightly higher annual earnings rates (including programs with greater proportions of Black graduates, female graduates, or graduates whose mothers completed college). *Id.* at 65054. The Department explained that "the

magnitude of the coefficients is sufficiently small indicating that these factors have little impact on annual earnings rates and that it would be unlikely for a program to move from passing to failing solely by virtue of enrolling more students with these characteristics." *Id.* From this analysis and others that the Department performed, it reasoned that it "cannot conclude that the D/E rates measure is unfair towards programs that graduate high percentages of students who are minorities, low-income, female, or nontraditional or that demographic characteristics are largely determinative of results." *Id*. at 65057. *See also APSCU I*, 870 F. Supp. 2d at 150-51 (finding similar conclusion about the 2011 Rules, based upon similar analyses, not arbitrary).

Plaintiff relies for its argument on a chart in the final rules that shows an "R-squared" of 0.44. Pl.'s Mot. at 24 (citing 79 Fed. Reg. at 65053). While this number does indicate that 44% of the variance in program annual earnings rates can be explained by the variables used in the analysis, *see* 79 Fed. Reg. at 65042, those variables included *non*-student demographic variables, such as the credential level of a program and the sector of an institution, that clearly correlate with annual earnings (whether a student earns a certificate, bachelor's degree, or master degree obviously correlates with how much money she earns post-graduation). Thus, plaintiff's contention that the Department concluded that 44% of the variance in annual earnings rates is due to "demographics and other factors unrelated to program quality" (Pl.'s Mot. at 24) is wrong. In fact, the Department's analysis for the NPRM suggested that minority status and Pell-grant eligibility represented only a small amount of the variation in annual earnings rates. 79 Fed. Reg. at 16544. Plaintiff's reliance on the 44% R-squared number is further flawed because it ignores the *magnitude* of the demographic coefficients. *See* AR- H-074278 (commenter explaining that "the R-squared statistic . . . is not the appropriate statistic" for determining "the extent to which student demographic factors explain program performance"). In order to

understand any impact of a demographic characteristic, one must consider the "degree to which individual demographic characteristics might be associated with a program's annual earnings rate." 79 Fed. Reg. at 65052. As noted above, the Department did this, and concluded that the measured variables had "little impact on annual earnings rates." *Id.* at 65054.

B. The D/E Rates Are Rational and Based On Expert Opinion

1. The passing thresholds are based on reasonable standards long-accepted in the education context

Plaintiff challenges the 8% annual earnings D/E rate threshold, arguing that the number derives from a mortgage-industry standard that is "irrelevant" in the context of student loans. Pl.'s Mot. at 28.[15] The 8% threshold is not, however, a standard thoughtlessly borrowed from mortgage practice. It is true that "many [mortgage] lenders typically recommend that all non-mortgage loan installments not exceed 8 percent of the borrower's pretax income." 79 Fed. Reg. at 64919. It is also true, however, that the 8% annual earnings threshold "has long been referred to as a limit for student debt burden." *Id.* The Department identified "[s]everal studies of student debt [that] have accepted the 8 percent standard," citing four in particular. *Id.* at 64919 & nn.100-03. It further noted that some states established guidelines based on this limit and that "the National Association of Student Financial Aid Administrators identified 8 percent of gross income as a limit for excessive debt burden." *Id.* "Finally, based on a study that compared borrowers' perception of [their education] debt burden versus their actual debt-to-earnings ratios, Baum and O'Malley determined that borrowers typically feel overburdened when that ratio is above 8 percent." *Id.*[16] The *APSCU I* court recognized the reach and significance of the 8%

[15] Plaintiff does not challenge the 20% discretionary income rate, which is reasonable in any event. *See APSCU I*, 870 F. Supp. 2d at 152.

[16] That many recent graduates may not have mortgages—a fact plaintiff stresses (Pl.'s Mot. at 28)—is irrelevant because they no doubt still have significant housing expenses in the form of rent. *See, e.g.*, 42 U.S.C.

figure, noting that "8 percent is a commonly used industry standard." 870 F. Supp. 2d at 152. Even the authors plaintiff holds out as having rejected the Department's approach, *see* Pl.'s Mot. at 29 & n.49 (discussing Baum and Schwartz), "acknowledge the widespread acceptance of the 8 percent standard" in the education context, and state that the 8% threshold is "'not . . . unreasonable,'" 79 Fed. Reg. at 64919 (citation omitted); *see also* AR-G-000299-300.[17]

The Department's 8% threshold is also consistent with recent debt guidance from the Federal Housing Administration and Consumer Financial Protection Bureau that non-housing debt, which includes student loans as well as other significant expenditures such as credit card and auto payments, "should remain below 12 percent of pretax income." 79 Fed. Reg. at 64919. Of that 12%, credit card debt consumes 2.25%, leaving 9.75% for other consumer debt, including student loans, making 8% an appropriate minimum standard for student loan debt. *Id.* The 8% threshold is also reasonable in light of the fact that it only includes debt within a school's control, potentially reducing the numerator (debt) and thus the D/E rate, in comparison to proposed higher rates that are based on total student debt, including the 18-20% figure plaintiff proposed. *Id.* at 64918.[18]

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§1437a(a)(1) (setting maximum monthly rent payable by low income rental assistance household at 30% of adjusted gross monthly income); AR-H-000148 (average Associate's degree recipient pays 27% of income toward housing costs).

[17] Plaintiff wrongly suggests that the Department could not have relied on expert recommendations because it located no records responsive to a Freedom of Information Act request for records of communications with outside experts about the thresholds. Pl.'s Mot. at 29 & n.48. The expert views that informed the rulemaking were those expressed in the sources cited in the rulemaking. *See, e.g.*, 79 Fed. Reg. at 64919 & nn.97-112. The Department was under no obligation to communicate with those experts in order to rely upon their views.

