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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff*, and NATIONAL STUDENT LEGAL DEFENSE NETWORK, *Intervenor-Plaintiff*, vs. UNITED STATES DEPARTMENT OF EDUCATION and MITCHELL ZAIS, *in his official capacity as Acting Secretary of Education*, *Defendants*.	Case No.: 21-cv-00384-JD [PROPOSED] COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF [Administrative Procedure Act Case]

INTRODUCTION

1. Even before the COVID-19 crisis, a growing number of Americans were enrolling in distance-based higher education, including through online learning. Defendant United States Department of Education (the "Department") and then Secretary Elisabeth DeVos reported that in the fall of 2018, more than 6.9 million students, or 35.3 percent of students nationwide, were enrolled in distance education courses at degree-granting postsecondary institutions.[1]

2. Students who attend private, for-profit institutions enroll in distance education programs at an especially high rate. Seventy-three percent of students enrolled at private, for-profit institutions are enrolled in distance education courses, compared to 34 percent of students enrolled in public institutions and 30 percent of students enrolled in private non-profit institutions.[2]

3. Students of color, low-income students, student parents, and veterans are enrolled in institutions offering distance education in disproportionately large numbers.[3] The Department has also noted that "non-traditional students . . . have been a key market for existing competency-based or distance education programs." 85 Fed. Reg. 18,638, 18,639 (Apr. 2, 2020).

4. In past economic downturns, predatory institutions, many of them for-profit online schools, saw an opportunity to target people who were struggling. *See generally* S. Health, Educ., Labor & Pensions Comm., *For-Profit Higher*

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[1] Nat'l Ctr. For Educ. Statistics, U.S. Dep't of Educ., *Fast Facts: Distance Learning* (last checked on Oct. 22, 2020), *available at:* https://nces.ed.gov/fastfacts/display.asp?id=80.

[2] *Id.*

[3] *See, e.g.,* Nat'l Ctr. For Educ. Statistics, U.S. Dep't of Educ., *Table 311.22. Number and Percentage of Undergraduate Students Enrolled in Distance Education or Online Classes and Degree Programs, by Selected Characteristics: Selected Years, 2003–04 through 2015–16* (2018), *available at:* https://nces.ed.gov/programs/digest/d18/tables/dt18_311.22.asp.

Education: The Failure to Safeguard the Federal Investment and Ensure Student Success (2012) *available at*: https://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf.

5. During the Great Recession, for example, for-profit college enrollment reached an all-time high as workers seeking retraining were "swayed by the convenience of online learning and the (often misleading) marketing of some of the largest for-profit chains." Stephanie Riegg Cellini, "The alarming rise in for-profit college enrollment," Brookings Institution (Nov. 2, 2020) (explaining that between 2006 and 2010, enrollment in for-profit colleges surged by 76 percent) *available at:* https://www.brookings.edu/blog/brown-center-chalkboard/2020/11/02/the-alarming-rise-in-for-profit-college-enrollment/.

6. The same thing is happening today as the nation grapples with the economic and social impact of the COVID-19 crisis.

7. Several online for-profit institutions are reported to have dramatically increased their marketing budgets to target potential students who were recently laid off. *See, e.g.,* Lindsay McKenzie, "COVID-19 College Marketing Draws Criticism," Inside Higher Ed (Aug. 19, 2020), *available at*: https://www.insidehighered.com/news/2020/08/19/college-advertising-during-covid-19-draws-criticism.

8. It is little surprise, therefore, that while overall higher education enrollment is down, for-profit college enrollment is on the rise at levels not seen since the Great Recession. *See* Cellini, supra; Jeffrey M. Silber, "Final Fall 2020 College Enrollment Data Released; Could be Largest Drop Ever," BMO Capital Markets, *available at:* https://researchglobal0.bmocapitalmarkets.com/research/f56014ea-af8c-4e09-90c3-b6e555d00481/?src=BM; Sarah Butrymowicz and Meredith Kolodner, "For-Profit Colleges, Long Troubled, See Surge Amid Pandemic," New York Times (June 17,

2020), *available at:* https://www.nytimes.com/2020/06/17/business/coronavirus-for-profit-colleges.html.

9. In light of these enrollment trends and the lessons learned during and after the Great Recession, oversight of institutions offering distance education programs, and of the programs themselves, is more important than ever.

