IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT J. INFUSINO, *et al.* *Plaintiffs*, v. BETSY DEVOS, in her official capacity as U.S. Secretary of Education, *et al.* *Defendants*.	Case No. 19-cv-3162 (CRC)

PLAINTIFFS' PETITION FOR ATTORNEYS' FEES AND COSTS

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INTRODUCTION

This lawsuit forced the government to quickly and dramatically reverse the fortunes of many student loan borrowers. Until Plaintiffs filed this class-action lawsuit, the United States Department of Education ("Department") required approximately 1,500 former students of two for-profit art colleges to pay back federal student loans, even though the Department knew—for nearly two years—that it had issued the loans illegally. Shortly after this case was filed, and its misconduct exposed, the Department abruptly cancelled those loans, refunded roughly $11 million in payments to the class, and extended eligibility for "Closed School Discharge," which it predicts will result in additional loan relief for hundreds of borrowers. Plaintiffs now seek attorneys' fees under the Equal Access to Justice Act ("EAJA") for the work that made this happen.

Plaintiffs expect the Department to assert its rapid surrender to their claims as its primary defense to Plaintiffs' entitlement to fees. And although the Department quickly agreed to much of the relief sought by Plaintiffs, it did not volunteer to provide the full panoply of relief that Plaintiffs required before they would agree to dismissal with prejudice. That additional relief was established by the parties' joint Stipulated Order of Dismissal ("Stipulation"), Dkt. 12, and subsequent March 30 Minute Order staying the case and ordering the Department to file a report addressing each obligation in the Stipulation.

This additional relief that Plaintiffs obtained through the Stipulation and March 30 order includes: (i) concessions and commitments that significantly reduce the risk that the IRS will tax the loan cancellations; (ii) notice to the class that all members were eligible for a closed school discharge, opening the door for many

additional borrowers to obtain non-taxable loan forgiveness for their entire education (as opposed to only 2018 loan cancellation with uncertainty regarding taxability); (iii) confirmation that credit reporting agencies would update their records to reflect the loan cancellations; (iv) an updated website to include more useful information for borrowers; and, (v) a court ordered report "addressing each of the obligations listed in the Stipulated Order of Dismissal."

On May 29, 2020, the Department filed its Report Regarding Obligations Contained in Stipulation of Dismissal, Dkt. 15. On June 3, "in light of" both the Stipulation and the Department's May 29, 2020 report, the Court, having evidently concluded that the Department had satisfied the terms of the Stipulation, dismissed the case with prejudice. *See* June 3 Minute Order. Even under the narrowest reading of cases interpreting EAJA, the Stipulation and subsequent court orders qualify as judicially sanctioned relief that changed the legal relationship between the parties and supports an award of attorneys' fees.

In making that attorneys' fees award, the Court should apply rates that are enhanced above the statutory EAJA baseline, primarily because of the record of bad faith conduct by the government that gave rise to this case. This lawsuit reversed government misconduct unusually hostile to the interests of the constituents the agency is supposed to protect. Correspondence between the Department and the schools reveals that the Department forced students to pay back loans for more than two years, all the while knowing it had issued those loans without authority. Rather than acknowledge its mistake, the Department secretively and retroactively altered the regulatory status

of the schools in order to conceal its misconduct. Before and during this litigation, the Department persistently misrepresented what happened to the schools, even at the risk of undermining the loan relief the Department finally agreed to provide, in order to deflect responsibility for its own misconduct. As set forth below, Plaintiffs therefore request $148,474.00 in fees and costs.

I. BACKGROUND

This lawsuit arose from a complex series of events involving intentional misconduct and misrepresentations by the Plaintiffs' schools and the Department, resulting in class members having their education disrupted, and being saddled with student loan debt for worthless credits and degrees. The ensuing factual recitation is necessary to demonstrate that the Department's actions to resolve this case were not entirely voluntary, and that its conduct before and during litigation constituted bad faith, supporting an enhancement of hourly rates.

A. The Higher Education Act, Accreditation, and Eligibility to Receive Federal Student Loans

Title IV of the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1070 *et seq.*, governs the administration of the federal student loan program. In order to participate in Title IV programs, institutions of higher education must satisfy the eligibility criteria set forth in HEA §§ 101-102, 20 U.S.C. §§ 1001-1002. *See* HEA § 453(d), 20 U.S.C. § 1087c(d). Although institutions that participate in Title IV can be public, private non-profit, or private for-profit, the statute and regulations have created various distinctions between the corporate form and tax statuses.

One such distinction is at the heart of this saga. Although the HEA generally requires all institutions to be accredited in order to participate in the Title IV programs, the statute and regulations permit public and private non-profit institutions to participate if they are either accredited or preaccredited. HEA § 101(a), 20 U.S.C. § 1001(a); 34 C.F.R. § 600.4(a)(5)(i). Proprietary institutions (*i.e.*, private, for profit institutions), however, may only participate in Title IV programs if they are "accredited." 34 C.F.R. § 600.5.

Students can only receive grants (*e.g.* Pell Grants) and loans (*e.g.* Federal Direct Loans) from the Department to pay for tuition and living expenses if they attend a school that participates in Title IV. HEA § 484, 20 U.S.C. § 1091.