[18] Plaintiff's opinion that the thresholds should have been higher is simply not relevant to its APA challenge. *See Envtl. Def. v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 82 (D.D.C. 2007) ("Th[e government's] reasoning is disputed, but the dispute presents a battle of experts—a battle conducted in an arena that is off limits to APA judicial review."). Nor may this Court "substitute [its] own judgment" of what the thresholds should be for that of the Department. *Wisc. Valley Improvement*, 236 F.3d at 745. The only relevant inquiry is whether the Department's selection of the 8% threshold was "reasonable and reasonably explained." *BNSF Ry. Co. v. Surface Transp. Bd.*, 748 F.3d 1295, 1300 (D.C. Cir. 2014) (quotation marks and citation omitted). As demonstrated above, it was.

Rather than grapple with this evidence, plaintiff compares the 8% rate against the 12% rate in the 2011 Rules. Pl.'s Mot. at 29-30. But plaintiff previously argued that the 50% tolerance that was built into the 2011 Rules, increasing the annual earnings rate from 8% to 12%, was arbitrary. *APSCU v. Duncan*, No. 1:11-cv-01314-RC (D.D.C.), ECF No. 15 at 27, ECF No. 18 at 29. While the *APSCU I* court upheld that tolerance as reasonable, 870 F. Supp. 2d at 152-54, the Department had very good reasons for incorporating tolerance into the new rules via the zone approach, as opposed to retaining 12% as the passing threshold. As the Department explained in the final rule, its choice of the 8% rate was based in part on data that was not available when the 2011 Rules were promulgated—specifically, the 2012 GE informational rate data. That data showed that graduates of programs with annual earnings rates above the 8% passing threshold have higher default rates and lower repayment rates than programs below the threshold. And the data further showed that programs with rates in the zone (with annual earnings rates between 8 and 12%) are much more similar to programs that fail than to programs that pass, in terms of default and repayment rates. 79 Fed. Reg. at 64920. Because programs in the zone are doing only slightly better than failing programs, the regulations give programs in the zone a longer time to loss of eligibility than those that fail the thresholds. *Id.* at 64920, 64924. The Department reasonably determined, based on this data, that this approach was preferable to that embodied in the 2011 Rules, which would have passed programs now in the zone.

2. It was reasonable for the Department to focus on students' income and ability to repay their loans, including in the first years after graduating

The Department's decision to measure students' income shortly after graduating, instead of considering income over a student's lifetime, was also reasonable, and reasonably explained. *See* Pl.'s Mot. at 25-28. As an initial matter, measuring income as early as 18 months after graduation improves the quality of information available to prospective students—a central

purpose of the rules—by providing them with current information about a program's student outcomes. *See* 79 Fed. Reg. at 64931; *APSCU I*, 870 F. Supp. 2d at 152 ("[T]he Department rationally concluded that considering a significantly longer earnings window in calculating the debt-to-income tests could weaken or sever the connection between earnings and education." (quotation marks and citation omitted)). The shorter measurement window also provides more meaningful feedback to schools to use to improve programs, while still allowing time for students to become employed. 79 Fed. Reg. at 64931.

More fundamentally, the decision to measure earnings within a short period after graduation, rather than over the students' lifetime, furthers the purpose of the rules to ensure that students earn enough to pay back their student loans. As the Department explained, although completing a program may result in increased earnings over the course of a lifetime,[19] "[b]orrowers are still responsible for managing debt payments, which begin shortly after they complete a program, even in the early stages of their career." *Id.* at 64914. The Department's reasoning is sound: "[B]enefits ultimately available over a lifetime may not accrue soon enough

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[19] The Department's recognition that earnings may increase for program graduates over the course of their lifetimes is consistent with its statements regarding the Postsecondary Institutional Ratings System. *See* Pl.'s Mot. at 26 n.41. In a solicitation for public comment on a new system to rate colleges, the Department said it was "considering pairing a short-term indicator of 'substantial employment' with a longer-term more specific earnings measure," explaining that "[s]hort-term labor market outcomes provide higher frequency feedback to stakeholders about institution performance," while "long-term earnings outcomes more closely correlate with an individual's lifetime earnings and are thus a better proxy for career success." U.S. Dep't of Educ., A New System of College Ratings—Invitation to Comment ("College Ratings Invitation") 12 (Dec. 2014).

Nor has the Department, by measuring debt and earnings with the GE rules, contradicted the College Ratings system. Pl.'s Mot. at 24 n.37. First, there has been no College Ratings proposal, let alone a final rule, so there is no policy to contradict. *See* College Ratings Invitation at 2 ("[T]his document is not version 1.0 of the ratings. . . . [V]ersion 1.0 will be released prior to the 2015/2016 school year."). Second, the College Ratings system, which will apply to vocational and non-vocational institutions alike, will serve to provide information going beyond whether a program is preparing students for gainful employment in a recognized occupation. Thus, one would expect it to employ a different methodology. Third, the College Ratings system is likely to take into account both "loan debt" and "graduate earnings," which is fully consistent with the GE rules. *Id.* at 4. Finally, the statement that "the Department reportedly has 'ruled out' a 'debt-to-earnings ratio,'" Pl.'s Mot. at 24 n.37 (citing newspaper article), is hearsay, and has no place in this record, *see, e.g.*, *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995).

to enable the individual to repay the student loan debt under and within the schedules available under the title IV, HEA programs." *Id*.[20]

Plaintiff objects to the Department's decision not to annualize earnings in its computation of cohort income. Pl.'s Mot. at 27 n.43. As the Department explained, with the GE rules it is looking "to assess the actual outcomes of students who complete a GE program." 79 Fed. Reg. at 64952. Thus, "[a]nnualizing earnings—attributing to a student earnings that the individual did not actually receive or otherwise ignoring periods of unemployment—would contravene the Department's goal." *Id.*. Plaintiff takes issue as well with the manner in which the Department amortizes debt for purposes of the rules. Pl.'s Mot. at 27-28. To calculate cohort debt, the Department applies one of three different amortization periods, based on the credential level of the program, reflecting the idea that borrowers enrolled in higher-credentialed programs are likely to have more debt and therefore to take longer to repay their loans. 79 Fed. Reg. at 64939. Plaintiff claims that the amortization periods are "unrealistic" and "divorced from reality." Pl.'s Mot. at 27-28. To be clear, the GE rules do not require graduates to complete repayment on these timelines; they simply use the schedules to determine what proportion of qualifying debt will be considered in any particular year. In any event, over thirty years of Department data shows that the majority of students do indeed meet these schedules. 79 Fed. Reg. at 64939-40.