10. Yet, despite the need for increased attention to and oversight of distance education, on September 2, 2020, in the middle of the pandemic, the Department published new rules that reduced government oversight of online education and stripped away critical protections for students enrolling in distance education programs. *See* 85 Fed. Reg. 54,742 (Sept. 2, 2020) ("2020 Regulation").

11. As detailed herein, the Department enacted the 2020 Regulation in contravention of clear governing law and without a sufficient factual basis.

12. Intervenor-Plaintiff National Student Legal Defense Network ("Student Defense") is challenging two parts of the 2020 Regulation in this action.

13. *First*, the 2020 Regulation provides that "[i]n the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration date of [an institution's] current period of participation, the institution will automatically be granted renewal of certification, which may be provisional." 34 C.F.R § 668.13(b)(3).

14. This provision is contrary to law and is therefore unlawful under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, because it disregards the Higher Education Act's ("HEA") clear requirement that the Secretary "qualif[y]" an institution for participation in Title IV, HEA programs by "determin[ing]" an institution's "legal authority to operate within a State, [its] accreditation status, and [its] administrative capability and financial responsibility. . . in accordance with the requirements" of the HEA. HEA § 498(a), 20 U.S.C. § 1099c(a).

15. In promulgating this provision, the Department also acted unlawfully due to its arbitrary and capricious failures to: (i) explain the departure from its

earlier reasoning adopting a prior regulation; (ii) consider reasonable alternatives to its decision; and (iii) provide adequate factual support for its decision.

16. Without this statutory safeguard, institutions that should be denied eligibility—due, for example, to findings of misconduct exposed by law enforcement agencies or the loss of accreditation—or have an eligibility determination delayed, may be automatically renewed for Title IV participation, placing students at great risk.

17. *Second*, the 2020 Regulation allows a degree-granting institution to outsource 100 percent of its educational program to another entity, as long as the other entity is Title IV eligible and has shared ownership with the degree-granting institution. 34 C.F.R § 668.5(a)(2).

18. Previously, the Department found that it was necessary to limit such outsourcing to 50 percent of an educational program in order to, among other things, ensure that the "institution providing most of the program will be the one associated with the students that are taking the program." 75 Fed. Reg. 66,832 (Oct. 29, 2010) ("2010 Regulation"); *see also* 75 Fed. Reg. 34,806, 34,814 (June 18, 2010) (providing many other reasons why the 50 percent cap was necessary).

19. In removing the 50 percent cap, the Department acted unlawfully due to its arbitrary and capricious failures to: (i) explain the departure from its reasoning in the 2010 Regulation; (ii) consider reasonable alternatives to elimination of the cap; and (iii) provide adequate factual support for its decision.

20. Under the Department's new approach, a student can now enroll in and receive a degree from an institution that provided *none* of the education for which the degree was conferred.

21. In issuing these two provisions, the Department has acted arbitrarily, capriciously, and not in accordance with law, compelling a conclusion that its actious should be held unlawful and set aside pursuant to the APA, 5 U.S.C. § 706(2).

22. Intervenor-Plaintiff seeks a declaration that these provisions violate the HEA and are arbitrary, capricious, and contrary to law. Intervenor-Plaintiff also requests an order vacating these two provisions in their entirety.

JURISDICTION AND VENUE

23. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (the APA).

24. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a) and this Court may grant declaratory, injunctive, and other relief pursuant to 28 U.S.C. §§ 2201–02 and 5 U.S.C. § 706.

PARTIES

25. Intervenor-Plaintiff Student Defense is a non-profit, non-partisan organization, recognized as tax-exempt under section 501(c)(3) of the Internal Revenue Code, that works to advance students' rights to educational opportunity and to ensure that higher education provides a launching point for economic mobility. Student Defense's official address is 1015 15th St. NW, Washington, DC 20005.

26. Student Defense is staffed by attorneys who are experts at the intersection of consumer protection and higher education, including attorneys with high level government experience working on issues related to those impacted by the 2020 Regulation.

27. Student Defense has represented numerous students and prospective students residing in California who have been harmed by the Department's regulations governing institutions of higher education, including specifically on issues related to distance education.

