



## **Comments of The Project on Predatory Student Lending and Public Citizen to the Department of Education on Interim Final Rule, Docket ID ED-2017-OPE-0108**

**November 22, 2017**

The Project on Predatory Student Lending (Project) and Public Citizen submit these comments on the Department of Education’s Interim Final Rule (IFR) purporting to amend the final “Borrower Defense Rule”<sup>1</sup> to further delay its effective date to July 1, 2018.<sup>2</sup> Public Citizen is a non-profit consumer advocacy organization with members and supporters nationwide. It works on both policy matters and litigation to defend consumers’ rights to access the civil justice system, including challenges to the use of forced arbitration provisions, class action bans, and mandatory internal dispute resolution processes that impede students’ access to justice and hide wrongdoing from this agency and the public. Public Citizen also works for transparency in lending and to prevent consumers from being taken advantage of by unscrupulous businesses and industries. The Project, part of the Legal Services Center of Harvard Law School, represents hundreds of thousands of low-income borrowers who have debt from for-profit colleges. Our clients have experienced unfair, deceptive, and otherwise illegal conduct at the hands of for-profit colleges. This fraud provides our clients with a complete defense to the repayment of their loans. But despite countless submissions to the Department of Education (ED), our clients have rarely received any response at all, let alone their legally mandated relief.

As ED itself has recognized, the Borrower Defense Rule would “give students access to consistent, clear, fair, and transparent processes to seek debt relief.”<sup>3</sup> ED has already delayed implementation of the Borrower Defense Rule, relying on an improper invocation of Section 705 of the Administrative Procedure Act (APA).<sup>4</sup> The IFR’s further delay of the Borrower Defense Rule harms student loan borrowers and the economy at large, and is not required by the Higher Education Act’s Master Calendar Rule.<sup>5</sup>

***Further delay of the Borrower Defense Rule would aggravate the harms to student loan borrowers and the economy at large caused by student debt incurred to attend predatory institutions.***

ED’s repeated delays of the Borrower Defense Rule perpetuate the harms to student loan borrowers associated with debt burdens incurred from attending unscrupulous institutions, and are forestalling the positive economic benefits that would result from cancelling that debt. Further delay would continue to hinder student loan borrowers’ ability to start a family, get a job,

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<sup>1</sup> ED, Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016).

<sup>2</sup> ED, Interim Final Rule; Delay of Effective Date; Request for Comments, 82 Fed. Reg. 49,114 (Oct. 24, 2017).

<sup>3</sup> 81 Fed. Reg. at 75,926.

<sup>4</sup> ED, Final Rule; Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27,621 (June 16, 2017).

<sup>5</sup> 20 U.S.C. § 1089.

and buy a home.<sup>6</sup> In the words of a defrauded ITT borrower, “the loans . . . have caused me to put my life on hold.”<sup>7</sup> ED itself recognized these harms in its Regulatory Impact Analysis of the Borrower Defense Rule.<sup>8</sup> Thousands of borrowers have submitted defense to repayment applications to ED—the vast majority of which remain in limbo—detailing these and other harms that they experience as a result of carrying debt that would entitle them to a borrower defense.<sup>9</sup> Some of these harms include:

*1. Harm to credit.* Many student borrowers have poor credit as a result of their student loan debt.<sup>10</sup> Because of high principal, high interest rates, and other unfavorable terms, it is not possible for them to repay their loans, especially considering that the credentials they received from fraudulent schools are often worthless on the job market. One told ED, “my credit score is ruined. [A]nytime I apply for some type of credit my student loans show up as negative.” Another, who is unable to buy a home and only qualifies for credit cards with extremely high interest rates because of a low credit score, explained that “[w]ithout these loans my credit would be pristine.” Even for borrowers who sacrifice in other areas of their lives to make their student loan payments and maintain their credit, the astronomical debt taken out in their names is a red flag to potential creditors. One borrower who beat the odds to maintain a credit score of over 700 has “absolutely no way of utilizing the credit score that I have built up because the debt I currently owe does not allow it. My fantastic credit score is literally useless to me.”

*2. Denial of employment due to poor credit.* Perversely, students who enrolled in higher education to improve their career prospects are experiencing the opposite; they are being denied employment because of the poor credit they have as a result of their student loans.<sup>11</sup> One borrower explained, “[p]rospective employers see the bad credit reports and deny us jobs thinking we are incapable of paying our bills therefore wouldn’t be good employees.” Another said: “I can’t get a job in my field because they do credit checks. I can’t better my life because I am financially unable to pay due to not having a job.” A lack of employment options makes it even harder to repay loans, creating what multiple borrowers have described as a “vicious cycle.”

*3. Difficulties obtaining utilities, obtaining insurance, and renting apartments.* Bad credit has myriad implications for student borrowers beyond denials of employment and their inability to secure additional loans.<sup>12</sup> Many see their apartment rental applications denied because of their student loan debt. Unable to buy or rent a home, these borrowers have extremely limited housing options. One told ED, “I am currently homeless and unable to even get approved for an apartment due to my credit score and low income.” Many borrowers have experienced

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<sup>6</sup> See 81 Fed. Reg. at 76,051.

<sup>7</sup> All of the quotes from borrowers in this comment are from defense to repayment applications submitted to ED by defrauded students of ITT Technical Institute (ITT), a for-profit college that recently filed for bankruptcy.

<sup>8</sup> See 81 Fed. Reg. at 76,050-51.

<sup>9</sup> More than 2,000 ITT students have submitted defense to repayment applications, but only a handful have been granted, and most have received no response from ED at all.

<sup>10</sup> See 81 Fed. Reg. at 76,051 (citing “[r]ecent literature . . . suggest[ing] that high levels of student debt may . . . increase credit constraints”).

<sup>11</sup> See *id.* (noting that defaulted borrowers may “be denied a job due to poor credit”).

<sup>12</sup> See *id.* (noting that for defaulted borrowers, “everyday activities like signing up for utilities, obtaining insurance, or renting an apartment can become a challenge”).

homelessness because of their student loan debt. Borrowers also face unaffordable insurance premiums and are not able to obtain utilities.

4. *Inability to pay professional licensing fees.* Predatory schools frequently misrepresent the necessity and cost of additional certifications that students need to enter their chosen fields. Once students graduate, many are surprised to learn that they need to take and pay for certification exams, which is only made more difficult by high student loan payments.<sup>13</sup> One borrower explains: “I can’t afford to pay for the certifications I need to move into a field relevant to my course of study, and I haven’t been able to since I graduated.” After investing so much time and money in their education, these students are unable to move forward in their careers.

5. *Inability to open a checking account.* Student loan debt prevents student borrowers from participating in the economy in even the most basic ways. Some borrowers are not even able to open a checking account.<sup>14</sup> One borrower told ED, “[m]y husband’s and my credit score is ruined to w[h]ere we can’t . . . have a bank account.” Another “basically had to go completely off the grid and stay off the grid.”

