UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DARNELL E. WILLIAMS and YESSENIA M. TAVERAS, *Plaintiffs,* v. ELISABETH P. DEVOS, in her official capacity as Secretary of the United States Department of Education, *Defendant.*	Civil Action No. 16-11949-LTS **Leave to File Granted on December 19, 2017**

REPLY TO OPPOSITION TO MOTION TO SUPPLEMENT

In her Opposition (Doc. No. 50) to Plaintiffs' Motion to Supplement the Administrative Record and Permit Limited Discovery (Doc. No. 46), Defendant Secretary of Education Elisabeth DeVos fails to counter Plaintiffs' substantive arguments in favor of supplementation of the record and limited discovery in this case. Instead, Defendant mischaracterizes the evidence in question, offers hollow arguments in favor of unnecessary secrecy, rehashes her arguments regarding exhaustion, and proposes an unfair and inefficient "bifurcated" process for adjudication. The Court should grant Plaintiffs' motion in order to facilitate meaningful and expeditious resolution of this dispute.

ARGUMENT

I. The Court should supplement the public record with the DTR Application.

Defendant does not offer a meaningful answer to Plaintiffs' argument that the record in this case should be supplemented with the 60-page memorandum submitted to Defendant by the Attorney General of Massachusetts ("DTR Application") because it represents "pertinent but

unfavorable information" that Defendant has omitted in order to skew the administrative record in her favor. *See Maine v. McCarthy*, No. 1:14-CV-00264-JDL, 2016 WL 6838221, at *2 (D. Me. Nov. 18, 2016). Notably, Defendant does not contest the fact that the DTR Application was (1) before the Department of Education at the time of the challenged decision or that it is (2) clearly relevant and adverse to Defendant's determination that Plaintiffs' federal student loan debts are legally enforceable and subject to collection using the Treasury Offset Program ("TOP")—the two key prerequisites for supplementation in this case. *See Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D.D.C. 2005). Indeed, it is difficult to imagine an argument contesting the relevance of the DTR Application to Defendant's certification of Plaintiffs' debts, given that the application specifically names Plaintiffs and provides legal and factual authority for the proposition that their loans are not enforceable. Instead, Defendant mischaracterizes the DTR Application and urges unnecessary secrecy.

A. Defendant mischaracterizes the DTR Application.

Defendant denies the obvious reality that the Attorney General's application *was a loan discharge application*. Doc. No. 50 at 9 (asserting that DTR Application is not an "individualized borrower defense application on behalf of Plaintiffs"); *accord* Doc. No. 26 at 12 ("Education Was Not Required to Consider the Letter from the Massachusetts Attorney General to be a 'Borrower Defense Claim'"). This characterization is neither correct nor dispositive.

As a factual matter, the DTR Application is clearly a loan discharge application on behalf of Plaintiffs and other former students of Everest Institute in Massachusetts. Defendant's own declarant, Chad Keller, acknowledges this fact, *see* Doc. No. 50-1 at 3 (noting that DTR Application seeks "immediate discharge of all federal loans taken out by student borrowers who attended Corinthian Colleges, Inc.'s Everest Institute campuses in Brighton and Chelsea,

Massachusetts, between 2007 and 2015"), and the Attorney General's Office ("AGO") has clarified this fact in its amicus brief to this Court, *see* Doc. No. 29 at 3 ("The AGO requested that Education 'provide a swift, wholesale, and automatic discharge . . . for each of Corinthian's [Massachusetts] students,' including . . . both Plaintiff Taveras and Plaintiff Williams . . . ."). And although Defendant claims that the AGO's submission was so utterly out of bounds as to be unrecognizable as an application for loan relief, in fact she granted just such an application submitted by the AGO several months after the DTR Application. *See* Press Release, Mass. Att'y Gen., *AG Healey Submits Application to the U.S. Department of Education to Cancel Loans for Thousands of For-Profit Schools Students* (July 26, 2016), https://perma.cc/4D2X-FVYY; Press Release, U.S. Dep't of Educ., *American Career Institute Borrowers to Receive Automatic Group Relief for Federal Student Loans* (Jan. 13, 2017), https://perma.cc/Q2HY-3GFL.