28. For example, Student Defense previously represented California residents harmed by the Department's delay of rules relating to distance education and the state authorization of online programs. *See Nat'l Educ. Ass'n v. DeVos*, 379

F. Supp. 3d 1001 (N.D. Cal. 2019), *appeal dismissed*, No. 19-16260, 2019 WL 4656199 (9th Cir. Aug. 13, 2019).

29. Student Defense currently represents two California residents who are prospective enrollees in higher education programs and who have been harmed by the Department's repeal of the Gainful Employment regulations that established eligibility, disclosure, and certification requirements for career and for-profit college programs, including those conducted online. *See Am. Fed'n of Tchrs. v. DeVos*, No. 5:20-cv-00455, (N.D. Cal. Jan. 22, 2020).

30. Defendant Mitchell ("Mick") Zais is the Acting Secretary of the United States Department of Education and is being sued in his official capacity. His official address is 400 Maryland Ave. S.W., Washington, DC 20202.

31. Defendant United States Department of Education is an executive agency of the United States government and an agency of the United States within the meaning of the APA. The Department's principal address is 400 Maryland Ave. S.W., Washington, DC 20202.

FACTUAL ALLEGATIONS

32. On July 31, 2018, the Department announced its intention to establish a negotiated rulemaking committee, as well as two subcommittees, "to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965," and to hold three public hearings to allow interested parties to comment on the topics suggested and to give interested parties the opportunity to suggest additional topics for consideration for action by the committee. 83 Fed. Reg. 36,814, 36,814 (July 31, 2018).

33. On October 15, 2018, the Department published a notice in the Federal Register stating its intention to establish a negotiated rulemaking committee, the Accreditation and Innovation Committee, to prepare for proposed regulations under Title IV, as well as three topic-based subcommittees, including the Distance Learning and Innovation Subcommittee. 83 Fed. Reg. 51,906 (Oct. 15, 2018).

34. The committee and the subcommittees met several times in early 2019, and reached consensus on the proposed regulations at the final meeting on April 3, 2019. 85 Fed. Reg. 18,638, 18,642 (Apr. 2, 2020) ("2020 NPRM").

35. The Department published the proposed regulations on April 2, 2020, and the comment period was open until May 4, 2020. *Id.* at 18,638.

36. Student Defense submitted comments on the 2020 NPRM on May 4, 2020. *See* National Student Legal Defense Network, Comment on NPRM on Student Assistance General Provisions, Distance Education and Innovation Regulations, Docket ID ED-2018-OPE-0076 (May 4, 2020) ("Student Defense Comment"), *available at:* https://www.regulations.gov/document?D=ED-2018-OPE-0076-1080.

37. The 2020 Regulation was published in final form on September 2, 2020 with an effective date of July 1, 2021. However, the Secretary designated the regulatory changes challenged here under title 34, part 668 (as well as those under title 34, parts 600 and 602) for early implementation. *See* 85 Fed. Reg. 54,743.[4]

A. The 2020 Regulation's Provision Granting Automatic Recertification of Title IV Eligibility for Institutions Whose Applications for Recertification Have Been Pending for 12 Months Violates the APA

38. Each year, under Title IV of the HEA, the Department provides billions of dollars in federal funding in the form of grants and loans to help students

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[4] The "Master Calendar Provision" of the HEA provides that, except in cases of voluntary compliance, "any regulatory changes initiated by the Secretary affecting the programs under [Title IV of the HEA] that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date." 20 U.S.C. § 1089(c)(1). An award year begins on July 1. The Secretary may also designate any such regulatory provision "as one that an entity subject to the provision may, in the entity's discretion, choose to implement prior to the effective date" set forth in the Master Calendar Provision. 20 U.S.C. § 1089(c)(2). Invoking this provision, the Secretary designated the regulations at issue in this case for early implementation beginning on September 2, 2020. *See* 85 Fed. Reg. 54,743.

pay for and finance programs of postsecondary education. *See generally* 20 U.S.C. § 1001, *et seq*.

39. Title IV funding does not flow directly to students. Rather, under the HEA, funding goes from the Department to an eligible institution of higher education, which must meet an array of statutory and regulatory requirements.

40. The HEA requires the Secretary to determine an institution's eligibility to participate in Title IV, HEA programs by evaluating an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility. HEA § 498(a), 20 U.S.C. § 1099c(a).