B. The Department's Violation of Law

Plaintiffs were students at for-profit schools, the Art Institute of Colorado ("AIC") and the Illinois Institute of Art ("IIA"), when those schools, along with several dozen others, were purchased by a non-profit charity, the Dream Center Foundation ("DCF").[1] Compl. (Dkt. 2-1) ¶¶ 24-25.[2] In 2017, Dream Center applied to the Department to convert all of the schools it purchased to non-profit status, but the Department did not approve its applications at that time. *Id.* ¶¶ 26-31.

Prior to the purchase, IIA and AIC were accredited by the Higher Learning Commission ("HLC"). In 2017, Dream Center applied to HLC to approve the changes in

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[1] DCF established an intermediate holding company, Dream Center Education Holdings ("DCEH"), as the direct corporate owner of the schools. For purposes of this Petition, DCF and DCEH shall be collectively referred to as "Dream Center." Compl. ¶ 25.
[2] Citations to the Complaint are to the Corrected Complaint filed on October 24, 2019. Dkt 2-1.

ownership for these two institutions. *Id.* ¶ 34. On November 16, 2017, HLC informed Dream Center that, as a consequence of the change of ownership, the schools no longer satisfied HLC's accreditation standards, and that HLC would only approve the change of control if the schools accepted the pre-accreditation status of "Change of Control-Candidate for Accreditation." *Id.* ¶ 35. HLC copied Department officials Michael Frola and Herman Bounds on that communication. *Id.* ¶ 36. By letter dated November 29, 2017, the schools accepted HLC's determination about their accreditation status. *Id.* ¶ 37.

On January 12, 2018, HLC directed the schools—again copying the Department—to inform students that the schools had accepted their change to candidacy status, and the potential consequences of that change. *Id.* ¶ 38. The schools did not comply, *id.* ¶ 39, opting instead to conceal and misrepresent the loss of accreditation until it was exposed by the media in June 2018. *Id.* ¶¶ 65-66. Students continued to pay tuition to the schools, most of it funded through federal student loans, oblivious both to the loss of accreditation and that federal student loan debt incurred to pay for the education was illegally issued. *Id.* ¶ 44.

The change in ownership occurred on January 20, 2018. *Id.* ¶ 24. On May 3, 2018, more than three months after the change was effectuated, Michael Frola, the same Department official who had been copied on the November 2017 and January 2018 communications from HLC, sent letters to the Presidents of IIA and AIC, in which he wrote that "the Department has learned that HLC transitioned the Art Institute from being accredited to being a candidate for accreditation effective January 20, 2018."

Id. ¶ 47–48. As described above, the Department—including Mr. Frola specifically—had been aware of the change in ownership and the resultant change in accreditation status since November 2017. *Id.* ¶ 49.

By May 3, 2018, it appears the Department had recognized that the change in accreditation status had legal consequences, because the Department's regulations "require a proprietary institution of higher education [like IIA and AIC] to be fully accredited to qualify as an eligible institution for purposes of the Title IV, HEA programs, and do not allow for pre-accredited (or candidacy status)." *Id.* ¶ 50 (citing 34 C.F.R. § 600.5(a)(6)).[3] Thus, the Department concluded that "the Art Institute no longer qualifies as an eligible institution to participate in the Title IV, HEA programs as a for-profit institution." *Id.*

Through this letter, the Department conceded that IIA and IAC had been ineligible to participate in Title IV programs since January 20. Title IV loans may only be issued to students who attend eligible institutions. 20 U.S.C. § 1091(a)(1). As a result, the Department did not have authority to issue loans to students to attend those schools after January 20, 2018.

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[3] Discovery produced to plaintiffs Infusino and Dunagan in their separate class action lawsuit against DCF, DCEH, and IIA reveals that the Department had understood for months that IIA and AIC's accreditation status affected their Title IV eligibility. Mr. Frola reached out to HLC on February 23 by email noting that the accreditation status could be problematic for Title IV status and seeking a meeting. *See* Rothschild Decl. ¶ 17 (Exh. 8) (Email from Michael Frola to Karen Peterson (Feb. 23, 2018)). That meeting took place on March 9, with Mr. Frola, numerous other department officials, and legal counsel on the phone, and HLC apparently made clear that "Change in Control-Candidacy" status did not equal accreditation. *See* Rothschild Decl. ¶ 18 (Exh. 9 at 19-20) (Letter from Barbara Gellman-Danley, President, HLC to Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning and Innovation, Department of Education (Nov. 13, 2019)). These communications do not suggest that the Department took the position—with HLC or internally—that HLC had acted improperly or harmed students by making that decision.

At this juncture, compliance with the HEA required the Department to: disclose to students that the schools had lost accreditation; acknowledge that the issuance of debt exceeded the Department's statutory authority; and declare the debt *ultra vires* and void (as it has effectively now done). The Department did none of these things. Instead, it concealed the developments recounted in the May 3 letter from students and the public, and retroactively placed the schools in a "temporary interim non-profit status," in order to "avoid the lapse of eligibility." Compl. ¶ 51. Notably, the Department did not actually determine that the schools qualified for non-profit status—*i.e.*, that the schools suddenly met the criteria that they had not when the Department reviewed the schools' application in 2017—it simply conferred that status by fiat, converting illegal debt into supposedly legal debt. *Id.* ¶ 52. The Department provided no authority for such a "temporary, interim," or retroactive determination, and indeed there is none. *Id.* ¶ 53.