More importantly, as a legal matter, the status of the DTR Application as a valid borrower defense application is not dispositive of this motion or, for that matter, this case. Whatever administrative process exists for borrower defense, Defendant has an independent legal obligation to determine the legal enforceability of debts subject to TOP, 31 C.F.R. § 285.5(b), (d)(3)(i)(B), and to certify enforceability to Treasury in writing, *id.* § 285.5(d)(6). The DTR Application contains extensive legal analysis and factual findings that directly attack the legal enforceability of Plaintiffs' loans—the central question of Defendant's challenged agency action.[1] It also identifies Plaintiffs by name. As such, it should have been considered by Defendant in her challenged decision and should be included in the record.[2]

[1] For similar reasons, the dispute between the parties about whether Plaintiffs fall within the date ranges of presumptive eligibility for loan discharge is not dispositive. It represents a (non-material) dispute of fact to be addressed at summary judgment.

[2] Defendant suggests that "if the Court were to find that the Secretary should have considered the AG Memorandum as an individualized borrower defense claim on behalf of the Plaintiffs, the

B. The DTR Application should be public.

Defendant also asserts that the DTR Application "must not be disclosed on the public record," that secrecy is "critical[]," and that "there is simply no reason to unseal" the document. Doc. No. 50 at 9–10. Yet all of the authorities that Defendant cites in favor of secrecy expressly contemplate disclosure by court order. The Protective Order in this case provides, "Nothing herein shall preclude any party to this action from moving to vacate or modify this Protective Order or any provision thereof." Doc. No. 40 at 2. The Common Interest Agreement between Defendant and the Massachusetts Attorney General "precludes . . . disclosure unless otherwise required by law, administrative order or court order." Doc. No. 36 at 2. And the relevant Massachusetts statute states that the information in the DTR Application may be disclosed by a court order "for good cause shown." Mass. Gen. Laws ch. 93A, § 6(6).

There is good cause for public disclosure of the DTR Application for three reasons. First, a public record in this case promotes the common law right of access to judicial proceedings:

> Courts long have recognized "that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system." *Siedle v. Putnam Inv., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (citation and internal quotation marks omitted). This recognition has given rise to a presumption that the public has a common-law right of access to judicial documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). This presumptive right of access attaches to those materials "which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 412–13 (1st Cir. 1987). It follows, then, that the common-law right of access extends to "materials on which a court relies in determining the litigants' substantive rights." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

---

appropriate remedy would . . . be . . . to remand to the agency for further consideration." Doc. No. 50 at 7. Any such remand should of course be accompanied by an order vacating and setting aside Defendant's invalid TOP certification. *See, e.g., Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("[R]emand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA.").

In re Providence Journal Co., Inc., 293 F.3d 1, 9–10 (1st Cir. 2002). The right of access is heightened in this case because the government is a party. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.").

Second, privacy concerns implicated by public disclosure of the DTR Application are minimal. The DTR Application has already been redacted to remove all personally identifiable information. It contains none of the attachments included with the AGO's original submission. The subjects of the document—Everest Institute and its parent, Corinthian Colleges, Inc.—have no privacy interest because both dissolved through Chapter 11 bankruptcy, leaving several unpaid judgments in their wake. *See* Doc. No. 5 at 7–8. And Defendant alleges no independent interest in nondisclosure. *See* Doc. No. 50 at 9–10 (citing only Protective Order, Mass. Gen. Laws ch. 93A, § 6(6), and Common Interest Agreement with AGO).