6. *Reduced home ownership.* Many student borrowers are unable to purchase a home because of their student loans.<sup>15</sup> One borrower explained, “now that the loans have hit my credit has dropped 100 points which will prevent me from getting a car or house of my own.” Another borrower’s “new family is living in a room sleeping on the floor because we can’t afford adequate housing.”

7. *Increased probability of bankruptcy.* Crushing student loan debt makes student borrowers more likely to have to file for bankruptcy.<sup>16</sup> One borrower has “a significant amount of credit card and health related debt that I should be paying off instead of this loan.” Another “will likely have to file for bankruptcy just to handle even part of the loans.” Because student loans are extremely hard to discharge, even if borrowers do declare bankruptcy, they will remain in significant debt. There is no statute of limitations on federal student loans, so these loans follow borrowers for the rest of their lives.

8. *Decreased long-term probability of marriage.*<sup>17</sup> Student loans not only affect the finances of borrowers—their impact is felt even in the most personal areas of borrowers’ lives. For one borrower, crushing debt “has put my family planning on hold.” Another “was afraid to get married because I didn’t want my student loan debt to hurt my husband’s credit score.” Yet another borrower says, “I have a fiancé that I can’t marry or support because of my financial situation, and that only makes the mental anguish a million times worse. . . . I may never be able

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<sup>13</sup> See *id.* (noting that defaulted borrowers may “struggle to pay fees necessary to maintain professional licenses”).

<sup>14</sup> See *id.* (noting that a defaulted borrower may “be unable [to] open a new checking account”).

<sup>15</sup> See *id.* (citing Jennifer M. Shand, *The Impact of Early-Life Debt on the Homeownership Rates of Young Households: An Empirical Investigation* (2007)).

<sup>16</sup> See *id.* (citing Dora Gicheva, *The Effects of Student Loans on Long-Term Household Financial Stability* (Univ. of North Carolina Greensboro Dep’t of Econ. Working Paper no. 14-02, 2014)).

<sup>17</sup> See *id.* (citing Dora Gicheva, *In Debt and Alone? Examining the Causal Link between Student Loans and Marriage* (Working Paper, 2013)).

to have a life or family now.” Those who do get married face further difficulties: “[m]y marriage is in danger because of constant stress.”

9. *Inability to re-enroll in high quality education.* Perversely, the loans student borrowers took out to advance their goals of higher education and increased opportunity now stand in the way of them doing so, leaving them unable to attend higher value institutions.<sup>18</sup> A borrower sums it up: “After the LACK of education I received from the school, I wanted to attend another school but couldn’t because I was maxed out on loans.”

Certain groups of students would experience additional harms as a result of the delay. The Borrower Defense Rule ensures automatic loan relief for students whose schools closed on or after November 1, 2013, and before they could complete their programs. So long as those students did not enroll at another Title IV-participating school within three years, they would have received automatic loan discharges. The Borrower Defense Rule also gives Federal Family Education Loan Program (FFEL) borrowers the right to appeal guaranty agencies’ denials of closed school discharge applications to ED. Further delay deprives students of these important rights and benefits.

Beyond the Borrower Defense Rule’s provisions concerning borrower defense procedures, the Rule provides important new provisions that seek to ensure financial responsibility of proprietary schools and to provide disclosures to students when a school’s students are unable to repay their loans. In promulgating the Rule, ED documented the important needs served by these provisions, and their benefits to students, the public, and the federal fisc. ED recognized that the Rule’s financial responsibility provisions would deter unscrupulous schools from defrauding students,<sup>19</sup> and that the Rule’s loan repayment disclosure requirement would enable students to make “more informed enrollment and financing decisions.”<sup>20</sup> Although ED has offered no explanation of how its conclusions in these regards were erroneous, it now proposes additional delay in the implementation of these provisions, which will in turn delay the achievement of the benefits associated with them.

***Further delay of the forced arbitration and class action waiver provisions is particularly harmful to student loan borrowers and the public.***

The Borrower Defense Rule includes a provision prohibiting schools that receive Title IV funding from relying on forced arbitration clauses and class action waivers. Class action waivers prevent students who all experienced the same fraudulent practices from bringing a single case against their school and, because individual students typically cannot afford to hire their own attorneys, limit students’ access to legal representation. Arbitration clauses force students into secretive tribunals, with limited review. The results of arbitrations are usually kept confidential, which prevents students from establishing a pattern of illegal behavior by a school and impedes law enforcement agencies from investigating the fraud. As ED remarked in promulgating the Borrower Defense Rule:

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<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 76,050 (noting that financial responsibility provisions “introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist”).

<sup>20</sup> *Id.* at 75,926.

[E]vidence showed that the widespread and aggressive use of class action waivers and predispute arbitration agreements coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program. It is undisputable that the abuse occurred, that a great many students were injured by the abuse, that the abusive parties aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school[s] to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.<sup>21</sup>

Thus, ED found that limiting the ability of recipients of Title IV funding to force students to agree to these predatory provisions would “enable more borrowers to seek redress in court.”<sup>22</sup> Continuing to delay the Borrower Defense Rule would deprive borrowers of the ability to seek that redress. For some claims, the statute of limitations will run out during the delay, which will prevent these students from ever having a chance to prove their allegations in court.

***The purported justifications for further delay are insufficient and illogical.***

None of the reasons provided in the IFR furnish a sufficient basis to further delay the Borrower Defense Rule and deprive student borrowers of the benefits of that rule.

The IFR’s Regulatory Impact Analysis details minor cost savings, such as those in schools’ “annual paperwork burden,”<sup>23</sup> but fails to account for the much more significant harms that would be faced by students as a result of the delay. In promulgating the Borrower Defense Rule, ED itself emphasized that the Rule would “give students access to consistent, clear, fair, and transparent processes to seek debt relief.”<sup>24</sup> Delay deprives borrowers of that consistency, clarity, fairness, and transparency, a cost that ED now fails to recognize. Notably, when ED did conduct a thorough analysis of the effects of a potential delay that included the effects on borrowers, it found that “[d]elaying the regulations would delay the improved clarity and accountability from the regulations without developing additional data within a definite timeframe.”<sup>25</sup> ED accordingly concluded that “we do not believe the benefits of such a delay outweigh the costs.”<sup>26</sup> Recently, ED’s own Inspector General expressed concern about ED’s delay of the Rule’s financial responsibility provisions, which, if enforced, “would improve [Federal Student Aid]’s processes for mitigating potential harm to students and taxpayers.”<sup>27</sup>

The IFR asserts that “simply delaying the final regulations for a year will have a . . . limited effect.”<sup>28</sup> But for student borrowers, who are often living on a month-to-month basis, yet another year’s delay is significant. Every day, these borrowers face difficult decisions because of their constrained finances and, in the words of one borrower, the “[e]motional stress of constant debt.” Borrowers describe their loans as “stressful,” “overwhelming,” “weighing me down in

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<sup>21</sup> *Id.* at 76,025.

<sup>22</sup> *Id.* at 75,939.

<sup>23</sup> 82 Fed. Reg. at 49,118.

<sup>24</sup> 81 Fed. Reg. at 75,926.

<sup>25</sup> *Id.* at 76,049.