The Department then took steps to shield the illegal non-profit conversion from notice or scrutiny. First, the Department did not copy HLC on its May 3 letters to the schools, even though HLC copied the Department on its correspondence with the schools about changing their accreditation status. *Id.* ¶ 57. Second, the Department elected not to update the institutions' "ECAR," which is the Department's official record of the institutions it regulates, containing the most critical data elements that form the basis of a school's approval, including the institution type. *Id.* ¶¶ 58–59. Finally, the Department did not tell students that the schools had been operating

without accreditation or that it was retroactively converting the schools' status with the Department in order to purportedly remedy the lack of accreditation. *Id.* ¶ 57.

On June 19, 2018, the *Pittsburgh Post-Gazette* reported that IIA and AIC had lost accreditation and had been concealing that crucial fact from students; DCEH and the schools admitted this to students the next day. *Id.* ¶¶ 65-66. Soon after, the schools informed students that they were closing in December 2018. *Id.* ¶ 67. But despite the Department's involvement with the schools' closure, *id.* ¶¶ 70-75, the Department continued to treat the loans as valid, so it could collect payments from students.

At the end of 2018, IIA and AIC closed, *id.* ¶ 80, spurring substantial litigation and Congressional investigations. But still, the Department refused to disclose the truth. The Department told Congress that it believed that the schools actually were accredited by HLC the whole time—thereby validating how it had treated the schools. For example, in a May 28, 2019 letter to Senator Richard Durbin, the Department stated that "*it is not true that the campuses were not accredited*" after January 2018 and that as of a June 14, 2018 meeting between the Department and DCEH, "*the Department believed that [IIA and AIC] were in an accredited status at that time*, or the Department would not have allowed the institution to participate in title IV programs." *Id.* ¶ 97 (emphasis added). Similarly, on May 22, 2019, Principal Deputy Under Secretary of Education Diane Auer Jones testified to Congress that "it is the Department's position that those schools *were accredited* throughout the period between the change of control in January and the closure in December 2018.

Otherwise, the schools could not have participated in Title IV program." *Id.* ¶¶ 99-101 (emphasis added). The Department did not disclose to Congress that in the May 3, 2018 letters it had recognized that the schools were *not accredited*, nor disclose the actions taken by the Department to work around the loss of accreditation.

C. Plaintiffs' Lawsuit Against the Department

On October 22, 2019, after coming into possession of the May 3, 2018 letters revealing the Department's illegal conduct, Plaintiffs filed this lawsuit, alleging that the Department violated the Administrative Procedure Act ("APA"): first, by allowing the schools to continue to participate in Title IV after they lost their accreditation; and, again, when it converted the schools from for-profit to non-profit schools, retroactive to the loss of accreditation, for the sole purpose of treating them as Title IV eligible. Compl. ¶¶ 110-19. Plaintiffs sought a declaration that the schools violated the APA, orders that their student loan obligations be vacated, and that the Closed School Discharge deadline be extended.[4] *Id.* at pp. 32-33 (Request for Relief).

Less than three weeks after the complaint was filed, the Department issued a press release announcing that it would cancel student loans and restore Pell Grant

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[4] The HEA requires the Secretary of Education to discharge a federal student loan if a borrower is unable to complete their program due to a school's closure. HEA § 437(c)(1), 20 U.S.C. § 1087(c)(1). *See also* HEA § 455(a)(1), 20 U.S.C. § 1087e(a)(1). The Department must grant a closed school discharge if a student is enrolled at the school at the time it closed or withdrew not more than 120-days prior to the school's closure, as long as the student did not complete the program through a teach-out at another school or by transferring credits earned. 34 C.F.R. § 685.214(c)(1)(i). The Secretary may extend the 120-day period if she "determines that exceptional circumstances related to a school's closing justify an extension." *Id.* § 685.214(c)(1)(i)(B). Exceptional circumstances for this purpose, "may include, but are not limited to: the school's loss of accreditation" as well as a "finding by a State or Federal government agency that the school violated State or Federal law." *Id.*

eligibility associated with any enrollment in AIC or IIA between January 20, 2018 and December 31, 2018. Rothschild Decl. ¶ 19 (Exh. 10). The Department also extended the closed school discharge lookback period to June 29, 2018, to help "approximately 300 additional borrowers." *Id.* But rather than acknowledge the improper things it had done, or explain how students were misled by Dream Center, the Department instead foisted blame onto HLC for its "classification of the institutions in a newly developed and improperly defined accreditation status after January 20, 2018," explaining further:

> The Department is concerned that the Art Institute of Colorado and the Illinois Institute of Art were actually fully accredited from January 20, 2018, until their closing at the end of the year. Because HLC has required these two schools to note on student transcripts that credits and degrees earned during this period are from a non-accredited institution, students have been harmed as they seek transfer credit and employment elsewhere.