41. Once an institution of higher education is "qualified" to participate in the Title IV programs, by statute, it must enter into a Program Participation Agreement ("PPA") with the Department. HEA § 487, 20 U.S.C. § 1094; 34 C.F.R. § 668.14.

42. In the 2020 NPRM, the Department proposed amending its distance education regulation to add a provision stating, "[i]n the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration date of [an institution's] current period of participation, the institution will automatically be granted renewal of certification, which may be provisional." 85 Fed. Reg. at 18,699.

43. The Department offered the following justification for its proposed change:

> [W]hen an institution that is currently certified submits a materially complete application for recertification to the Department no later than 90 calendar days before its PPA expires, its PPA remains valid, and its eligibility to participate in the title IV, HEA programs is extended on a month-to-month basis until its application is either approved or not approved. Although an institution's eligibility is extended on a month-to-month basis for as long as is necessary for the Secretary to render a decision on its application for renewal of certification, we are aware of the uncertainty experienced by institutions in cases where the decision period is lengthy. The proposed

> regulations would address this by providing that renewal of an institution's certification is automatically granted if the Secretary has not made a determination to grant or deny certification within 12 months of the expiration of the current period of participation. Because the renewal of an institution's certification may be provisional (for as little as one year in length), the Department would retain the requisite degree of control over the certification process.

Id. at 18,663.

44. In its comment, Student Defense stated that the proposed change was contrary to the HEA. Student Defense explained: "[t]here exists no basis in the law to allow the Department to essentially undo the Secretary's statutory obligation to qualify and certify institutions, no matter how long an institution's application for PPA recertification remains under review." Student Defense Comment at 10.

45. The Department did not respond to Student Defense's assertion that the proposed regulation exceeded the Department's authority under the HEA, and instead merely stated in the final rule that "the certification renewal process outlined in § 668.13 is neither arbitrary and capricious nor would it constitute an impermissible abdication of the Secretary's responsibility to determine an institution's legal authority to operate within a State, its accreditation status, and its administrative capability and financial responsibility when determining the institution's eligibility to participate in title IV, HEA programs." 85 Fed. Reg. at 54,776.

46. The Department ultimately adopted the language in the 2020 NPRM without any change.

47. The 2020 Regulation therefore provides that "[i]n the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration [date of an institution's] current period of participation, the institution will automatically be granted renewal of certification, which may be provisional." 34 C.F.R § 668.13(b)(3).

48. By allowing for automatic PPA recertification, the 2020 Regulation violates the Secretary's statutory requirement to "qualif[y]" an institution for participation in Title IV, HEA programs by "determin[ing]" its "legal authority to operate within a State, [its] accreditation status, and [its] administrative capability and financial responsibility. . . in accordance with the requirements" of the HEA. HEA § 498(a), 20 U.S.C. § 1099c(a).

49. The Department has also failed to provide an adequate justification for departing from the previous recertification regulations.

50. As its justification for its proposal, the Department states, "we are aware of the uncertainty experienced by institutions in cases where the decision period is lengthy." 85 Fed. Reg. at 18,663.

51. The Department failed to provide any evidence of this "uncertainty," nor did it explain its impact.

52. There may be any number of good reasons for why the Department's review of an institution's application for recertification may take longer than 12 months. For example, there may be a pending investigation by the Department or by the accrediting agency, a Departmental review of the institution's ability to meet conditions set forth by the Department regarding the institution's financial responsibility obligations, a criminal investigation, or other litigation that would give the Department reason to postpone its approval of an institution's application or decide not to issue a provisional PPA.

53. In such a circumstance, the Department can allow an institution to operate on a month-to-month basis while its application for a new PPA is pending, such that the results of the investigation or review may be considered in determining the school's eligibility to participate in Title IV.

54. Without any evidence that such "uncertainty" requires the Department to modify its recertification process, and without any consideration for how this

proposal would impact student interests or its statutory obligation, the Department's rule is arbitrary and capricious.

55. Finally, the Department failed to consider reasonable alternatives to this provision.

56. There exist a multitude of reasonable alternatives for addressing the uncertainty purportedly experienced by institutions that have submitted an application for recertification, short of unlawfully granting institutions automatic recertification for the full PPA period.