<sup>26</sup> *Id.*

<sup>27</sup> Letter from Kathleen S. Tighe, Inspector General, ED, to Sen. Patty Murray (Oct. 31, 2017), <https://www2.ed.gov/about/offices/list/oig/misc/lettersenmurraybdgeoctober2017.pdf>.

<sup>28</sup> 82 Fed. Reg. at 49,118.

life,” and “crushing.” They feel “depressed,” “discouraged,” “grief, hopelessness, empty, [w]recked,” and “broken.” Several even expressed “suicidal thoughts.” These statements demonstrate that delaying loan relief would have serious consequences. One borrower “can’t even feed myself some weeks because I have to pay these” loans. Student borrowers are “tired of being hungry and worrying where [they] will end up because of this mess.” An additional year of crushing debt, bad credit, and uncertainty would be a heavy burden.

ED also fails to account for the impact of delaying other provisions of the rules. An additional year of delay in implementation of the arbitration and class action provisions of the Rule will result in another year in which students who seek to assert claims against schools are likely to find themselves forced into an ineffectual and expensive dispute resolution process—individual arbitration. Because statute of limitations clocks will continue to tick on students’ claims during that year of delay, the effect of that delay cannot be waved off as “limited.” In addition, during the period of delay, students will continue to have to make choices about what schools to attend without the information that would be provided by the Rule’s provision regarding repayment rate disclosure. Students who commit to a school that turns out to be a debt-trap will face long-term consequences, and will take little comfort in the assertion that the effect of only another year of delay is “limited.” Likewise, financially irresponsible schools that continue to participate in the federal loan program during the additional period of delay without providing the letters of credit that would otherwise be required under the provisions of the Rule may saddle the federal government with significant financial consequences.

ED’s statement that it is “continuing to process borrower defense claims under the existing regulations”<sup>29</sup> does not comport with the experiences of student borrowers, many of whom submitted claims years ago and have not heard anything from ED. Taking advantage of existing regulations’ silence on the process for asserting borrower defense claims on non-defaulted loans, ED has ignored such claims altogether. In a July 7 letter to Senator Durbin, ED confirmed that despite sitting on 65,169 pending claims, it had not approved a single one since January 20, 2017.<sup>30</sup> That number has only grown since July: more than 87,000 applications for relief were pending before ED as of October 24, 2017.<sup>31</sup>

***Neither APA Section 705 nor the Master Calendar Rule supports this delay.***

ED asserts that the IFR is necessary because of the previous delay under APA Section 705 and the Master Calendar Rule: “Because the final regulations have been postponed beyond July 1, 2017, pursuant to the 705 Notice, the postponement of the final regulations must be for at least one year to comply with section 482 of the HEA (20 U.S.C. 1089).”<sup>32</sup> But the Master

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<sup>29</sup> *Id.* at 49,115.

<sup>30</sup> Letter from James F. Manning, Acting Under Secretary, ED, to Sen. Richard J. Durbin (July 7, 2017), <https://www.durbin.senate.gov/imo/media/doc/17-010570%20Durbin%20Outgoing.pdf>.

<sup>31</sup> Offices of Sens. Elizabeth Warren & Richard J. Durbin, *Insult to Injury: How the DeVos Department of Education is Failing Defrauded Students* 1 (2017), [https://www.warren.senate.gov/files/documents/2017\\_11\\_Warren\\_Durbin\\_Borrower\\_Defense\\_Report.pdf](https://www.warren.senate.gov/files/documents/2017_11_Warren_Durbin_Borrower_Defense_Report.pdf).

<sup>32</sup> 82 Fed. Reg. at 49,115.

Calendar Rule requires no such additional delay.<sup>33</sup>

The Master Calendar Rule requires only that:

any regulatory changes initiated by the Secretary affecting the programs under this subchapter 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.<sup>34</sup>

Because the Borrower Defense Rule was published in its final form on November 1, 2016, it may become effective during the 2017-18 award year. That ED has purported to stay the Rule's effective date pending litigation through an improper invocation of Section 705 has no bearing on the Master Calendar Rule analysis. In the absence of the IFR, the Borrower Defense Rule could be implemented as soon as the Section 705 stay is lifted. ED argues that implementing the rule on any date other than July 1 would "frustrate the notice objectives of the HEA."<sup>35</sup> But the parties affected by the Borrower Defense Rule have been on notice since it was published in final form on November 1, 2016. There is no reason to further delay urgently needed relief.

Not only does ED's interpretation of the Master Calendar Rule have no support in the text of the statute, but it is inconsistent with ED's own previous position that all the provision requires is that the text of a final rule be published in the Federal Register in order for it to become effective in the following award year.<sup>36</sup>

ED's previous position was accepted by the D.C. Circuit in *Career College Association v. Riley*, and the D.C. Circuit's opinion there strongly suggests that the only relevant inquiry is whether the "normative standard" at issue was published in the Federal Register by November 1, even if other things had to happen after that date for the Rule to be effective.<sup>37</sup> The court held that neither the lack of an effective date nor the pendency of OMB approval affected whether the regulation at issue was in "final form." ED's purported indefinite stay of the Rule pursuant to Section 705 here did not do so either. The regulated community has been on notice of the normative standard since November 1, 2016. That ED has chosen not to enforce it does not mean the November 1, 2016 "publication was not 'final' within the meaning of the Master Calendar Provision."<sup>38</sup> As in *Career College Association*, "[t]he published regulation . . . gives a maximum regulatory exposure; an institution knows fully the substantive requirements."<sup>39</sup>

There is no indication that the "notice objectives of the HEA" sought to provide ED with the discretion to unilaterally delay regulations by at least one year at a time simply by

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<sup>33</sup> A more complete explanation of the unlawfulness of the IFR's invocation of the Master Calendar Rule and of the good-cause exception to notice and comment and negotiated rulemaking procedures is set forth in the plaintiffs' motion for summary judgment in the pending case *Bauer v. DeVos*, a copy of which is attached hereto as Exhibit A and incorporated by reference.

<sup>34</sup> 20 U.S.C. § 1089.

<sup>35</sup> 82 Fed. Reg. at 49,116.

<sup>36</sup> See Br. for Appellees at 19-26, *Career College Ass'n v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996) (No. 94-5270), 1995 WL 17204770.

<sup>37</sup> 74 F.3d at 1268-69.

<sup>38</sup> *Id.* at 1269.

<sup>39</sup> *Id.* at 1269 n.2.

announcing a delay, without even engaging in any reasoned decisionmaking. But that is what the interpretation expressed in the IFR would allow. At any time, the agency could announce a “stay” or “postponement” or delay of a rule—by invoking Section 705, perhaps, or by simply issuing an “interim final rule” or an order resting on nothing more than administrative fiat. If that stay or postponement lasted a single day past July 1, it would convert into at least a one-year delay automatically, even if the delay was unlawful when issued. And ED could insulate the lawfulness of its initial order from judicial review by waiting until shortly before July 1 to make its pronouncement, as it did here. The Section 705 stay that the IFR uses as a basis for further delay is itself invalid because ED failed to conduct the required analysis. A four-factor test governs whether a Section 705 stay is appropriate: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm absent relief; (3) the balance of equities; and (4) the public interest.<sup>40</sup> Both courts and agencies are required to apply this test.<sup>41</sup> ED considered none of these factors, and instead only cited “serious questions concerning the validity of certain provisions of the final regulations,”<sup>42</sup> questions which ED did not even identify. The IFR doubles down on this invalid analysis by using the Section 705 stay as an excuse for further delay—while ED makes no attempts to resolve the pending litigation, which is dormant.