Id. (As explained further below, this decision to blame HLC placed students at greater risk of adverse tax consequences for the loan discharges; the resolution of this issue was a critical component of the Stipulation that supports Plaintiffs' right to attorneys' fees.)

This public explanation for why the Department discharged the loans after Plaintiffs filed this lawsuit on October 22, 2019 cannot be reconciled with its actions until that point.[5] The Department knew about HLC's accreditation decision since November 2017, but never told HLC that it was acting improperly, and never took

[5] Plaintiffs take no position on whether HLC made the right or wrong decision in November 2017 when it required the schools to accept a change in their accreditation status. Neither the schools nor the Department informed students about HLC's decision when it happened, such that they could have made their own decision about what to do with that information.

action to protect IIA and AIC students from these supposedly "harmful" actions by HLC. And when the Department addressed the consequences of the accreditation change in its May 3, 2018 letters to the schools, it did not state that the problem it was addressing was an improper decision by HLC. If HLC's accreditation decision was the threat to students that the Department now claims, there was nothing stopping the Department from stepping in immediately to protect them.

After the Department issued its November 8, 2019 press release announcing cancellation of the loans, it reached out to counsel for Plaintiffs seeking a dismissal, contending that the lawsuit was now moot. Plaintiffs did not agree because, among other things: (i) the Department's insistence that HLC was to blame, rather than the Department and the schools, and silence on the issue of Form 1099s, threatened significant tax consequences to the class; (ii) the Department had not fully extended the Closed School Discharge lookback period or provided any notice to the class regarding expanded eligibility; and (iii) the Department had provided no assurances that loan servicers had in fact updated credit reporting agencies about the cancelled loans.

Subsequently, the Department further extended the Closed School Discharge lookback period to January 20, 2018, the date the schools' accreditation status changed. *See* Rothschild Decl. ¶ 22 (Exh. 13). While the Department noted this change on its website, it still did not inform students directly of this significant new right.

It was not until after the Stipulation was filed on March 27, 2020, and the Court had entered its March 30 and June 3 Orders, that Plaintiffs achieved the full panoply of relief in this proceeding, including:

- Department commitments and admissions that significantly reduce the risk that the IRS will tax the loan cancellations, including the assurance that the Department would not issue IRS Form 1099s and the admission that the loans were cancelled not because of accreditor misconduct, as the Department previously explained, but rather "because the Schools transitioned from accredited to change of control candidacy status effective January 20, 2018, and the Schools did not notify students of this change of status (or its consequences) until late June or early July 2018." Dkt. 12.

- A requirement that the Department directly notify borrowers—for the first time—that the closed school discharge date was extended to January 20, 2018, a critical new right that opened the door for many additional borrowers to obtain non-taxable loan forgiveness for their entire Dream Center education (as opposed to simply 2018 loan cancellation with uncertainty regarding taxability).

- A requirement that the Department confirm that loan servicers had in fact updated credit reporting agencies about the cancelled loans.

- A requirement that the Department update its website to include the Stipulation and closed school discharge application.

On March 30, the Court issued a Minute Order staying the case for sixty days and ordering the Department to file a status report by May 29 "addressing each of the obligations listed in the [Stipulation]." On May 29, the Department filed the required report attesting to its full compliance with the Stipulation. Dkt. 15. On June 3, the Court issued a Minute Order dismissing the case "in light of the Stipulation of Dismissal and the Government's Status Report."

II. ARGUMENT

A. <u>Plaintiffs Are Entitled to Recover Attorneys' Fees</u>

1. Standard for Recovery of Fees

To award attorneys' fees under EAJA, the Court must find that (1) the party seeking fees is the prevailing party; (2) that party has incurred reasonable fees or expenses; (3) the position of the United States in the action was not substantially justified; and (4) no special circumstances make an award of fees unjust. *True the Vote, Inc. v. Internal Revenue Service*, No. 13-cv-734 (RBW), 2019 WL 2304659, at *3 (D.D.C. May 30, 2019). Once the plaintiff establishes that it is the prevailing party, the government has the burden of showing that its position was "substantially justified" or that "special circumstances make the award unjust." *Id.*[6]

2. Plaintiffs Are Prevailing Parties

To qualify as a prevailing party under EAJA, there must be a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 605 (2001). In short, there must be some "judicial *imprimatur* on the change." *Id; see also Thomas v. Nat'l Sci. Found.,* 330 F.3d 486, 492–93 (D.C. Cir. 2003) (holding that, to qualify as a prevailing party under EAJA, "there must be a court-ordered change in the legal relationship between the plaintiff and the defendant") (internal quotations omitted).

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[6] EAJA also requires that for attorneys' fees to be awarded, a party's "net worth [must] not exceed $2,000,000 at the time the civil action was filed . . . ." 28 U.S.C. § 2412(d)(2)(B)(i). Here, each named plaintiff incurred substantial debt in order to attend college for art and design, and either did not complete their degree or recently graduated. Each named plaintiff has submitted a declaration attesting to the fact that their net worth falls well below the EAJA limit. Rothschild Decl. ¶ 23 (Exh. 14). Plaintiffs accordingly meet this requirement for an EAJA fee award. *See Cobell v. Norton*, 407 F. Supp. 2d 140, 148 (D.D.C. 2005) ("[A]ffidavits signed by the class representatives, attesting to the fact that their net worth fell within EAJA statutory guidelines at the time the litigation was initiated . . . amply satisfy the requirements of the statute for the entire class.").