Third, thousands of individuals have an interest in this information. Corinthian enrolled approximately 350,000 students in its last five years of operation alone. Tamar Lewin, *Government to Forgive Student Loans at Corinthian Colleges*, N.Y. Times (June 8, 2015), http://nyti.ms/2qgf5nu. At the time this lawsuit was filed, Defendant subjected over 30,000 former Corinthian students to coercive collection by Treasury Offset. Letter from Sen. Warren to Educ. Sec'y King 4 (Sept. 29, 2016), https://perma.cc/2MST-2VLB. And by Defendant's own admission, the DTR Application specifically names 7200 covered individuals. Doc. No. 50-1 at 4. Although this case is not a class action, it proceeds under "the presumption that the defendant, a public official, will act in good faith and comply with governing law as declared by the Court."

Doc. No. 35. Public access to the redacted DTR Application will allow former Corinthian students to ensure that the Department observes their rights in the TOP process.

II. The Court should permit limited discovery.

As with supplementation, Defendant does not address the merits of Plaintiffs' argument that limited discovery will facilitate judicial review by providing "explanation of the reasons for the agency decision." *Camp v. Pitts*, 411 U.S. 138, 143 (1973). Defendant does not contest that the record contains no factual findings and no explanation of Defendant's decision to refer Plaintiffs' debts for TOP. Instead, Defendant rehashes her arguments regarding exhaustion and proposes an unwarranted "bifurcated" process for adjudication. These arguments do not diminish the utility or appropriateness of discovery.

A. No further exhaustion is required.

Defendant attempts to blame Plaintiffs for the gaps in the record, arguing that the administrative record lacks factual findings, explanation of the challenged action, and even written certification of legal enforceability because Plaintiffs did not fully engage with the TOP and borrower defense administrative processes. *See, e.g.*, Doc. No. 50 at 8 n.5 ("Had either party objected to Treasury Offset by filing a Request for Hearing form supplied to them along with a pre-offset notice, there would have been a reviewable final agency decision concerning the enforceability of the student loan debts at issue here."); *id.* at 7 ("because Plaintiffs have failed to exhaust their administrative remedies, there *are* no fulsome or final decisions or findings on the merits of their fraud-based borrower defenses in the Record"). These arguments misstate Defendant's legal obligations under TOP and repeat arguments already fully briefed in the motion to dismiss—a motion that this Court has already determined could not be granted on the basis of the existing record.

First and most importantly, before subjecting Plaintiffs to TOP, Defendant was required by law to determine the legal enforceability of Plaintiffs' debts, 31 C.F.R. § 285.5(b), (d)(3)(i)(B), and to certify enforceability to Treasury in writing before offset, *id.* § 285.5(d)(6). That obligation exists regardless of Plaintiffs' degree of participation in the TOP (or borrower defense) administrative process. Put in terms of the record, the "Unenforceable Debt Exclusion" and "Discharge Process Exclusion" apply regardless of whether Plaintiffs requested a TOP hearing. *See* Doc. No. 43-12 at 34, 38; Doc. No. 43-19 at 34 (defining exclusions). Thus, no act or omission by Plaintiffs excuses the absence of evidence of a determination of legal enforceability or the lack written certification in the record filed in this case.

As for exhaustion, as Plaintiffs pointed out in their Opposition to Motion to Dismiss nearly a year ago, no further exhaustion is required of Plaintiffs because the agency action they challenge pursuant to the Administrative Procedure Act is, by definition, "final." *See generally* Doc. No. 22 at 11–14 (addressing exhaustion in detail); *id.* at 12 (discussing *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) and citing 31 C.F.R. § 285.5(b)). Hence, the existence of any purported administrative remedy—in the form of a discretionary TOP hearing or borrower defense application—is immaterial. *See* Doc. No. 22 at 12–13 (citing *United States v. Hughes*, 813 F.3d 1007, 1009–10 (D.C. Cir. 2016) (rejecting government's argument that exhaustion barred litigation challenging TOP, noting "even assuming an available administrative remedy . . . [the APA], imposes no prerequisite of administrative exhaustion," and quoting *Darby*, 509 U.S. at 143)).