***ED was wrong to proceed without pre-rule notice and comment and negotiated rulemaking.***

The rationale for avoiding the procedural requirements of the APA and HEA contained in the IFR is insufficient. The assertion that “notice-and-comment and negotiated rulemaking are unnecessary and impracticable”<sup>43</sup> does not meet the high bar required to invoke the narrow “good cause” exception.<sup>44</sup> Agencies may only take advantage of the “unnecessary” exception in “those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.”<sup>45</sup> As explained above, delaying the Borrower Defense Rule an entire year is neither insignificant nor inconsequential to student borrowers. And it would not have been “impracticable” to follow the requisite procedures. The IFR does not identify any fact that required ED to act on October 24, 2017, to avoid an imminent threat to life or physical property.<sup>46</sup> Although ED argues that following the statutory procedures would have been “impracticable” because litigation was commenced on May 24, 2017, only a short time before the initial effective date of July 1, 2017,<sup>47</sup> that has no logical connection to why procedures were impracticable for the next five months. Accordingly, the IFR is procedurally invalid.

The costs imposed on borrowers by this delay are real and massive: the money devoted to debt service on student loan debt does not provide borrowers with any basic life necessities, and leaves them scrambling to pay for food, housing, and healthcare. By unnecessarily delaying the

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<sup>40</sup> See, e.g., *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

<sup>41</sup> *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012).

<sup>42</sup> 82 Fed. Reg. at 49,115.

<sup>43</sup> *Id.* at 49,117.

<sup>44</sup> See *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

<sup>45</sup> *Id.* at 94.

<sup>46</sup> See *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

<sup>47</sup> 82 Fed. Reg. at 49,117.

Borrower Defense Rule based on an incorrect interpretation of the Master Calendar Rule, the IFR exacerbates the harms of crushing student loan debt.

Thank you for the opportunity to submit these comments. If you have any questions about these comments, please contact Amanda Savage at [asavage@law.harvard.edu](mailto:asavage@law.harvard.edu) or Adam Pulver at [apulver@citizen.org](mailto:apulver@citizen.org).

Project on Predatory Student Lending and Public Citizen  
Comments on Interim Final Rule, Docket ID ED-2017-OPE-  
0108

Exhibit A

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

MEAGHAN BAUER and STEPHANO )  
DEL ROSE, )  
 )  
 *Plaintiffs,* )  
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 v. )  
 )  
 ELISABETH DEVOS, Secretary, U.S. )  
 Department of Education, *et al.*, )  
 *Defendants.* )  
 \_\_\_\_\_ )

Civil Action No. 17-1330 (RDM)

**PLAINTIFFS’ RENEWED MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs Meaghan Bauer and Stephano Del Rose hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, plaintiffs submit the accompanying (1) memorandum; (2) declarations of attorney Toby R. Merrill and plaintiffs Meaghan Bauer and Stephano Del Rose; and (3) a proposed order.

Dated: November 10, 2017

Respectfully submitted,

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

MEAGHAN BAUER and STEPHANO )  
DEL ROSE, )  
 )  
 *Plaintiffs,* )  
 )  
 v. )  
 )  
 ELISABETH DEVOS, Secretary, U.S. )  
 Department of Education, *et al.*, )  
 *Defendants.* )  
 \_\_\_\_\_ )

Civil Action No. 17-1330 (RDM)

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The need to protect student borrowers from predatory for-profit educational institutions has become ever more apparent over the past several years, as investigations have revealed fraud and misrepresentation that have lured students into amassing significant student loan debt—under federal government programs—in exchange for low-quality and often useless educations. These predatory institutions stand on precarious financial grounds and close at alarming rates, stranding students and leaving federal taxpayers with the bill.<sup>1</sup> Plaintiffs Meaghan Bauer and Stephano Del Rose are two of the tens of thousands of student borrowers nationwide who have been harmed by the practices of these predatory institutions and continue to be harmed today, as the Department of Education plays games to prevent rules finalized by notice and comment over a year ago from ever taking effect: first, by issuing an indefinite stay of the rule based on an arbitrary and improper invocation of section 705 of the APA (the Delay Rule), and then, after delays in this and the litigation challenging the underlying rule, using the invalid section 705 action to justify an Interim Final Rule (IFR), without notice and comment, further delaying the rule and attempting to prevent Plaintiffs from obtaining a remedy from this Court.

In 2015, the Department of Education (the Department or ED) began a negotiated rulemaking, as required by the Higher Education Act (HEA), 20 U.S.C. § 1098a, to examine proposals to address problems caused by predatory and failing institutions. When the negotiated rulemaking did not yield consensus, ED undertook a full notice-and-comment rulemaking—considering over

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<sup>1</sup> See, e.g., Press Release, U.S. Department of Education Announces Path for Debt Relief for Students at 91 Additional Corinthian Campuses, Mar. 25, 2016, <https://www.ed.gov/news/press-releases/us-department-education-announces-path-debt-relief-students-91-additional-corinthian-campuses>; Tamar Lewin, *Government to Forgive Student Loans at Corinthian Colleges*, N.Y. Times, June 8, 2015, <https://www.nytimes.com/2015/06/09/education/us-to-forgive-federal-loans-of-corinthian-college-students.html>.

10,000 comments and publishing a 150-page final rule, known as the Borrower Defense Rule (the Rule) on November 1, 2016, with an effective date of July 1, 2017. ED, Final Regulations, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926 (Nov. 1, 2016). The Rule clarified and strengthened procedures by which borrowers raise claims of misrepresentation and fraud as defenses against loan repayment and obtain loan discharges when schools close; disallowed participation in certain federal student loan programs by schools that rely on forced arbitration clauses or class action waivers when students sue them over loan-funded education; required schools to provide a letter of credit or otherwise demonstrate financial soundness when their soundness is in doubt; and required for-profit schools to publicly disclose when their median borrower has been unable to reduce his or her loan balance by even one dollar after three years.

More than six months later, a trade association representing private post-secondary schools sued in this Court, challenging the Rule and moving for a preliminary injunction as to one part of the rule. *CAPPS v. DeVos*, No. 17-999 (D.D.C. filed May 24, 2017) (the *CAPPS* litigation). A few weeks later, ED issued the Delay Rule, which indefinitely postponed the effective date of a selection of provisions of the Rule two weeks before they would have gone into effect. ED, Final rule; Notification of Partial Delay of Effective Dates, 82 Fed. Reg. 27621 (Jun. 16, 2017). Denominating its action a final rule, the Department invoked section 705 of the Administrative Procedure Act (APA), 5 U.S.C. § 705, as its sole authority for delaying the Borrower Defense Rule, while also indicating it intended to initiate rulemaking to “review and revise” the Rule. *Id.* at 27621-22.