Although *Buckhannon* expressly recognized only two appropriate bases for awarding fees—judgments on the merits and settlements enforced through consent decrees—prevailing party status in this jurisdiction is not so limited. "Under the D.C. Circuit's construction of *Buckhannon,* a litigant in this jurisdiction need only establish that he or she received 'some form of judicial relief, not necessarily a court-ordered consent decree or a judgment on the merits.'" *Texas v. Holder*, 63 F. Supp. 3d 54, 63-64 (D.D.C. 2014) (quoting *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 15 (D.C. Cir. 2010)). As relevant here, "under certain circumstances, prevailing-party status may result from . . . a judicially-sanctioned stipulation." *Id.* at 64 (citing *Turner*, 608 F.3d at 15); *see also Carbonell v. INS*, 429 F.3d 894, 899-902 (9th Cir. 2005) (finding that plaintiff was a prevailing party when he "obtained a court order incorporating a voluntary stipulation" staying his deportation); *Turner*, 608 F.3d at 15 (citing with approval *Carbonell'*s holding regarding voluntary stipulations).

Here, the "judicial imprimatur" required by *Buckhannon* is satisfied by the Stipulation, the subsequent March 30 order staying the case for sixty days and ordering the Department to file a status report by May 29, 2020 "addressing each of the obligations listed in the [Stipulation], " and the June 3 Order dismissing the case, in light of the Department's completion of its remaining obligations. With entry of the Stipulation and the Court's March 30 and June 3 orders, the legal relationship between the parties changed in the following ways.

First, the Stipulation committed the Department to actions that significantly reduce the chances that Plaintiffs will be taxed on their loan cancellations. *See*

generally Vara v. DeVos, No. 19-cv-12175-LTS, 2020 WL 3489679, at *19 (D. Mass. June 25, 2020) (holding that student loan borrowers' claims were not moot where their loan discharges and refunds were at risk of being treated by the IRS as gross income, and that such borrowers "undoubtedly have an interest in minimizing their tax liabilities"). The March 30 and June 3 orders ratified that commitment.

Although a borrower receiving a loan discharge is ordinarily required to consider the amount of the discharge as income subject to federal income tax, I.R.C. § 61(a)(11) (1986), the IRS recognizes an exception when the reduction of a debt can be tax-free "to the extent that the debt reduction by the third-party lender is based on an infirmity that clearly relates back to the original sale." Rev. Rul. 92-99, 1992-2 C.B. 35 (1992); *see also Preslar v. Commissioner*, 167 F.3d 1323, 1333 (10th Cir. 1999); *Payne v. Comm'r*, No. 21634–06, 2008 WL 724027, at *2 n.5 (T.C. 2008) (explaining that, under Revenue Ruling 92-99, a "seller's inducement of a higher purchase price by misrepresentation of a material fact or by fraud" is an example of an infirmity that relates back to the original sale). The Department's public justification for the discharges, to address alleged misconduct by the accreditor HLC, rather than the school (the seller) or the Department (the lender), threatened to negatively affect the students' ability to avoid taxation under the infirmity exception.[7] Accordingly,

[7] The immediacy of that threat was underscored by actions taken by the Department right after the lawsuit was filed. On October 24, 2019, the Department—in furtherance of its accreditor-focused rationale for discharging IIA and AIC loans—began demanding information from HLC about its almost two-year old accreditation decision. *See* Rothschild Decl. ¶ 20 (Exh. 11) (Letter from Lynn Mahaffie to Barbara Gellman-Danley (Oct. 24, 2019)); *Id.* ¶ 18 (Exh. 9). The Department and HLC engaged in an ongoing, contentious back and forth on that subject in the following months, culminating in the Department

Plaintiffs required that the pleading that would end the case include the Department's acknowledgement that it "took this action to cancel the loans because *the Schools* transitioned from accredited to change of control candidacy status effect January 20, 2018, and *the Schools* did not notify students of this change of status (or its consequences) until late June or early July 2018." Dkt. 12 (emphasis added).[8]

Additionally, the Stipulation includes statements by the Department that: (i) committed the Department to "treating the loans as if they had never been issued";

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initiating a review of HLC's recognition by the National Advisory Committee on Institutional Quality and Integrity (NACIQI), the Department's accrediting review arm. *See* Eric Kelderman, "Ed Department Blames Accreditor for Dream Center's Collapse," *Chronicle of Higher Education* (Jul. 6, 2020); Rothschild Decl. ¶ 25 (Exh. 16) (Letter from Barbara Gellman-Danley to Annamarie Weisman (July 1, 2020) (summarizing and hyperlinking to prior correspondence between the Department and HLC)). The position that the Department will take in the review proceeding is that HLC must admit wrongdoing in its accreditation decisions for IIA and AIC, and retroactively accredit the schools. *See Id.* ¶ 21 (Exh. 12 at 1) (United States Department of Education Staff Report to the Senior Department Official on Regulation and Compliance Issues re HLC).