3. It was not arbitrary or capricious to eliminate the repayment rate metric.

Having successfully challenged the repayment rate threshold contained in the 2011 Rules as arbitrary, plaintiff now claims that the elimination of that metric is arbitrary. Pl.'s Mot. at 25.

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[20] Many investments that are profitable in the long-term are not good choices for an individual who cannot afford them. For example, a five-bedroom home in a desirable Washington, DC, neighborhood may appreciate over time—and may accordingly be a sound investment for a person who can afford to pay 20% down and thirty years of principal, interest, taxes, and insurance. But the same investment would be a decidedly poor choice for the person who would finance 99% of the purchase and default on the loan a few months after moving in.

There is, however, nothing arbitrary about the Department's decision to abandon the repayment rate measure for lack of expert opinion or statistical analysis supporting an appropriate threshold level. *See* 79 Fed. Reg. at 64915; *id*. at 16426, 16445. Indeed, this was the very reason that the court in *APSCU I* found the 2011 repayment rate threshold arbitrary: because no expert study or industry standard supported the 35% repayment rate selected by the Department as the eligibility standard. 870 F. Supp. 2d at 154. In the current rules, the Department concluded that further study was necessary before adopting another method for assessing the repayment performance of former students, such as program Cohort Default Rate ("pCDR"). 79 Fed. Reg. at 64915. It is obviously reasoned decisionmaking for an agency not to adopt standards that it believes are not currently supported by sufficient evidence, and the Department was entirely transparent about its reasons for not including a repayment measure in the current regulations. The Department, however, did continue to consider repayment data in setting the D/E rates, consistent with its views on the importance of this information. *See id*. at 64920.

Nor did the Department previously suggest that the debt-to-earnings measures alone would be insufficient to assess whether programs are preparing their students for gainful employment in a recognized occupation. *See* Pl.'s Mot. at 25. Its statement about researchers' belief that there can be no "single percentage that answers the question of how much students can borrow without risking repayment difficulties," *APSCU v. Duncan*, ECF No. 20 at 11, is consistent with the fact that the D/E rates consist of *two* measures, either of which a program can pass to remain eligible for Title IV aid—the debt-to-annual-earnings rate or the debt-to-discretionary-income rate. 34 C.F.R. §§ 668.403(b), (c)(1), 668.404; *see also APSCU I*, 870 F. Supp. 2d at 152 ("[T]he Department employed the [annual earnings and discretionary earnings] tests in tandem."); 79 Fed. Reg. at 64920.

4. The Department's reliance on SSA earnings data to calculate D/E rates is neither arbitrary nor capricious

The data used to calculate the mean and median annual earnings of a program's graduates for the denominator of the D/E rates is obtained from the Social Security Administration's ("SSA") Master Earnings File ("MEF"). 79 Fed. Reg. at 64950. The MEF is used to calculate Social Security benefit amounts for individuals, as well as for policy analysis and research both within and outside SSA. *See* SSA's Master Earnings File: Background Information, U.S. Social Security Administration, AR-G-002825-41. It is populated using earnings information reported to SSA and the Internal Revenue Service on various tax forms under penalty of law. *Id.*

Contrary to plaintiff's assertion, the MEF data is not "severely distorted." Pl.'s Mot. at 30-31. Indeed, in the final rule, the Department "explained why [each of the purported] shortcomings pointed out [by plaintiff (*see* Pl.'s Mot. at 30-31) would] not lead to seriously flawed results." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1167 (D.C. Cir. 1987); *see* 79 Fed. Reg. at 64950-59. With respect to reports of zero earnings, for example, approximately 96% of the 245 million wage reports SSA receives each year are successfully posted to the MEF after computerized routines are applied to remedy any mismatches (*i.e.*, when the name and SSN on a wage report do not match information in SSA's file of individuals with SSNs). AR-G-002833; 79 Fed. Reg. at 64953. Although some of the remaining mismatches may be due to clerical errors by employees or employers (e.g., transposing numbers when reporting a SSN or misspelling a name), many of them result from the employment of unauthorized non-citizens who are not eligible for federal student aid. Therefore, these mismatches (which may have earnings associated with them, *see* Pl.'s Mot. at 31 n.53) would not affect a program's D/E rates. 79 Fed. Reg. at 64953. Moreover, SSA has systems in place to address any remaining clerical-type mismatches. SSA sends letters to all employees and many

employers when a mismatch occurs to alert them to the error; all workers receive an annual Social Security Statement that shows earnings that have been posted to the MEF so that they may correct any errors that could affect their Social Security benefits; and SSA continually performs reinstate processes to reconcile any mismatches. AR-G-002833; 79 Fed. Reg. at 64953.

If SSA does not match any wage report to a particular individual, the MEF will show zero earnings for that individual. *See* 79 Fed. Reg. at 64953-55. The absence of a match could mean that the individual is unemployed (and thus no wage report was submitted) or that a mismatch occurred and has not been corrected despite the many safeguards discussed above. *See id*. To ensure that the latter possibility did not render the MEF unreliable as a data source for D/E rates, the Department compared the number of individuals who showed zero earnings in the instances in which it had previously obtained aggregate earnings data from SSA with the unemployment rate in the relevant years. *Id.* That analysis showed that occurrences of zero earnings were consistent with unemployment rates, including the unemployment rates for the age groups most likely to be encompassed by the relevant cohort of students. *Id.* Accordingly, the Department reasonably determined that any understatement of earnings from incorrect reports of zero earnings is not likely to lead to seriously flawed results of aggregate program earnings.