The Delay Rule was a patently improper use of section 705. Invocation of section 705 must be based on the same four-factor test that guides courts in granting preliminary injunctive

relief. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30-31 (D.D.C. 2012). In the Delay Rule, ED did not even acknowledge this standard, and instead engaged in a cursory one-page discussion that failed to acknowledge any negative impacts of a delay on students, the public, and the government itself—including the harms that the agency itself had determined only months earlier that the Borrower Defense Rule would help prevent. Moreover, the purported harm to regulated institutions that the Department identified does not rise to the level of the non-speculative, irreparable serious injury that is required for a stay. Nowhere in the Delay Rule did the Department provide any explanation for, or even acknowledgement of, its reversal of its view of the costs and benefits of the Borrower Defense Rule or its legal basis—a failure that condemns its decision as arbitrary and capricious under the four-factor test or any other conceivable standard.

Although this action challenging the Delay Rule was promptly commenced on July 6, 2017, after a series of delays and extensions, Defendants were finally scheduled to respond to Plaintiffs' complaint and motion for summary judgment on October 31, 2017. Just one week before that deadline, ED issued an "Interim Final Rule," without notice and comment or negotiated rulemaking, purporting to amend the Borrower Defense Rule to move the effective date to July 1, 2018. ED, Interim final rule; Delay of Effective Date, 82 Fed. Reg. 49114 (Oct. 24, 2017). Without acknowledging this litigation challenging the legitimacy of ED's invocation of section 705, and with a cursory, factually inaccurate analysis of the consequences of its actions, the Interim Final Rule stated that, in light of an HEA provision referred to as the "master calendar requirement," 20 U.S.C. § 1089, the earliest the rule can go into effect is now July 1, 2018—even if the Delay Rule's purported section 705 stay expires or is set aside.

ED's position reflects an incorrect and atextual reading of the statute, and is inconsistent with D.C. Circuit case law, *see Career College Association v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996),

and ED's own prior interpretation. Both the D.C. Circuit and ED agreed that the only question under the master calendar provision is whether a rule was published "in final form" by the requisite date. The "final form" of the Borrower Defense Rule was published on November 1, 2016 and has not changed. ED's new, alternative interpretation of the master calendar rule would allow the agency to arbitrarily "stay" any rule it does not like and create an unreviewable one-year delay. The HEA does not permit—much less require—such an end-run around the principles and procedures of reasoned decisionmaking.

In the Interim Final Rule, ED acknowledged that its ultimate goal is to achieve delay after delay so that it can complete a new rulemaking "before regulatory changes become effective in this area." 82 Fed. Reg. at 49117. This objective animates both the Delay Rule's and the Interim Final Rule's distortions of statutory provisions and procedural requirements. But this case is not one where "delaying" a valid rule simply freezes the status quo; it hurts borrowers every day. ED's unlawful actions harm not only borrowers like Plaintiffs who have already left predatory institutions saddled with debt and worthless educations, but also current and future students. Since the Delay Rule was issued on June 16, 2017, predatory institutions that would have been subject to the Borrower Defense Rule continue to shutter, and their students are left without the protections that the Rule would have provided them.<sup>2</sup> Meanwhile, the Department halted processing borrower

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<sup>2</sup> See, e.g., Eva-Marie Ayala, *Hundreds of Veterans Scramble after Garland For-Profit College Closes*, Dallas Morning News, Sept. 28, 2017, <https://www.dallasnews.com/news/education/2017/09/28/hundreds-veterans-scramble-garland-profit-college-closes>; Elizabeth Olson, *For-Profit Charlotte School of Law Closes*, N.Y. Times, Aug. 15, 2017, <https://www.nytimes.com/2017/08/15/business/dealbook/for-profit-charlotte-school-of-law-closes.html>; Kristen Taketa, *Hickey College in St. Louis Stops Accepting New Student Applications*, St. Louis Post-Dispatch, Jun. 21, 2017, [http://www.stltoday.com/news/local/education/hickey-college-in-st-louis-stops-accepting-new-student-applications/article\\_de82cce1-9c15-5ee5-9776-f9d18d215f2a.html](http://www.stltoday.com/news/local/education/hickey-college-in-st-louis-stops-accepting-new-student-applications/article_de82cce1-9c15-5ee5-9776-f9d18d215f2a.html); see also Accrediting Council for Independent Colleges and Schools, "Institution Closings," <http://www.acics.org/commission%20actions/content.aspx?id=1476> (listing nine school closures since issuance of Delay Rule).

defense applications, and when it resumes processing it will do so without the protections that the Rule provides borrowers. Both the Delay Rule and the Interim Final Rule completely ignore the harms to borrowers caused by delay.

The Delay Rule must be set aside because its invocation of section 705 does not reflect reasoned decision-making, and there is no justification for ED's issuing what amounts to a substantive rule without the required negotiated rulemaking and notice-and-comment proceedings. The Interim Final Rule must also be set aside as arbitrary and capricious, because it rests on an unreasonable construction of plain statutory text and other impermissible factors, and because ED cannot meet the high burden of establishing that its substantive rule falls under the narrow good cause exceptions to the APA's and HEA's procedural rulemaking requirements.

## STATEMENT OF FACTS

### I. Statutory and Regulatory Background<sup>3</sup>

#### A. The Title IV Aid Program and Predatory Schools

The federal government spends more than \$125 billion annually on student aid distributed under Title IV of the HEA, 20 U.S.C. § 1070 *et seq.* See ED, Federal Student Aid Office, 2016 Annual Report, [https://studentaid.ed.gov/sa/sites/default/files/FY\\_2016\\_Annual\\_Report\\_508.pdf](https://studentaid.ed.gov/sa/sites/default/files/FY_2016_Annual_Report_508.pdf). Students use Title IV, the largest stream of federal postsecondary education funding, to attend

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<sup>3</sup> Plaintiffs believe that the administrative record in this action is properly limited to the documents published and/or cited by the agency in the Federal Register and its other official statements concerning the Delay Rule, and the docket in the pending litigation in *CAPPS v. DeVos*. The one section 705 challenge in this Court that Plaintiffs have identified proceeded on a similar administrative record. See *Sierra Club v. Jackson*, No. 11-cv-1278-PLF, Dkt. No. 18 (administrative record consisting of agency publications and subsequent petitions for reconsideration and/or judicial review). In accordance with the Court's Standing Order, plaintiffs' counsel will work with the Government to prepare a joint appendix. References to comments submitted in the underlying rulemaking at issue in the *CAPPS* litigation are provided as background.

colleges, career training programs, and graduate schools authorized by the Department to participate in Title IV programs. To receive Title IV funds, participating schools must enter into contracts called Program Participation Agreements (PPA) with the Department and agree to comply with the HEA and all applicable regulations. *See* 20 U.S.C. §§ 1094 & 1087c(a); 34 C.F.R. §§ 668.14 & 685.300(b). Schools act as fiduciaries to the Department in coordinating federal aid programs, and by participating, they become subject to federal oversight. *See, e.g.*, 20 U.S.C. § 1094; 34 C.F.R. § 668.82.