This discussion comes far too late for former students like plaintiff Infusino, who has already completed his education at a different school, without having the courses on his 2018 transcript labeled as "accredited." Compl. ¶ 89. As with the press release, this belated effort to hold HLC solely responsible for the harms suffered by students risked adverse tax consequences for the class, had Plaintiffs not secured the commitments from the Department described in Section II(A)(2) below.

[8] The IRS has also recently issued a new Revenue Procedure 2020-11 that provides that discharges under the statutory Defense to Repayment discharge process are not treated as taxable gross income. Rev. Proc. 2020-11, 2020-6 I.R.B. 406 § 2.02 (2020). Borrowers qualify for such discharges when they establish, as a defense against repayment, that a *school's actions* would give rise to a cause of action against the school under applicable state law." *Id.* (emphasis added). The IRS justifies this Safe Harbor by stating that most of the borrowers who benefit from the Safe Harbor "would be able to exclude from gross income the discharged amounts based on . . . fraudulent or material misrepresentations made by such nonprofit or for-profit schools." *Id.* § 2.08. The borrowers who received discharges in response to this lawsuit effectively had their applications for Defense to Repayment—whether actually pending or forthcoming—preempted by the Department's decision to discharge all of the loans on a group basis. However, the Department's admission that the schools' concealment from students, rather than conduct by the accreditor, was the reason for the discharge, gives further support for class members' position that the discharged debt should not be deemed taxable by the IRS.

and (ii) committed the Department to not issuing IRS Form 1099s for the cancelled loans and refunds.

Second, the Stipulation and subsequent order required the Department to directly notify Plaintiffs and the class—for the first time—that they had the right to obtain a Closed School Discharge. The communication required by the Stipulation informed students that "the Department has extended the period of time during which a student could have withdrawn from the Schools and not lost eligibility for a closed school discharge back to January 20, 2018," the date the schools' lost accreditation. Rothschild Decl. ¶ 24 (Exh. 15) (Email from the Department to plaintiff Infusino (May 27, 2020)). Until this requirement was incorporated in the Stipulation, the Department had not communicated directly to students that it was moving the eligibility date backwards, opening the door for more putative class-members to obtain loan discharges for their entire Dream Center education. The Court did not dismiss the case until the Department attested to the fact it had actually complied with the Stipulation.

Third, the Stipulation and subsequent order required the Department to confirm that loan servicers had in fact updated credit reporting agencies about the cancelled loans.

Fourth, the Stipulation and subsequent order required the Department to update its website to include more borrower-friendly information, including the closed school discharge application, contact information for loan services, and a copy of the Stipulation.

Finally, through the March 30 order, the Court required the Department to publicly report on these steps. The Court stayed the litigation, entering an order of dismissal only after the reporting requirement was met in a manner that led the court to believe that the Department had complied with the terms of the Stipulation.

Entry of the Stipulation and the March 30 and June 3 orders therefore provided the necessary judicial *imprimatur* on the change in the relationship between the parties. Indeed, cases in this District have found that plaintiffs prevail under the *Buckhannon* test in circumstances just like this. For example, in *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 774 F. Supp. 2d 225 (D.D.C. 2011), the parties entered a joint stipulation requiring the government to complete specific actions by a date certain. *Id.* at 229. The court subsequently entered a minute order approving the parties' stipulations and the deadlines set therein. *Id.* at 228. Applying *Buckhannon*, the court later held that plaintiffs "substantially prevailed by virtue of the Court's . . . acceptance of the . . . joint stipulation." *Id. See also Campaign for Responsible Transplantation v. Food & Drug Admin.*, 511 F.3d 187, 197 (D.C. Cir. 2007) ("[T]he order memorializing the agreement created the necessary judicial *imprimatur* for plaintiffs to be a prevailing party."); *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 368–70 (D.C. Cir. 2008) (explaining that court orders approving of stipulations, "even when voluntarily agreed to by the government," are sufficient to satisfy *Buckhannon's* requirement that a prevailing party be "awarded some relief by [a] court"); *Univ. Legal Servs. Prot. & Advocacy, Inc. v. Knisley*, No. 04-cv-01021 (RW), 2006 WL 3623695, at *4–5 (D.D.C. Dec. 11, 2006) (holding that a stipulation

has "the 'judicial *imprimatur*' required to confer prevailing party status on the plaintiff because it mandated a change in the defendant's conduct which materially changed the relationship between the parties") (citing *Buckhannon,* 532 U.S. at 604)); *Carbonell*, 429 F.3d at 900 (holding that a voluntary stipulation "materially altered the legal relationship between the parties, because the defendants were required to do something directly benefitting the plaintiffs that they otherwise would not have had to do") (citations omitted).

Here, as in the cases cited above, "upon consideration" of the joint stipulation, the Court stayed the litigation and ordered the Department to provide a report, by a date certain, in which it "address[ed] each of the obligations listed" in the Stipulation. After that report was filed, and "in light of" the Department's statements addressing its obligations, the Court dismissed the case. That is sufficient to establish prevailing party status in this District.