More importantly, however, as this Court has recognized, "the accuracy of any particular [data] cannot be weighed in a vacuum, but instead must be evaluated by reference to the data that was available to the agency at the relevant time." *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 41 (D.D.C. 2008). "[T]he best available data standard leaves room for error, so long as more reliable data did not exist at the time of the agency decision." *Id.* at 49; *see also Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 567 F.2d 1016, 1046 (D.C. Cir. 1977) ("Courts cannot fairly demand the perfect at the expense of the achievable."). Here, the Department considered

alternatives and reasonably determined that the MEF provides the best available data. That is all the APA requires. *See City of Brookings*, 822 F.2d at 1169; *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1229, 1233 (9th Cir. 1993) (concluding agency's reliance on data that failed to account for part-time workers was permissible, despite the resulting underestimation of labor costs, because it was the most reliable data available).

Contrary to plaintiff's assertion (Pl.'s Mot. at 31), the Department independently considered other sources of earnings data and did not rely solely on commenters to offer alternatives. *See* 79 Fed. Reg. at 64941-42 (explaining why the Department declined to use data from the Bureau of Labor Statistics ("BLS")); *id*. at 64956 (noting that the Department conferred with SSA, but it did not have data superior to that in the MEF). The Department also considered methodologies for addressing any shortcomings in the MEF data, including the imputed earnings approach advocated by plaintiff and Dr. Eric Bettinger, on whose report plaintiff relies (*see* Pl.'s Mot. at 31 (citing AR-H-109275-81)). But the Department determined that this approach is not appropriate for calculating D/E rates because it does not permit the Department to "distinguish between programs," as is the situation with unreported tip income too. 79 Fed. Reg. 64955-56.[21]

In addition, the Department provided for an alternative earnings appeal. If a school believes that the mean or median earnings reported by SSA that give a program a failing or zone rate are inaccurate (because the instances of zero earnings are not reflective of its unemployed graduates or otherwise), it may file an appeal using alternate earnings data from an institutional

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[21] Dr. Bettinger imputed earnings, even for unemployed graduates of a program, based on data from the Current Population Survey ("CPS"), which is derived from surveys of households. *Id*. at 64956. Dr. Bettinger "extrapolate[d] from earnings reported by those survey recipients who identify their occupation as one that appears related to GE programs of that general type, and then project[ed] an increase in aggregate earnings for all GE programs in the category of programs that appears to include that occupation." *Id*. Thus, any inference drawn from the CPS data would improve the D/E rates for every program in a particular category, "mask[ing] poorer performing programs and thwart[ing] a major purpose of the GE assessment." *Id*. The Department further explained why Dr. Bettinger's examples of agencies imputing data for missing information are distinguishable and do not justify imputation here. *Id*. at 64957-58.

survey or State-sponsored data system. 34 C.F.R. § 668.406; *see also* 79 Fed. Reg. at 64950. This alternative earnings data is then used to recalculate the program's D/E rates. 34 C.F.R. § 668.406.[22] Thus, the Department gave a reasoned explanation for its rejection of proposed alternatives and reasonably concluded that the MEF provides the best data available.

C. The Department Studied The Effects Of The D/E Rates And Reasonably Determined That Such Effects Are Positive

Contrary to plaintiff's argument (Pl.'s Mot. at 32-34), the Department gave careful, extensive consideration to the effects of the D/E rates on both institutions and students, across its nearly eighty-page Regulatory Impact Analysis, concluding that the effects are positive. *See* 79 Fed. Reg. at 64024-5103.

The Department explored in detail how all institutions offering GE programs will have to incur expenses "associated with the reporting and disclosure requirements," and that institutions interested in "improv[ing] the outcomes of failing and zone programs will face additional costs." *Id.* at 65080; *see also id.* at 65080-81 (discussing costs to students, institutions, and state and local governments); *id.* at 65102-03 (discussing costs to small businesses). Compliance costs will, however, "vary significantly by institution"; institutions could, for example, discontinue failing programs, rather than reinvest in them. *Id*. at 65080. More importantly, plaintiff fails to acknowledge the GE rules' substantial benefits for schools and students, which the Department considered: improved market information; reduced student debt and increased earnings; federal divestment from poorly performing programs; better return on investment for students, taxpayers and the government; more programs in high-demand, well-paying fields; and even increased

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[22] Interestingly, the limitations that plaintiff identifies with respect to *some* state databases (Pl.'s Mot. at 37 n.73) exemplify why the Department rejected proposed alternatives like BLS data and imputing earnings. And the concerns plaintiff voices about conducting an institutional survey (Pl.'s Mot. at 37-38) are speculative, as the standards for such a survey are still being developed in consultation with schools and other interested parties. *See* 79 Fed. Reg. at 64962.

revenue for "institutions with high-performing programs." *Id.* Nor does plaintiff recognize that the Department "assessed the potential costs and benefits, both quantitative and qualitative, of this final regulatory action," and issued the rules "only on a reasoned determination that their benefits justify their costs." *Id.* at 64993. Thus, rather than "duck[] serious evaluation of the costs" to institutions and students, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011), the Department examined them head-on.

Plaintiff also overstates the displacement effect on students. Pl.'s Mot. at 16, 33. First, the GE rules will not close a single program. Programs that are rendered ineligible for Title IV aid may continue to operate—they will just have to do so without the federal government's substantial investment in them. Second, the Department's analysis indicates that, "under a static scenario assuming no reaction to the regulations," 94% of students whose programs are rendered ineligible will be able to enroll in a comparable program either nearby or online.[23] 79 Fed. Reg. at 65074. Third, some zone and failing programs will retain eligibility by improving, meaning that students will continue to be able to apply Title IV funds there. And fourth, there is obvious merit in identifying "inadequate programs and unscrupulous institutions" and ensuring that students do not spend taxpayer funds to study there. *APSCU I*, 870 F. Supp. 2d at 148.[24]

Finally, plaintiff suggests that the "only realistic way schools can improve" is by "limit[ing] who is admitted." Pl.'s Mot. at 34. Plaintiff overlooks the fact that there are many

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[23] Plaintiff's exclusive emphasis on "nearby transfer options," Pl.'s Mot. at 33 (quotation marks and citations omitted), overlooks the role of online education, an option plaintiff previously touted, *see* Compl. ¶ 30.