Moreover, as a factual matter, the administrative remedies that Defendant urges are in no sense adequate—they are in fact just as, if not more illusory than they were a year ago when Plaintiffs first briefed the issue of exhaustion. *See* Doc. No. 22 at 13–14 (briefing prudential

exhaustion for Declaratory Judgment Act claims and noting "unreasonable [and] indefinite delay"). With regard to TOP, as was true a year ago, having missed the one-time, 65-day window to request a hearing, Plaintiffs have no right to an administrative hearing. *See* Doc. No. 22 at 4–5 (citing 34 C.F.R. § 30.24(c)).[3] Moreover, experience suggests that Plaintiffs' prospects for a discretionary hearing are bleak: over the past year, Plaintiffs' attorneys at the Legal Services Center of Harvard Law School have submitted TOP hearing requests after the initial 65-day window for several former Corinthian students. Jiménez Dec. ¶ 17 (attached as Exhibit 1). Not a single client has received a hearing and most remain certified for TOP. *Id.* ¶ 18. Moreover, the inability of borrowers to get TOP hearings after the initial 65-day window appears to be the norm. *Id.* ¶ 19.

As for borrower defense, as was true a year ago, "the defense to repayment process is plagued with problems" and "[m]any Corinthian borrowers have been waiting years for adjudication of their borrower defense applications." *See* Doc. No. 22 at 14 (citing declarations). If anything, the borrower defense process worsened since Plaintiffs first briefed this issue. Recent reports indicate that for nearly all of 2017, Defendant's borrower defense processing stood at a standstill while a backlog of nearly 90,000 claims accumulated. *See* Danielle Douglas-Gabriel, *Pressure Mounts for Betsy DeVos to Address the Backlog of 87,000 Student Debt Relief*

[3] Defendant asserts that Plaintiffs "failed to respond to a myriad of notices by the Department of Education and the Department of Treasury" regarding TOP, Doc. No. 50 at 2. In fact, the record makes clear that Defendant issued precisely one notice to each plaintiff stating her intent to use TOP and informing Plaintiffs of their right to object. *See* Doc. No. 43-11 at 45 (Williams); Doc. No. 43-18 at 37 (Taveras). Defendant further asserts, "Nor did either Plaintiff file a pre-certification or pre-offset challenge in response to notices received from the Department of Education." Doc. No. 50 at 7 n.5. It is not clear what Defendant refers to by "pre-offset challenge." According to Defendant's regulations, borrowers may either file a request for hearing within the 65-day window, triggering a mandatory hearing, or file one after the window, implicating a discretionary hearing. *See* 34 C.F.R. §§ 30.33(d)(1), 30.24(c).

Claims, Wash. Post (Nov. 14, 2017), http://wapo.st/2ArEJp8. According to Defendant's own inspector general, Defendant's borrower defense process is plagued by pervasive problems, including a need to improve "policies and procedures over the federal student loan borrower defense loan discharge process" and "an inadequate information system to manage borrower defense claim data." Office of Inspector Gen., U.S. Dep't of Educ., *Federal Student Aid's Borrower Defense to Repayment Loan Discharge Process*, No. ED-OIG 104R0003 at 9, 21 (Dec. 8, 2017), https://perma.cc/5QYV-B2F2.

The experience of the Plaintiffs' attorneys matches these reports: over the past several years, Plaintiffs' attorneys at the Legal Services Center assisted 119 former Corinthian students apply for borrower defense student loan discharge. Jiménez Dec. ¶ 5. 115 of these applications remain outstanding. *Id.* ¶ 6. Some of the Legal Services Center's borrower defense clients have been waiting nearly three years for a decision. *Id.* ¶ 10. Many of the Legal Services Center's borrower defense clients have had difficulty getting the administrative forbearances and stays of collections that they are entitled to in connection with their borrower defense applications, forcing them to take emergency measures to avoid default and coercive collection by the government. *Id.* ¶¶ 12–14.[4]