Recent years have seen many revelations of Title IV schools engaging in fraud and misrepresentation regarding educational offerings and student outcomes. *See* ED, Proposed Rule, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39330, 39335 (Jun. 16, 2016) (NPRM) (discussing fraudulent practices of Corinthian College); *see also* Comments of Legal Services NYC, ED-2015-OPE-0103-10057 at 3-6 (Aug. 1, 2016); Comments of Coalition of Legal Aid Organizations, ED-2015-OPE-0103-10705 at 7-9, 12, 14-16, 19-25 (Aug. 1, 2016); Comments of Attorneys General of Massachusetts, et al., ED-2015-OPE-0103 at 1 (Aug. 1, 2016); Comments of Veteran Negotiators, ED-2015-OPE-0103-9726 at 1-2 (Aug. 1, 2016).<sup>4</sup> Predatory schools, generally concentrated in the for-profit college industry, target vulnerable populations of students, including students of color, first-generation immigrants, single parents, and students with disabilities. *See, e.g.*, Comments of Americans for Financial Reform, ED-2015-OPE-0103-10698 at 1 (Aug. 1, 2016). Because Title IV schools cannot obtain more than 90 percent of their funding from

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<sup>4</sup> All comments are available at <https://www.regulations.gov/docket?D=ED-2015-OPE-0103> (searchable by provided docket number).

the Department's aid programs, 20 U.S.C. § 1094(a)(24), these schools also relentlessly target service members and veterans who have access to GI Bill benefits that do not count toward the 90 percent cap. *See* Comments of Veteran Negotiators, ED-2015-OPE-0103-9726 at 1 (Aug. 1, 2016).

Investigations have documented boiler room-like enrollment processes at such schools, which train employees to encourage prospective students to enroll quickly before classes purportedly fill up. *See* U.S. Senate Health, Education, Labor & Pensions Committee, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* 64 (2012) (HELP Report) (cited in multiple comments, including Coalition of Legal Aid Organizations, *supra*, and Consumers Union, ED-2015-OPE-0103-10390 (Aug. 1, 2016)); *see also* Comments of Public Citizen, ED-2015-OPE-0103-10723 (Aug. 1, 2016) (including student declarations describing the enrollment process at predatory schools). Once enrolled, students often find that the educational experience is not what they were promised. As the Senate HELP Committee found, these schools often spend more per student on marketing than on instruction—while public and non-profit institutions spend significantly more on instruction in absolute and relative terms. *See, e.g.*, HELP Report at 86-87. For example, the HELP Committee noted that in 2009, Northern Virginia Community College spent \$4,068 per student per year on instruction, and about \$22 per student per year on marketing. *Id.* at 87. For-profit ITT, by contrast, spent only \$2,839 per student on instruction, and a whopping \$3,156 per student on marketing. *Id.* It is little surprise, then, “that many for-profit schools have curricula that do not challenge students, academic integrity policies that are sparsely enforced, and teaching practices that in some cases do not lead to successful student learning and outcomes.” *Id.* at 89. Many also have substandard, outdated, or insufficient equipment and materials. *See, e.g.*, Bauer Decl. ¶ 10; Del Rose Decl. ¶ 10; Comments of Coalition of Legal Aid Organizations, *supra*, at 15.

Many students drop out of such predatory schools, citing a variety of reasons, including the low quality of educational programs and schools' failures to live up to promises regarding facilities and services. Many students come to realize they were admitted to programs from which the school should have known they could not benefit. *See* NPRM, 81 Fed. Reg. at 39366; HELP Report at 69 (discussing enrollment of a veteran with traumatic brain injury who "can't remember what course he's taking"). Students who drop out, and even those who graduate, often are surprised to find they are unable to meaningfully use the educational credits they earned, as they were misled about a particular program's accreditation, its preparation of students to seek professional certification or licensure, or the transferability of its credits to other schools. In 2013, for example, the Attorney General of Colorado entered into a \$3.3 million settlement with Argosy University, Denver, based on allegations that the school misled students about the accreditation of its counseling psychology doctorate program. Press Release, Attorney General Suthers Announces Consumer Protection Settlement with Argosy University (Dec. 5, 2013), <https://coag.gov/press-room/press-releases/12-05-13>, cited in Comments of Consumers Union, *supra*, at 5. The Attorney General concluded that Argosy had engaged in "a long and elaborate pattern of deceptive behavior." *Id.* The state observed that no student in the program "ha[d] become licensed as a psychologist in Colorado or any other state." *Id.*

When Title IV-participating schools engage in fraud, misrepresentation, and other wrongdoing, they threaten the federal investment in student aid. Students who drop out or obtain worthless degrees from institutions ill-prepared to educate them—a common outcome at predatory schools—are more likely to default on their student loans. *See* NPRM, 81 Fed. Reg. at 39373 (citing Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan*

*Defaults* (Brookings Institution 2015), 49, <https://www.brookings.edu/bpea-articles/a-crisis-in-student-loans-how-changes-in-the-characteristics-of-borrowers-and-in-the-institutions-they-attended-contributed-to-rising-loan-defaults/>) (finding 47% default rate for for-profit school borrowers versus 28% for borrowers at all schools). By statute, Department regulation, and the terms of their loan contracts, students who are harmed by a Title IV school's violation of certain laws, including prohibitions on fraud, may be entitled to cancellation of their federal Direct Loans through a process known as a "borrower defense" to repayment. *See* 20 U.S.C. § 1087e(h); preexisting 34 C.F.R. § 685.206(c). Moreover, students who attend a Title IV school that closes because of mismanagement or wrongdoing are entitled to a "closed-school" discharge of their federal loans if they do not reenroll in another program. 34 C.F.R. § 685.214 (new and preexisting rule).

Unfortunately, students who have been injured by their school's wrongdoing often have little recourse to be made whole by the school itself. Predatory schools have been remarkably successful at insulating themselves from liability through forced arbitration and class action waiver provisions buried in their enrollment contracts. One recent investigation found, based on a sample of enrollment contracts at for-profit colleges, that roughly 98 percent of students who attended such colleges were subject to forced arbitration provisions. *See* Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students' Rights* 7 (The Century Foundation 2016) (submitted as part of Comments of the Century Foundation, ED-2015-OPE-0103-9861 (Aug. 1, 2016)). Another analysis documented the role that such provisions played in forcing student-brought cases out of court and shutting down class actions that alleged systematic wrongdoing. *See* Comments of Public Citizen, *supra*, App'x C at 8-18. The recent closures of Corinthian Colleges and ITT Technical Institutes provide two cases in point. Both schools eventually closed after multiple state and federal investigations, leaving the federal government and/or students on the hook for loans