[24] Plaintiff further argues that the rules will have a "disproportionate effect . . . on disadvantaged students." Pl.'s Mot. at 33. Plaintiff provides no evidence in support of this claim, pointing instead to gross enrollment figures of some groups (Hispanics, African-Americans, women) in certain unidentified programs. As noted above, the Department determined that "passing, zone, and failing programs have very similar proportions of low-income, non-traditional, female, white, Black, and Hispanic students." 79 Fed. Reg. at 65045; *see also id.* at 65057; AR-H-073978 ("Targeting people of color and providing them with an inferior product cannot be justified on the grounds that an institution is providing services to students of color."). And all students, including "disadvantaged students," *benefit* by avoiding failing programs, which offer little reward for the increase to students' burdens.

"causes of excessive debt, high default rates, and low earnings," 79 Fed. Reg. at 65032, and just as many ways an institution can improve student outcomes, *e.g.*, *id.* at 64890, including:

> Providing [an institution's own] financial aid to students with the least ability to pay in order to reduce the number of students borrowing and the amount of debt that students must repay upon completion; improving the quality of the vocational training they offer so that students are able to earn more and service a larger amount of debt; and decreasing prices for students and offsetting any loss in revenues by reducing institutional or program expenditures in areas not affecting programs quality, such as administrative overhead, recruiting, and advertising.

Id. at 64916. Programs committed to preparing students for gainful employment in a recognized occupation can pass the D/E rates by doing just that.

D. The Regulations Are Not Retroactive or Overly Broad

The regulations are not retroactive because they have only future effect. *See* Pl.'s Mot. at 35-36. They do not undo any program's past eligibility for Title IV funding; they merely require consideration of the debt and (future) earnings of past students in determining a program's future eligibility. *See Reynolds v. United States*, 292 U.S. 443, 449 (1934) ("A statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment."). Regulations that do not alter "the *past* legal consequences of past actions" are not retroactive. *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009). Indeed, the *APSCU I* court rejected the same challenge to the 2011 Rules on this basis, 870 F. Supp. 2d at 151-52, and numerous other courts, including the D.C. Circuit, have done the same with respect to retroactivity challenges to similar regulatory schemes under the HEA, *see, e.g.*, *Ass'n of Accredited Cosmetology Schs.*, 979 F.2d at 865-66 (holding that CDR regulations, which required the Department to consider the loan default rates of students who exited a school before the regulations were issued, were not retroactive); *Career Coll. Ass'n v. Riley*, 1994 WL 396294, *5 n.7 (D.D.C. July 19, 1994) (concluding regulations that required at least 15% of a school's

revenues to be derived from non-Title IV sources were not retroactive even though they applied to accounting periods that were closed when the regulations were announced).

The regulations also are not secondarily retroactive because they do not "impair the future value of a past bargain" by altering the value of a contract or license entered into under a prior regulatory scheme. *Nat'l Cable & Telecomms. Ass'n*, 567 F.3d at 670. Plaintiff does not (and cannot) point to any prior bargain or contract that has been devalued as a result of the regulations. *See APSCU I*, 870 F. Supp. 2d at 152; *Career College Ass'n*, 1994 WL 396294, *5.

Even assuming *arguendo* that the regulations are secondarily retroactive, they should be sustained because they are reasonable. *See Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001). The Department considered the benefits of the regulations as well as any burden imposed on schools by reliance—for the first few years of implementation—on the debt and earnings of students who left a program before the regulations were promulgated. 79 Fed. Reg. at 64947-49. The Department determined that the need to remove poorly performing programs from Title IV eligibility was too great to delay implementation for the number of years that would be necessary to fully address this concern. *Id*. In particular, six years would be needed for students to enroll and complete a four-year program before earnings would be measured under the D/E rates, and that period would double for students enrolled on a half-time basis. The Department, however, did create a five-to-seven-year transition period to provide poorly performing programs with an opportunity to improve their D/E rates before they lose eligibility. *Id*. During the transition period, the debt of students who completed the program during the applicable cohort period will be replaced by the debt of students who completed the

program during the most recently completed award year.[25] *Id.*; *see* 34 C.F.R. § 668.404(g). The transition period allows schools to improve the D/E rates for a program by reducing costs, and therefore borrowing, for current students. 79 Fed. Reg. at 64948.

Contrary to plaintiff's assertion (Pl.'s Mot. at 35-36), there are steps schools can take now to improve their D/E rates before they lose eligibility. Reducing program costs, or replacing or reducing the loan debts of current students for the remainder of their program with scholarships or tuition discounts, would dramatically improve a program's D/E rates under the transition period calculation. 79 Fed. Reg. at 64948-49. Programs can also increase past students' earnings by improving their job placement services.

Plaintiff contends the sanctions imposed on failing programs are overbroad because schools are prohibited for three years from offering any other program, at any credential level, that shares the same four-digit Classification of Instructional Programs ("CIP") code as a failing program. Pl.'s Mot. at 36-37. This argument misstates the scope of the sanction and ignores the Department's reasonable rationale for imposing it. First, the prohibition on programs that share the same four-digit CIP code only applies to *new* programs. 34 C.F.R. § 668.410(b)(2); 79 Fed. Reg. at 64973. Thus, a school whose certificate program in information technology loses eligibility may not create a new information technology program for 3 years, but it may continue to offer an existing associate or master's degree program in information technology if the program passes the D/E rates. Second, the Department reasonably explained that it was extending the prohibition to similar programs at any credential level in response to comments that failing to do so would allow schools to circumvent the regulations by simply creating new, similar programs to replace ineligible ones. *See* 79 Fed. Reg. at 64973, 64991.

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[25] The earnings of a program's graduates, which are used to calculate the denominator of the D/E rates, always postdate the effective date of the regulations.