[4] These facts undermine declarant Chad Keller's assertion that "[h]ad Plaintiffs Williams and Taveras applied for Borrower Defense discharge . . . they would ultimately receive final decisions on their claims." Doc. No. 50-1 at 5. Not only is Mr. Keller's assertion unsupported by the available evidence, his testimony appears to lack foundation for the assertion, having alleged only a generic "familiar[ity]" with "the administrative discharge options available under the HEA." *Id.* at 1. Indeed, Mr. Keller's declaration, which avers that Defendant "received a copy" of the DTR Application including a list of 7200 covered individuals including Plaintiffs, *id.* at 3–4, only underscores the need for discovery to explain why, among other things, "Education did not consider Plaintiffs Williams and Taveras as having applied for Borrower Defense Discharge," *id.* at 4, and why the "Unenforceable Debt Exclusion" and "Discharge Process Exclusion" did not apply to Plaintiffs during TOP processing.

In short, no further exhaustion is required of Plaintiffs and the shortcomings[5] of the record filed by Defendant cannot fairly be placed on the shoulders of Plaintiffs.

B. A "bifurcated" process for factual development is not appropriate.

Finally, Defendant proposes a "bifurcated" process for factual development which would first address her arguments for dismissal and then proceed to factual development for resolution of Plaintiffs' claims. This approach is contrary to the Court's instructions and the process agreed upon by the parties. Following briefing on motion to dismiss, the Court observed that some of Defendant's arguments for dismissal might raise questions intertwined with the merits and ordered the parties to confer and propose a proper and efficient means for resolution of the case. Doc. No. 32 at 2. The parties jointly proposed that Defendant file the administrative record, and that the parties would then file cross-motions for summary judgment (or judgment on the administrative record). Doc. No. 34 at 2. The parties anticipated possible disputes about the contents of the record, *see id.*, and subsequently agreed to "file the record to the extent agreed upon, first, and ask the Court to resolve any outstanding areas of dispute [regarding the record] once the record is before it." Doc. No. 38 at 3. The Court approved the proposal, *see* Doc. Nos. 35, 41, Defendant filed the record, *see* Doc. No. 43, and as agreed, Plaintiffs asked the Court to resolve the outstanding areas of dispute about the contents of the record by filing the motion at issue now, *see* Doc. No. 46.

[5] Plaintiffs make no "concession" regarding the utility of further factual development. *See* Doc. No. 50 at 12. Factual development will provide an "aid to understanding." *See Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 460 (1st Cir. 1989). However, given Defendant's assertion that there is no "reviewable final agency decision concerning the enforceability of the student loan debts at issue here," Doc. No. 50 at 8 n.5, her related disavowals of any "fulsome or final decisions or findings," *id.* at 7, and the dearth of relevant evidence in the record as filed, it appears increasingly likely that Defendant simply failed to follow the legal requirements of TOP.

Having agreed to resolve her arguments to dismiss on cross-motion for summary judgment (or judgment on the record), Defendant cannot now forestall development of the record until after her arguments have been decided. For the sake of fairness and efficiency, the record should be sufficient for judicial resolution of both parties' arguments on cross-motions. Thus, the Court should permit limited discovery to supplement the record before addressing the parties' dispositive arguments.

CONCLUSION

For the reasons stated above, the Court should grant Plaintiffs' Motion to Supplement the Administrative Record and Permit Limited Discovery.

Respectfully submitted,

By: */s/ Alec P. Harris*
Alec P. Harris, BBO No. 601127
Eileen M. Connor, BBO No. 569184
Toby R. Merrill, BBO No. 601071
Deanne B. Loonin, BBO No. 668231
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 522-3003
Attorneys for Plaintiffs

Dated: January 5, 2018

CERTIFICATE OF SERVICE

I, Alec Harris, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing ("NEF") and paper copies will be sent to those indicated as non-registered participants by First Class Mail.

/s/ Alec P. Harris
Alec P. Harris

Dated: January 5, 2018