used to finance education at these predatory institutions. *See, e.g.*, Rule, 81 Fed. Reg. at 75985; ED, Important Information Regarding ITT Educational Services, Inc., <https://studentaid.ed.gov/sa/about/announcements/itt>. For years before its closing, however, Corinthian had used arbitration agreements with class action waivers to stave off lawsuits alleging a variety of misrepresentations in the recruitment process. *See, e.g., Ferguson v. Corinthian Colleges*, 733 F.3d 928 (9th Cir. 2013); *Miller v. Corinthian Colleges, Inc.*, 769 F. Supp. 2d 1336 (D. Utah 2011). During the peak years of Corinthian’s wrongdoing, only one student among thousands enrolled in the school obtained a favorable arbitrator’s award.<sup>5</sup> Likewise, ITT enforced arbitration agreements including “gag clauses” that forbade students who *did* arbitrate against the school from publicly disclosing any information about the evidence obtained in, or outcome of, the proceedings. Comments of Public Citizen, *supra*, App’x C at 12-13. In one case, ITT obtained a permanent injunction preventing several former students who had prevailed against it in arbitration from sharing the arbitral findings with another student seeking to bring a similar suit. *ITT Educational Servs., Inc. v. Arce*, 533 F.3d 342 (5th Cir. 2008).

## **B. The Department’s Consideration of the Borrower Defense Rule**

In 2015, after the Corinthian collapse and amid widespread confusion about the borrower defense process, the Department announced that it intended to amend its Title IV regulations to address the process, including its consequences for borrowers, schools, and the agency. *See* ED, Negotiated Rulemaking Committee; Public Hearings, 80 Fed. Reg. 50588, 50588 (Aug. 20, 2015).

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<sup>5</sup> In connection with its August 1, 2016 comments in response to the NPRM, Public Citizen conducted an analysis of publicly available data produced by the American Arbitration Association (AAA). That analysis found 71 students pursued arbitration against Corinthian with AAA between 2011 and 2015. Ten students’ claims were resolved by an arbitrator’s final decision; one received monetary relief, and none received non-monetary relief. Comments of Public Citizen, *supra*, at 25.

The HEA generally requires the agency to attempt to adopt rules through consensus-based negotiated rulemaking. 20 U.S.C. § 1098a(b). If the negotiators fail to reach agreement on a rule, the Department may propose a rule of its own choosing on the subjects covered by the negotiated rulemaking and follow normal APA notice-and-comment procedures.

Consistent with the HEA's mandate, the Department established a negotiated rulemaking committee with representatives selected from groups of stakeholders with an interest in the rule, including borrowers, veterans' groups, consumer groups, legal aid providers, state attorneys general, and a broad array of schools, including for-profit institutions. *See* NPRM, 81 Fed. Reg. at 39333. The negotiators, however, ultimately did not reach consensus on a rule. *See id.* at 39334-35. Accordingly, in June 2016, the Department published an NPRM setting forth its own proposal and set a deadline for public comments of August 1, 2016. *Id.* at 39330. The NPRM stated that the Department intended to issue a final rule to take effect on July 1, 2017, *see, e.g., id.* at 39331, 39337, the beginning of the next "award year" for Title IV funding, *see* 20 U.S.C. § 1088(a)(1); 34 C.F.R. § 600.2.

The Department received more than 10,000 comments on the proposed rule. Some addressed the proposed effective date of the regulations and either urged that the effective date be postponed or that portions of any rule be permitted to take effect earlier than July 1. *See* Comments from the California Ass'n of Private Postsecondary Schools, ED-2015-OPE-0103-10693 at 8 (Aug. 1, 2016) (urging ED to "allow more time for study, deliberation, and input, rather than rushing to promulgate these rules ... for an effective date of July 1, 2017"); Comments of Trade Ass'ns Representing Student Loan Providers, ED-2015-OPE-0103-10045 at 4 (Aug. 1, 2016) (urging ED to permit early implementation of a portion of a rule before the effective date).

### C. The Contours of the Borrower Defense Rule

On November 1, 2016, the Department published its final Borrower Defense Rule, “effective July 1, 2017.” 81 Fed. Reg. at 75926. The Rule has four key parts:

**1. The borrower defense process.** The Borrower Defense Rule provides revised procedures to better enable student loan borrowers to vindicate their longstanding right to seek cancellation of federal loans through the “borrower defense” process when the loans were used to attend a school that engaged in fraud or other unlawful conduct. 81 Fed. Reg. at 75961-64. The Rule requires the Department to process borrower defense applications “through a fact-finding process” that includes consideration of “Department records” and “[a]ny additional information or argument that may be obtained by” the Department—*i.e.*, not just the evidence available to and provided by borrowers. 81 Fed. Reg. at 76084 (new § 685.222(e)(3)(i)). The Rule also obligates the Department, “[u]pon the borrower’s request,” to identify “the records the Department official considers relevant to the borrower defense” and, upon reasonable request, provide them to the borrower. *Id.* (new § 685.222(e)(3)(ii)). If the Department denies cancellation in full or part, it must issue “a written decision” notifying the applicant “of the reasons for the denial, the evidence that was relied upon, any portion of the loan that is due and payable to the Secretary, and whether the Secretary will reimburse any amounts previously collected.” *Id.* (new § 685.222(e)(4)). While a borrower defense application is pending, the Rule requires the Department to provide automatic forbearance on payments toward any non-defaulted loans for which cancellation is sought. *See* 81 Fed. Reg. at 76083 (new § 685.222(e)(2)(i)); *see also id.* at 76080 (new § 685.205(b)(6)(i), (vi)).

In promulgating these new provisions, ED explained how they “give students access to consistent, clear, fair, and transparent processes to seek debt relief,” and reduce obstacles to pursuing borrower defense claims. 81 Fed. Reg. at 76047. The streamlined borrower defense process

also aids institutions: “[T]hrough clarification of circumstances that could lead to a valid claim, institutions may better avoid behavior that could result in a valid claim and future borrowers may be less likely to face such behavior,” which would also benefit both borrowers and the federal government. *Id.* at 76049. ED also noted the extensive benefits to “borrowers who ultimately have their loans discharged,” explaining that discharge would ameliorate the well-documented hardships that are associated with high levels of student debt, while also providing “spillover economic benefits.” *Id.* at 76051. By allowing more students to return to school, discharge would benefit both students and the public. *Id.*

**2. Arbitration and other contractual barriers to justice.** The Rule amends 34 C.F.R. § 685.300 to address the use of predispute arbitration agreements or class action waiver provisions by schools that wish to participate in the Direct Loan Program. *See* 81 Fed. Reg. at 76021-31. Specifically, the Rule provides that a participating school may not “enter into a predispute agreement [with a student] to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim.” 81 Fed. Reg. at 76088 (new § 685.300(f)(i)). It similarly amends § 685.300 to require a participating school to forgo reliance on any predispute agreement with a student that waives the student’s right to participate in a class action against the school related to a borrower defense claim. *Id.* (new § 685.300(e)). The Rule requires that, as of its effective date, schools participating in the Direct Loan Program include language incorporating the policy into any new contracts with students. *Id.* at 76087, 76088 (new § 685.300(e)(3)(i), (f)(3)(i)). Schools may either amend contracts entered into before the Rule’s effective date or notify affected students or former students that the schools will no longer rely on the contracts’ predispute arbitration or class action waiver provisions. *Id.* at 76087, 76088 (new § 685.300(e)(3)(ii)-(iii), (f)(3)(ii)-(iii)).