57. For example, as explained in the Student Defense Comment, the Department could seek additional funding to increase its staff designated to review recertification applications in order to ensure that all applications are promptly reviewed and acted upon. In addition to or as an alternative to this, the Department could allow that, after 12 months following the expiration of an institution's current period of participation, should the Department still be unable to reach a final decision on the institution's application for recertification, the institution in question could, on a case-by-case basis, be granted a provisional PPA, lasting between three and six months, while the Department continues its review. Student Defense Comment at 11.

58. By failing to even consider reasonable alternatives and failing to give a reasoned explanation justifying the rejection of those alternatives, the Department has acted in a manner that is arbitrary and capricious within the meaning of the APA.

B. The 2020 Regulation's Provision Removing Outsourcing Caps for the Delivery of Distance Education Programs Violates the APA

59. The 2010 Regulation was published to strengthen and improve the administration of programs authorized under the HEA. 75 Fed. Reg. 66,832 (Oct. 29, 2010).

60. The Department explained that the 2010 Regulation "would protect taxpayer investments in higher education by helping to curtail fraud and abuse and would protect the interests of a diverse population of students who are seeking higher education for personal and professional growth." 75 Fed. Reg. at 66,833–34.

61. The 2010 Regulation included several provisions intended to protect students from being harmed by online programs. Under one such provision, eligible institutions with shared ownership that enter into written arrangements with one another had to comply with the regulatory requirement that "[t]he institution that grants the degree or certificate must provide more than 50 percent of the educational program." Former 34 C.F.R. § 668.5(a)(2)(ii).

62. The Department offered multiple justifications for this provision in the 2010 NPRM. For example, the Department explained that this provision was "intended to ensure that the institution enrolling the student has all necessary approvals to offer an educational program in the format in which it is being provided, such as through distance education, when the other institution is providing instruction under a written agreement using that method of delivery." 75 Fed. Reg. 34,806, 34,814 (June 18, 2010).

63. The Department further explained that the 50 percent cap would address multiple concerns that may arise when two institutions under common ownership enter into written arrangements with each other.

64. One concern was that, absent the cap, "written agreements between institutions under common ownership could be used to circumvent regulations governing cohort default rates and '90–10' provisions, which limit the percentage of revenue for-profit institutions may receive from the Federal student financial assistance programs, by having one institution provide substantially all of a program while attributing the title IV revenue and cohort default rates to the other commonly-owned institution." *Id.* at 34,814.

65. Another reason the 50 percent cap was necessary was to prevent campus-based institutions from being "used as 'portals' to attract students for online institutions under common ownership where students may not have expected the program to be offered by a different institution." *Id.*

66. In the final 2010 Regulation, the Department further explained that the 50 percent cap was necessary because "limitations on institutions that are based on program measures can be circumvented if programs that appear to be offered by one institution are actually offered by another institution" and that the "prohibition in this regulation will ensure that the institution providing most of the program will be the one associated with the students that are taking the program." 75 Fed. Reg. at 66,870.

67. In the 2020 NPRM, the Department proposed to eliminate the 50 percent outsourcing cap in 34 C.F.R. § 668.5(a)(2)(ii), such that a degree-granting institution could outsource 100 percent of its educational program to another entity, as long as the other entity is Title IV eligible and has shared ownership with the degree granting institution. 85 Fed. Reg. at 18,659. In other words, a student could enroll in, and receive a degree from, an institution that provided *none* of the education program for which the degree was conferred.

68. The Department failed to provide a reasonable justification to support the elimination of the 50 percent cap.

69. To justify this proposal, the Department explained that the 50 percent cap was "needlessly restrictive," and that "each institution must meet the criteria to be an eligible institution," even if under common ownership or control. 85 Fed. Reg. at 18,659.

70. The Department did not ask for comment on alternative thresholds or publish evidence or studies supporting the proposal.

71. In its comment on the 2020 NPRM, Student Defense explained that eliminating these safeguards would cause substantial harm to students, and could

"lead to the deception of both students and employers," both of whom would expect that the institution providing the degree would have provided at least some of the education. Student Defense Comment at 7. Additionally, Student Defense explained that the provision ignores the qualitative differences that may exist between institutions with shared ownership that lead to outsized differences in student experience and outcomes, including that one institution could be a ground campus and the other entirely online. *Id.*

72. Student Defense further stated that the Department failed to provide any evidence in support of its reasoning that the 50 percent cap was "needlessly restrictive," and that the Department therefore lacked the facts or evidence to support the proposed regulatory change. Student Defense Comment at 8.