3. The Government Cannot Meet Its Burden of Showing That Its Actions Were Substantially Justified or That Special Circumstances Make an Award of Fees Unjust

For a prevailing party to obtain attorneys' fees under EAJA, the position of the United States must not be substantially justified. 28 U.S.C. § 2412(d)(1)(B). Because Plaintiffs have established their "prevailing party" status, the United States has the burden to establish that its position was substantially justified. *Carey v. Federal Election Comm'n*, 864 F. Supp. 2d 57, 62-63 (D.D.C. 2012) (holding that an agency's actions were not substantially justified when it ignored controlling law).

"The government's position is substantially justified if it is 'justified to a degree that could satisfy a reasonable person' or, in other words, has 'a reasonable basis both

in law and fact.'" *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). "The [government] must show 'both' that (1) the 'underlying agency action' and (2) 'the arguments defending that action in court' satisfy that standard." *Nat'l Venture Capital Ass'n v. Nielson,* 318 F. Supp. 3d 145, 149 (D.D.C. 2018) (quoting *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000)). Having not denied or defended against any of Plaintiffs' allegations, and in light of the facts set forth above, Plaintiffs do not expect the Department to meet this burden, or even to try.

Even if the position of the United States was not substantially justified, a fee award is inappropriate if "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Special circumstances may make an award of fees unjust if it is "grossly disproportional to the limited success achieved." *True the Vote, Inc.*, 2019 WL 2304659, at *8. That clearly does not apply here—Plaintiffs achieved everything they set out to with this lawsuit.

B. Plaintiffs' Requested Attorneys' Fees and Costs Are Reasonable

Plaintiffs have incurred reasonable fees and expenses to develop, file, and serve the complaint (152.7 hours), negotiate relief and the Stipulation (56.4 hours), and develop the fee petition (87 hours). Rothschild Decl. ¶16 (Exh. 7) (statement of fees and costs).

As set forth below, at a minimum Plaintiffs are entitled to an EAJA adjusted rate of $205.84/hour for this work. In addition, Plaintiffs are entitled to a "special factor" enhancement under § 2412(d)(2)(A) as well as an enhancement based on the

Department's "bad faith" under 28 U.S.C. § 2412(c)(2). Based on these enhancements, Plaintiffs seek a blended rate of $500 per hour.

1. The Adjusted EAJA Rate Prior to Enhancements

EAJA provides that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A)(ii). This Court has routinely approved cost-of-living adjustments to the statutory rate. *See, e.g.*, *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004) (explaining that "courts routinely approve cost-of-living adjustments" and that the court "found no case where we denied one") (internal quotations omitted); *Venture Capital Ass'n v. Nielson*, 318 F. Supp. 3d 145, 151 (D.D.C. 2018) (finding cost of living increase as of 2018 to be $198.99); *Porter v. Astrue*, 999 F.Supp.2d 35, 38-39 (D.D.C. 2013) (explaining consumer price index adjustments to attorneys' fees). Here, the EAJA adjusted rate as of May 2020 is $205.84/hour. *See* Rothschild Decl. ¶ 15. Multiplying counsel's hours by this baseline rate, Plaintiffs are entitled to $61,373.22 in fees (including $424 in costs for service and the filing fee) at a bare minimum. *Id.* ¶ 16.

2. Enhancement for Bad Faith Conduct

In addition to the cost-of-living adjustment, Plaintiffs are entitled to a rate enhancement due to the Department's bad faith conduct. A prevailing party is entitled to a bad faith enhancement based on the conduct that gave rise to the litigation or that occurred during the litigation. *Gray Panthers Project Fund v.*

Thompson, 304 F Supp. 2d 36, 39 (D.D.C. 2004); *True the Vote*, 2019 WL 2304659, at *10. Both exist here.

The Department has admitted, in the May 3, 2018 letters, that it issued loans to IAC and IIA students in violation of Title IV of the HEA. On multiple occasions it was presented the opportunity to correct its illegal actions and relieve students of their loan obligations. It passed that opportunity up every time and, instead, took steps to retroactively change, and then conceal, its behavior. *See infra* Section I(B).

The officials in the Department who carried out this enterprise took pains to keep the conversion secret from the schools' accreditor, the public, students, and Congress. *Id.* It even made sure that its official records showed no traces of what it had done. *Id.* Finally, rather than acknowledging its misconduct, the Department manufactured a new, after-the-fact narrative blaming HLC as the sole source of the students' misfortune. *See infra* Section I(C).

The upshot of the Department's misconduct, misrepresentations, and concealment was that hundreds of students—already harmed by misrepresentations from their schools—were required to continue paying back illegal loans until the abrupt loan cancellation after this lawsuit was filed. This conduct meets or exceeds the threshold that courts in this circuit have applied in previous cases to enhance attorneys' fees. *See, e.g., American Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 220 (D.C. Cir. 1991) ("Bad faith in conduct giving rise to the lawsuit may be found where a party, confronted with a clear statutory or judicially-imposed duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake

otherwise unnecessary litigation to vindicate plain legal rights.") (internal quotation omitted); *Gray Panthers Project Fund*, 304 F. Supp. 2d at 41 (concluding that "[t]he Secretary's actions in direct contradiction to congressional directives coupled with his failure to consult with or notify beneficiaries were 'extraordinary circumstances' warranting an award of bad faith attorney's fees"); *True the Vote*, 2019 WL 2304659, at *11 (holding that defendants underlying conduct "rise[s] to the level of pre-litigation bad faith" because defendants breached the "clear . . . judicially-imposed duty not to engage in viewpoint discrimination") (internal quotation omitted).