E. The Procedures For Challenging D/E Rates Satisfy The APA

Plaintiff claims the regulations' procedures for challenging D/E rates are inadequate because schools cannot obtain SSA earnings data for individual students to challenge the accuracy of the mean and median aggregate earnings figures provided to the Department by SSA.[26] Although plaintiff refers to "due process principles" (Pl.'s Mot. at 37), neither plaintiff's complaint nor its summary judgment brief raises a claim under the Due Process Clause. The absence of such a claim is not surprising, as the D.C. Circuit has made clear that schools do not have a protected interest in continued eligibility for federal student loan programs. *See Ass'n of Accredited Cosmetology Schs.*, 979 F.2d at 864; *APSCU I*, 870 F. Supp. 2d at 154 n.7 (rejecting due process challenge to similar procedure in 2011 Rules for this reason). Instead, plaintiff attempts to graft Due Process Clause protections onto the APA. That endeavor fails.

The Supreme Court has made clear that, "when the Due Process Clause is not implicated . . . , the APA establishes the maximum procedural requirements a reviewing court may impose on agencies." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653 (1990). But plaintiff has not identified any procedures required by the APA that are absent from the regulations. The requirements of §§ 554, 556, and 557 of the APA do not apply here because adjudication is not "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). Although the HEA previously required an "opportunity for hearing on the record," 20 U.S.C. § 1094(b) (1990), in 1992 Congress removed the "on the record" language, *see* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992). The current version of § 1094(c)(1)(F), which requires only "notice and opportunity for hearing" does not require formal adjudication under §§ 554, 556, and 557. *See, e.g.*, *United*

[26] Because the earnings data for individual students in the MEF is obtained from various tax forms, SSA is prohibited by law from disclosing it to schools or the Department. *See* 26 U.S.C. § 6103.

States v. Fl. E. Coast Ry. Co., 410 U.S. 224, 234 (1973) ("after hearing" language in statute did not invoke APA's formal adjudication requirements); *R.R. Comm'n of Texas v. United States*, 765 F.2d 221, 227 (D.C. Cir. 1985) (referring to the "fundamental and well-recognized distinction" between requiring "hearing" and a "hearing on the record" and noting that "formal proceedings" attach to the latter but not the former). Rather, § 1094(c)(1)(F) permits informal adjudication, the requirements of which are satisfied here. *See* 5 U.S.C. § 555; *Pension Benefit Guar.*, 496 U.S. at 653-656 (rejecting argument similar to plaintiff's under statute that required only informal adjudication).[27]

III. THE DISCLOSURE, REPORTING, AND CERTIFICATION REQUIREMENTS ARE LAWFUL

Disclosure Requirements. The Court should reject plaintiff's claims that the disclosure requirements exceed the Department's statutory authority, violate the First Amendment, and are arbitrary and capricious. *See* Pl.'s Mot. at 41. As an initial matter, these claims are not ripe because the Department has not yet determined exactly what schools will be required to disclose. *See, e.g.*, *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (quotation omitted)). The rules list 16 items of information that the Secretary "may" include in the disclosure template (34 C.F.R. § 668.412(a)), but the Department in fact "do[es] not intend to include all of the disclosure items listed in § 668.412 on the disclosure

[27] The regulations allow schools, *inter alia*, to review and make any necessary changes to the list of students the Department provides to SSA, see the information on which the Department relies in calculating D/E rates (*i.e.*, the mean and median aggregate earnings figures provided by SSA), and offer a contrary presentation using earnings data from an institutional survey or State-sponsored data system. *See* 34 C.F.R. §§ 668.405(e)(3)(i), 668.406; *see also id*. § 668.405(c), (f). Moreover, the specific procedures for challenging D/E rates in 34 C.F.R. §§ 668.405-668.406 control over the general procedural requirements in 34 C.F.R. § 668.88 to which plaintiff refers (Pl.'s Mot. at 37 n.71). *See Spreckels v. Helvering*, 315 U.S. 626, 628 (1942); *see also* 34 C.F.R. § 668.181-668.217 (establishing specific procedures for challenging cohort default rates).

template each year." 79 Fed. Reg. at 64976. Rather, it plans to "use consumer testing to identify a subset of possible disclosure items that will be most meaningful for students." *Id*.

In addition, it is wholly speculative whether any of plaintiff's member schools will not know the costs of its own programs and need to report them as estimates, in alleged violation of the First Amendment.[28] Far from "[m]andating disclosure of uncertain, speculative estimates," Pl.'s Mot. at 39, the rules merely provide that if a school is not certain of the amount of its own costs, it may include a disclaimer advising that the data are estimates. 79 Fed. Reg. at 64977-78. Plaintiff provides no basis for believing that any of its members will need to do this, and there is no reason to expect that they would. Schools must, of course, know their costs in order to set their tuition and fees and charge their students. And, as plaintiff acknowledges (Pl.'s Mot. at 40), schools are already required to disclose the costs of attending the institution, including any costs particular to the program in which a student is enrolled or interested. 20 U.S.C. § 1092(a)(1)(E). Because of the speculative nature of the asserted injury, plaintiff lacks standing for this claim. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013).

Plaintiff's disclosure claims fail on the merits, too. The *APSCU I* court specifically found that the disclosure requirements included in the 2011 Rules fell comfortably within the Department's broad authority conferred by 20 U.S.C. §§ 1221e-3 and 3474. 870 F. Supp. 2d at 156; *see also* 20 U.S.C. § 1231a. Plaintiff did not appeal that determination, and those disclosure rules remain in effect. *See* 79 Fed. Reg. at 64893. If the Department had authority to promulgate the 2011 disclosure rules, it sensibly has authority to promulgate the current disclosure rules.

Plaintiff's argument that program cost estimates are not "purely factual" under the

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[28] Plaintiff challenges only the supposed required disclosure of program cost estimates as a violation of the First Amendment. Pl.'s Mot. at 39.