73. The 2020 Regulation nevertheless adopted the proposal set forth in the NPRM such that an institution can now outsource 100 percent of its educational program to another entity, as long as the other entity is Title IV eligible and has shared ownership with the degree-granting institution. 34 C.F.R. § 668.5(a)(2).

74. In response to Student Defense's comment, the Department stated that it "maintains that there is value in maintaining flexibility to achieve synergies between two or more eligible institutions owned or controlled by the same individual, partnership, or corporation. The COVID-19 pandemic highlights a worst-case scenario, where institutions had to quickly move students online and expand any remote learning infrastructure they had at their disposal. However, a local or national economic shift that quickly necessitates more training in one area and less in another may be a more common example." 85 Fed. Reg. 54,774.

75. The Department further noted that "many accrediting agencies require at least 25 percent of the program to be delivered by the institution conferring the credential" and that it "defers to accrediting agencies in this area." *Id.*

76. The Department continued by explaining that it "does not believe this provision, which applies to a very small subset of institutions and students, exposes

those students to meaningful additional risk and notes that any misrepresentation or fraud of the kind the commenter fears may be addressed through existing enforcement means." *Id.*

77. The Department did not provide any evidence, let alone studies or data, to support its "belie[f]" that the provision "applies to a very small subset of institutions and students" and does not "expose[] those students to meaningful additional risk."

78. These statements fail to explain the Department's departure from its finding in 2010 that the 50 percent cap was necessary to ensure that the "institution providing most of the program will be the one associated with the students that are taking the program." 75 Fed. Reg. at 66,870. Indeed, these statements do not even mention the concerns raised by the Department in the 2010 Rule.

79. The Department also did not provide any evidence, let alone studies or data, to address its significant concerns in the 2010 Regulation that the 50 percent cap was necessary to prevent institutions from circumventing regulations governing cohort default rates and '90–10' provisions, or that, without the 50 percent cap, campus-based institutions could be used as "portals" to attract students to online institutions without their knowledge.

80. Finally, to the extent the Department eliminated the 50 percent outsourcing cap because it believed it was "needlessly restrictive," 85 Fed. Reg. at 18,659, the Department was obligated to consider known, common, and reasonable alternatives to that cap and provide a reasoned explanation for its rejection of the same.

81. The Department was aware of numerous obvious alternatives to complete elimination of the outsourcing cap. For example, the Department noted in the 2020 Regulation that "many accrediting agencies require at least 25 percent of

the program to be delivered by the institution conferring the credential." 85 Fed. Reg. 54,774.

82. Nevertheless, the Department did not seek comment on any alternatives during the comment period, nor did it provide a sufficient explanation for its rejection of those alternatives in the 2020 Regulation.

83. Indeed, the Department failed to consider whether other thresholds would be more appropriate under 34 CFR 66.8(a)(2). To the extent the Department did consider such alternatives, the Department failed to identify those alternatives or give a reasoned explanation for the rejection of the alternatives.

84. By failing to consider reasonable alternatives and failing to give a reasoned explanation justifying the rejection of those alternatives, but nevertheless publishing the portion of the 2020 Regulation that eliminated the 50 percent outsourcing cap, the Department has acted in a manner that is arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706.

CAUSES OF ACTION

COUNT I

Agency Action that is Not in Accordance with Law and is in Excess of Statutory Authority (Automatic PPA Renewal)

85. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

86. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A).

87. The APA also requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

88. The 2020 Regulation is a "final agency action for which there is no other adequate remedy in a court" and is "subject to judicial review." 5 U.S.C. § 704; *see id.* § 702.

89. The 2020 Regulation provides that "[i]n the event that the Secretary does not make a determination to grant or deny certification within 12 months of the expiration of [an institution's] current period of participation, the institution will automatically be granted renewal of certification, which may be provisional." 34 C.F.R § 668.13(b)(3).

90. This provision runs afoul of the HEA, which provides that, "[f]or purposes of qualifying institutions of higher education for participation" in Title IV programs, "the Secretary *shall* determine [the institution's] legal authority to operate within a state, [its] accreditation status, and [its] administrative capability and financial responsibility." 20 U.S.C. § 1099c(a).