What distinguishes this case is that the Department did not just violate the law once—by issuing loans in violation of Title IV—and dig its heels in defending that action in litigation. Rather, it engaged in serial misconduct and misrepresentations, all designed to force students to pay back money they shouldn't have owed, and to avoid scrutiny of its own actions. That conduct continued during this litigation; the Department, exposed by this case for forcing students to pay back loans it knew were illegal, continued publicly blaming HLC in a way that was irreconcilable with its prior statements and actions, and potentially harmful to students' interests in avoiding taxation for the discharges.

3. Enhancement for Specialized Expertise

Finally, Plaintiffs are entitled to a "special factor" enhancement under 28 USC § 2412(d)(2)(A). Such enhancements are available where there is a "limited availability of qualified attorneys for the proceedings involved," *id.*, or where plaintiffs' counsel "possessed 'some distinctive knowledge or specialized skill needed

for the litigation in question.'" *Truckers United for Safety v. Mead,* 329 F.3d 891, 895 (D.C. Cir. 2003) (quoting *Pierce v. Underwood,* 487 U.S. 552, 572 (1988)).

These factors are satisfied here. *First,* Plaintiffs' counsel has extensive knowledge, unique experience, and specialized skill in higher education, consumer protection, and student loan law. Founded by former senior Department officials, Student Defense focuses on student protection issues in higher education. Rothschild Decl. ¶¶ 3-4. The attorneys who worked on this case have years of experience working on education matters at the Department and in private practice. *Id.* ¶¶ 4-10 (describing experience of Eric Rothschild, Alice Yao, and Alex Elson).

Second, Plaintiffs' counsel has specialized knowledge of the specific proceedings at issue that allowed for a fast and detailed understanding of the issues in this case. *See Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929, 960 (C.D. Cal. 2010) (explaining that prevailing parties' counsel, by virtue of their long involvement in this litigation, possess distinctive knowledge crucial to litigation of this complicated case). Prior to filing the complaint, Student Defense represented (and continues to represent) many of the same plaintiffs in the class action lawsuit against the institution for the same underlying misrepresentations regarding accreditation status, *Dunagan v. Illinois Institute of Art,* No. 19–cv–809 (N.D. Ill.), and as intervenors in the highly complex and contentious federal receivership of DCEH and the schools, *Digital Media Solutions, LLC v. South University of Ohio, LLC et al.*, No. 19-cv-145 (N.D. Ohio). *See* Rothschild Decl. ¶¶ 11-14.

Student Defense's intimate understanding of the facts, legal issues, and complicated procedural posture in multiple jurisdictions, combined with the limited availability of qualified attorneys who would have represented these students free of charge, made it uniquely suited to represent plaintiffs in this case, and therefore warrants a special factor enhancement. *See, e.g., Douglas v. Baker*, 809 F. Supp. 131, 135 (D.D.C. 1992) ("In light of *Pierce v. Underwood,* the Court is satisfied that [plaintiff's counsel's] specialized knowledge of immigration law, and the limited availability of attorneys who would have taken this case at the statutory rate, are 'special factors' which justify an increase in the rate of pay.").

4. Support for the Requested Rates

There is no prescribed formula for what enhancement should be provided when these special factors apply. Plaintiffs' counsel does not have established hourly rates, as all of its legal services are provided free of charge. Rothschild Decl. ¶ 3. Instead, we "point to such evidence as . . . the Laffey matrix [and] the U.S. Attorney's Office Matrix." *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995). The Laffey Matrix for the Washington D.C. area provides for rates of $899 per hour for lawyers of Mr. Rothschild's experience (more than 20 years) and $747 per hour for lawyers who have practiced 11-20 years like Ms. Yao and Mr. Elson. *See* Rothschild Decl. ¶¶ 6, 8, 10. The U.S. Attorney's Office Matrix was developed "to evaluate requests for attorneys' fees in civil cases in District of Columbia courts," like this one, and is "intended to facilitate the settlement of attorney's fees claims in actions in which the United States may be liable to pay attorney's fees to the prevailing party and the United States Attorney's Office is handling the matter." *Id.* ¶ 6 (Exh. 5). The

USAO Matrix provides for rates of $595 per hour for attorneys of Mr. Rothschild's experience, $565 per hour for attorneys of Ms. Yao's experience, and $510 per hour for attorneys of Mr. Elson's experience. *Id.* ¶¶ 6, 8, 10.

With these matrices as guideposts, Plaintiffs are taking the conservative position that the Court should award a $500 blended rate for the time spent litigating this matter.

C. Calculation of Fees and Costs

Plaintiffs' fee request at $500 per hour for 296.1 hours kept is $148,474.00 (including $424 in costs for service and the filing fee). Rothschild Decl. ¶ 16 (Exh. 7).

CONCLUSION

For the reasons stated here, Plaintiffs Petition for Fees and Costs should be GRANTED and fees awarded at the rates described herein.

<u>/s/ Eric Rothschild</u>
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