"purely factual and noncontroversial" standard for permissible required disclosures, should be rejected for several reasons. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). First, as noted above, the Department permits, as opposed to requires, the disclosure of program costs as an estimate. Second, the authority plaintiff relies on for its argument is wholly inapposite. Pl.'s Mot. at 39 (citing *Chem. Mfrs. Ass'n*, 1980 WL 29285, at *3 (D.D.C. Dec. 21, 1980)). *Chemical Manufacturers Association* analyzed whether cost estimates of proposed versions of a labelling requirement were purely factual or deliberative for purposes of the deliberative process privilege incorporated into Exemption Five of the Freedom of Information Act. The court determined that the cost estimates were indefinite estimates based on complex assumptions; they were thus analytical rather than purely factual, revealing the deliberative process of the agency. 1980 WL 29285, at *3. That is a different analysis than whether an estimate of a school's own program costs, well-known to it, would be considered "purely factual and noncontroversial" for purposes of the First Amendment. Plaintiff cites no authority in support of that proposition, and the Department is aware of none. Third, the disclosure of program costs—such a basic, critical piece of information to any prospective student—would also satisfy the heightened standard for disclosures that are not purely factual and noncontroversial. *See* 79 Fed. Reg. at 64978-79.[29]

Finally, the disclosure rules do not "needlessly add to schools' statutory disclosure obligations and risk creating confusion" such that they are arbitrary and capricious. Pl.'s Mot. at 40. Again, it is premature for plaintiff to claim that the rules "thrust upon students a bewildering

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[29] Plaintiff's citation to *APSCU I* in support of its First Amendment argument does not help it. *See* Pl.'s Mot. at 39. The *APSCU I* court expressed doubt, in dicta, that the statement that students in a program that failed the 2011 Rules' debt measures in two out of three years "should expect to have difficultly repaying his or her student loans" was purely factual. 870 F. Supp. 2d at 154 n.7. That warning, which the Department did not include in the new regulations, is a far cry from merely requiring schools to disclose their program costs.

array of statistics" when the Department has yet to determine which of the 16 potential disclosures it will require. *Id.* Plaintiff is also wrong that the Department did not explain the need for the challenged disclosure rules above and beyond the statutory disclosure requirements. The Department explained that the HEA requires disclosures about the institution as a whole, whereas the new rules require disclosures about the characteristics of individual GE programs. Rather than create confusion, the new rules "address a significant gap . . . . Particularly for consumers who enroll in a program in order to be trained for particular occupations, this program-level information can reasonably be expected to be far more useful than information on the institution as a whole." 79 Fed. Reg. at 64979. Likewise, the Department adequately explained the reasons why it may require disclosure of program cohort default rates, even though the Department decided to forgo conditioning eligibility based on them. *See* Pl.'s Mot. at 41. The level of default associated with a particular program is useful information to students who are deciding whether or not to borrow to attend a particular program, and disclosing the rates also helps to hold GE programs accountable for the outcomes of students who do not complete a program. 79 Fed. Reg. at 64915.[30]

Reporting Requirements. The reporting provisions require schools to report information to the Department that will be used to calculate D/E rates and many of the disclosure

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[30] Nor is the requirement that schools must provide student warnings in alternative languages for students and prospective students for whom English is not their first language, "unduly vague" or "impossible to obey" simply because the requirement is qualified by the phrase "to the extent practicable." Pl.'s Mot. at 40 n.77 (discussing 34 C.F.R. § 668.410(a)(4)). *See Sproles v. Binford*, 286 U.S. 374, 393 (1932) ("'Shortest practicable route' is not an expression too vague to be understood."). It is hardly impossible to comply with this requirement, as the Department demonstrated in the final rule. 79 Fed. Reg. at 64970 ("There are many ways in which an institution could practicably identify individuals for whom English may not be their first language. . . . [O]ne simple test . . . is whether the language principally used in marketing and recruiting for the program was a language other than English. Where institutional records show that a student responded to an advertisement in a language other than English, or was recruited by an institutional representation in an oral presentation conducted in a language other than English, an institution may readily and practicably identify that student as one whose first language is not English."). Plaintiff's argument that by simply noting that "other methods might also be practicable," the Department *required* that schools use other unspecified methods, is meritless.

items. 79 Fed. Reg. at 64974; 34 C.F.R. § 668.411. The reporting requirements fall well within the Department's broad rulemaking authority to carry out the purposes of Title IV, similarly to the disclosure rules. *See* 20 U.S.C. §§ 1221e-3, 3474, 1231a (authorizing Secretary to "inform the public regarding federally supported education programs" and "collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving the intended purposes of such programs); *see also* 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i); *APSCU I*, 870 F. Supp. 2d at 156.

Moreover, the requirement that schools report to the Department the amount of private education loans a Title IV student receives for enrolling in a GE program, 34 C.F.R. § 668.411(a)(2)(ii), does not violate 20 U.S.C. § 1015c. Section 1015c prohibits the development, implementation, or maintenance of a federal database of personally identifiable information on individuals receiving federal student aid. The prohibition, however, does not apply to "a system (or a successor system) that–(1) is necessary for the operation of programs authorized [under Title IV]; and (2) was in use by the [Department as of August 13, 2008]." 20 U.S.C. § 1015c(b). Private loan information that the Department collects on Title IV students for purposes of calculating the D/E rates and implementing the disclosure requirements will be incorporated into the National Student Loan Data System ("NSLDS"). 79 Fed. Reg. at 64975-76. The NSLDS "clearly" fits within 1015c(b)'s exception, and "the Department is obviously not barred from maintaining it." *APSCU II*, 930 F. Supp. 2d at 218.

Relying on *APSCU II*, plaintiff nevertheless argues that private loan information is so far afield from the type of information that Congress authorized the Department to collect in the NSLDS that it amounts to the creation of a new database in violation of § 1015c. But plaintiff mischaracterizes *APSCU II*. The court did not find any fault with the Department's collection of

private loan information on students receiving Title IV funds, which the 2011 Rules also required. *See id.* at 214. Instead, the court determined that the Department was prohibited from collecting any information on non-Title IV students because the overall purpose of the NSLDS was focused on students receiving Title IV funding. *Id*. at 221.