91. By waiving this statutory mandate in allowing for the automatic renewal of participations by certain institutions with applications pending for more than 12 months, the 2020 Regulation is both "not in accordance with law" and "in excess of statutory jurisdiction [and] authority," in violation of HEA § 498(a), 20 U.S.C. § 1099c(a), and sections 706(2)(A) and 706(2)(C) of the APA.

COUNT II

Agency Action that is Arbitrary and Capricious
(All Provisions)

92. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

93. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [or] capricious." 5 U.S.C. § 706(2)(A).

94. In issuing and repealing regulations, federal agencies are required to base their decisions on adequate factual support, meaning that agencies must have

and rely upon enough relevant evidence that a reasonable mind might accept it as adequate to support a conclusion. *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1072 (9th Cir. 2015) (recognizing that the "arbitrary and capricious standard incorporates the substantial evidence test" in the case of informal agency proceedings).

95. Further, under the APA's notice and comment requirements, among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies. *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Although an agency is permitted to add supporting documentation in response to comments submitted during a comment period, such documentation is limited to materials that supplement or confirm existing data. An agency is not permitted to introduce in a final rule the *only* evidence that it claims supports a proposition.

96. The failure to meet these requirements renders an agency action arbitrary and capricious.

97. In issuing each of the provisions challenged herein, the Department failed to base its decision on adequate factual support. *See* supra ¶¶ 49-54 (automatic PPA renewal); ¶¶ 68-79 (50 percent cap).

98. For both of these provisions, the Department has therefore acted in a manner that is arbitrary and capricious within the meaning of APA, 5 U.S.C. § 706.

99. In addition, under the APA agencies may change their existing policies if they provide a reasoned explanation for the change. When an agency changes its existing position, policy, or factual findings, it must display both an awareness that it is changing its position and that there are good reasons for the new policy. An unexplained inconsistency in an agency policy is a proper basis for holding an interpretation to be arbitrary and capricious.

100. The Department failed to provide a reasoned explanation for its departure from the previous PPA recertification regulations. *See* supra ¶¶ 49-54.

101. The Department also failed to provide a reasoned explanation for its change in position regarding the 50 percent outsourcing cap. Although the Department previously asserted that the cap was necessary for a multitude of reasons, *see* supra ¶¶ 59-66, the Department now claims, without adequate explanation or justification, that the cap is "needlessly restrictive," 85 Fed. Reg. at 18,659.

102. Finally, in promulgating and repealing regulations, the APA requires federal agencies to consider reasonably obvious alternatives to the chosen policy that could serve the agency's identified goals. In its consideration of those alternatives, the agency must give a reasoned explanation for its rejection of those alternatives. The agency's failure to do so constitutes arbitrary and capricious decision-making.

103. The Department failed to consider the multitude of reasonable alternatives to granting institutions automatic recertification for the full PPA period, *see* supra ¶¶ 55-58, and for eliminating the 50 percent outsourcing cap, *see* supra ¶¶ 80-84.

104. By failing to consider reasonable alternatives to these provisions, and failing to give a reasoned explanation justifying the rejection of those alternatives, the Department has acted in a manner that is arbitrary and capricious within the meaning of the APA, 5 U.S.C. § 706.

REQUEST FOR RELIEF

WHEREFORE, Intervenor-Plaintiffs respectfully request that this Court:

A. Declare that 34 C.F.R. § 668.13(b)(3), as published in the 2020 Regulation, violates the HEA;

B. Declare that 34 C.F.R. § 668.5(a)(2) and 34 C.F.R. § 668.13(b)(3), as published in the 2020 Regulation, are arbitrary and capricious;

C. Hold unlawful, vacate, and set aside 34 C.F.R. § 668.5(a)(2) and 34 C.F.R. § 668.13(b)(3), as published in the 2020 Regulation;

D. Enjoin the Defendants from implementing 34 C.F.R. § 668.5(a)(2) and 34 C.F.R. § 668.13(b)(3), as published in the 2020 Regulation;

E. Award Intervenor-Plaintiffs their costs and reasonable attorneys' fees; *and*

F. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Hillary Benham-Baker

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