In accordance with the court's decision in *APSCU II*, the Department limited the information it collects under the challenged regulations to Title IV students. *See* 79 Fed. Reg. at 64899, 64975-76. Having previously argued in favor of this change, plaintiff now, remarkably, argues that it is arbitrary to exclude non-Title IV students from the D/E rates. Pl.'s Mot. at 30. Compliance with a court decision is, of course, not arbitrary, and this limitation is consistent with the purpose of the GE rules to safeguard the Title IV program. *See* 79 Fed. Reg. at 64899.[31] Moreover, the amount of private education loans a Title IV student receives is consistent with the types of information already collected in the NSLDS such that its inclusion cannot be said to create an entirely new database.[32] *See* 20 U.S.C. § 1092b(a)-(b) (providing non-exhaustive list of information the NSLDS should contain, including, a borrower's name and social security number; characteristics of the borrower such as family income; institutions attended; the amount

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[31] Plaintiff's hypothesized "absurd" result about a passing program with 51% of its graduates receiving Title IV grants but incurring no debt, Pl.'s Mot. at 31-32, simply reflects the rules' concern with student debt, and is not, in any event, reason to invalidate the rules (*see also id*. at 19 "absurd" results). *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991) (on "a challenge to the validity of [an] entire rule in all its applications," the "fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule 'arbitrary or capricious.'"); *APSCU I*, 870 F. Supp. 2d at 148-49 ("[Plaintiff's] argument that the regulation may produce absurd results in certain circumstances is better suited to an as-applied challenge arising out of such claims."). Plaintiff's other hypothetical, about a failing program whose graduates are "all timely repay[ing] their loans without difficulty," Pl.'s Mot. at 31-32—reads like fiction. The record shows that only 32% of graduates from failing programs are successfully repaying their loans. 79 Fed. Reg. at 64920.

[32] It is not uncommon for the Department to add new data points into the NSLDS to meet the changing requirements and needs of its student aid programs. For example, a new provision was added to the HEA in 2012 that limits the amount of time for which a student may obtain a subsidized federal student loan to no more than 150% of the stated length of the educational program in which the student is enrolled. Pub. L. No. 112-141, 126 Stat. 405 (2012). To implement this requirement, the Department added new data points to the NSLDS regarding the program in which a Title IV student is enrolled, including its credential level and length. *See* NSLDS Systems of Records Notice, 78 Fed. Reg. 38963 (June 28, 2013).

and type of loans received; other assistance received; the payment status of loans; and the remaining balances of outstanding loans); *see also* 79 Fed. Reg. at 64975-76; *Chevron*, 467 U.S. at 843 (deferring to agency's interpretation of ambiguous statute).[33]

Certification Requirements. The certification provisions require schools to certify that each GE program they offer satisfies any applicable federal or state program-level licensure, certification, and accreditation standards for the occupations for which the program purports to prepare students to enter. 34 C.F.R. § 668.414(d). The requirements are designed to protect students from completing a GE program only to learn that it does not satisfy the necessary prerequisites for obtaining a job in their field of study. *See* 79 Fed. Reg. at 64891, 64989-90. And the requirements are consistent with the Department's statutory authority to ensure that Title IV program funds are used to prepare students for gainful employment in a recognized occupation, *see* 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i), as well as the Department's broad rulemaking authority to carry out the purposes of Title IV, *see id.* §§ 1221e-3, 1231a, 3474. Moreover, Congress's decision to require accreditation at the institution level does not preclude the Department from ensuring that GE programs, as a condition of their students receiving Title IV funds, meet the prerequisites for students to obtain a job in the occupation for which the program prepares them. *See Chevron*, 467 U.S. at 843.

The certification requirements also are not vague. If a school lists a particular "occupation," like butcher or manicurist, on its disclosure template as one that "the program prepares students to enter," 34 C.F.R. § 668.412(a)(1), then it must certify that the program

[33] If the Court nonetheless determines that the Department may not, consistent with § 1015c, maintain data on the amount of private education loans a Title IV student receives for enrolling in a GE program, it would not require invalidation of the entire regulatory scheme as plaintiff contends (*see* Pl.'s Mot. at 42-43). The Department has indicated its intention that the regulations be severable. *See* 34 C.F.R. § 668.415. And the regulations can still "function sensibly" without the private loan data. *Verizon*, 740 F.3d at 659. Specifically, D/E rates can be calculated as if the private loan amount were zero. *See* 34 C.F.R. § 668.404(b)(1)(i). The disclosures that do not rely on private loan data—namely, 34 C.F.R. § 668.412(a)(1)-(5), (7), (8), (11)-(16)—also can survive.

meets the licensure requirements for that occupation. *See id.* § 668.414(d)(3) (requiring certification of licensure for any "occupation that the program prepares students to enter"); 79 Fed. Reg. at 64989 (explaining that the requirement applies to "the occupations the institution identifies for the program"). This provision easily satisfies the Department's obligation to inform schools what is required of them. *See, e.g.*, *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) (noting a "less strict vagueness test" applies to economic regulation because, among other things, a business "ha[s] the ability to clarify the meaning of the regulation by its own inquiry"); *Act Now to Stop War and End Racism Coal. v. District of Columbia*, 905 F. Supp. 2d 317, 331 (D.D.C. 2012) ("The vagueness doctrine does not require perfect clarity and precise guidance[.]").

Finally, plaintiff's claim that the certification requirements may subject schools to conflicting state requirements (Pl.'s Mot. at 44-45) is speculative and not justiciable. The current state authorization regulations require that schools be authorized only "in the State in which the institution is physically located." 34 C.F.R. §§ 600.4(a)(3), 600.5(a)(3), 600.6(a)(3); *see also* 79 Fed. Reg. at 64992. Plaintiff's speculation that the Department may, in the future, amend the state authorization regulations to require authorization in additional states and further that the requirements of those additional states will create a conflict in any particular instance is far too speculative to warrant review at this time. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of [standing]"); *Texas*, 523 U.S. at 300.

CONCLUSION

For all of the foregoing reasons, the Department respectfully requests that the Court grant defendants summary judgment in their favor on all of plaintiff's claims.

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