ED explained that “prohibiting predispute arbitration clauses will enable more borrowers to seek redress in court” through individual or class actions. 81 Fed. Reg. at 75939. The Department found that forced arbitration clauses “jeopardize the taxpayer investment in Direct Loans,” by allowing institutions to “insulat[e] themselves from direct and effective accountability for their misconduct, [] deter[] publicity that would prompt government oversight agencies to react, and [] shift[] the risk of loss for that misconduct to the taxpayer.” *Id.* at 76022. ED also concluded that class action waivers “effectively removed any deterrent effect that the risk of [] lawsuits would have provided,” and shifted the risk to taxpayers, by foreclosing meaningful options for redress other than the borrower defense process. *Id.* Based on its experience, ED concluded that “class action waivers for these claims substantially harm the financial interest of the United States and thwart achievement of the purpose of the Direct Loan Program.” *Id.* Limiting the use of arbitration clauses and class action waivers by Title IV-eligible institutions would thus benefit both borrowers and federal taxpayers, given the Department’s findings of “widespread and aggressive use of class action waivers and predispute arbitration agreements [that] coincided with widespread abuse by schools over recent years, and effects of that abuse on the Direct Loan Program.” *Id.* at 76025.

**3. Financial responsibility triggers.** The Rule amends the standards by which ED determines whether an institution is “financially responsible.” Institutions must meet these standards to be eligible for Title IV programs unless they obtain a letter of credit or demonstrate another form of financial protection. *See* 81 Fed. Reg. at 76075-76 (new 34 C.F.R. § 668.175).

The prior version of the regulations focused solely on the institution’s current equity, reserve, and net income ratios and calculated a “composite score” on that basis. The new regulations also take into consideration “triggering” events that indicate an institution is at significant risk of financial instability. For all institutions, these triggers are: (1) a debt or other liability arising from

a final judgment or settlement, 81 Fed. Reg. at 76073 (new § 668.171(c)(i)(A)); (2) the pendency for more than 120 days of an action by a federal or state government agency against the institution relating to the making of a Direct Loan or the provision of educational services, *id.* (new § 668.171(c)(i)(B)); (3) other litigation against the institution that has reached one of three procedural stages, *id.* (new § 668.171(c)(ii)); (4) a requirement for a “teach-out plan” by an institution’s accrediting agency for any location of that institution, *id.* (new § 668.171(c)(iii)); (5) a determination by the Secretary that the institution has programs that may be ineligible for aid under ED’s “gainful employment” rules, *id.* (new § 668.171(c)(iv)); and (6) withdrawal of owner equity in certain scenarios, *id.* (new § 668.171(c)(v)). If any of these six triggers is met, the Rule requires recalculation of the institution’s “composite score,” accounting for potential losses that could result from these events. *Id.* (new § 668.171(c)(2)).

The Rule also includes events that automatically trigger a finding of financial irresponsibility. These include: (1) violating the statute’s 90/10 rule, which caps the amount of a for-profit school’s revenue that can come from Title IV funds at 90 percent, 81 Fed. Reg. at 76074 (new § 668.171(d)) and (2) having two official cohort default rates of 30 percent or more, *id.* (new § 668.171(f)). For publicly traded institutions, certain actions by the SEC or the exchange on which the institution is traded are also triggers. *Id.* (new § 668.171(e)).

In addition to these “automatic” triggers, the Rule provides that an institution may be deemed not financially responsible if the Secretary determines that an event or condition is “reasonably likely to have a material adverse effect on the financial condition, business, or results of operations of the institution.” 81 Fed. Reg. at 76074 (new § 668.171(g)). The Rule includes a nonexhaustive list of eight events or conditions that may serve as “discretionary triggers.” *Id.* (new § 668.171(g)(1)–(8)).

ED determined that these financial responsibility provisions “introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist.” 81 Fed. Reg. at 76049. Associated disclosure provisions allow “borrowers to receive early warning signs about an institution’s risk for students, and therefore borrowers may be able to select a different college, or withdraw or transfer to an institution in better standing in lieu of continuing to work towards earning credentials that may have limited value.” *Id.* at 76051. ED also found that, together, these provisions “provide some protection for taxpayers as well as potential direction for the Department and other Federal and State investigatory agencies to focus their enforcement efforts.” *Id.* at 76055.

**4. Disclosures of loan repayment rates.** The fourth major provision of the Rule creates an additional disclosure requirement for proprietary institutions. 81 Fed. Reg. at 76070-72 (new 34 C.F.R. § 668.41). Under this provision, the Secretary will calculate a final loan repayment rate for each institution over a two-year cohort period. *Id.* at 76070-71 (new § 668.41(h)(1)). If that calculation shows that the median borrower has neither fully repaid his or her Title IV loans, nor made payments sufficient to reduce the balance on each such loan by at least one dollar, the institution must include a prescribed disclosure in its promotional materials. *Id.* at 76,071 (new § 668.41(h)(3)). The institution must also use this language to notify enrolled and prospective students, and must post the language on its website. *Id.* at 76,071-72 (new § 668.41(i)).

ED explained that these provisions “give borrowers more information with which they can make informed decisions about the institutions they choose to attend.” 81 Fed. Reg. at 76051; *see also id.* at 76015. “How alumni are repaying their loans ... [is] of direct interest to consumers.” *Id.* at 76014. The loan repayment disclosure provisions reflect ED’s determination that “all students deserve to have information about their prospective outcomes after leaving the institution.” *Id.* at

76015. Based on cited research, the Department concluded that such information would have meaningful benefits, as “students and families react to information about the costs and especially the value of higher education, including by making different decisions.” *Id.* ED concluded that “this information is critical to ensure students and families have the information they need to make well-informed decisions about where to go to college.” *Id.* at 76018.

## **II. The *CAPPS* Litigation and the Department’s Delay Rule**

In May 2017, just weeks before the Rule was to take effect, the California Association of Private Postsecondary Schools (*CAPPS*), an industry group representing private schools, including many for-profit institutions, sued to challenge parts of the Rule’s four major provisions, and sought invalidation and vacatur of the Rule in its entirety. *See CAPPS*, Dkt. No. 1 (Complaint). *CAPPS* also moved for a preliminary injunction solely against the Rule’s provisions regarding predispute arbitration clauses and class action waivers. *CAPPS*, Dkt. No. 6, 6-1 (Mot. for Preliminary Injunction).

The following month, the Department published a two-page “Final Rule” delaying the effective date for many of the Borrower Defense Rule’s provisions, “pending judicial review” in the *CAPPS* litigation. *See Delay Rule*, 82 Fed. Reg. at 27621. To justify this Delay Rule, ED invoked its authority under section 705 of the APA. Section 705 provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” The Department stated that it had “concluded that justice require[d] it to postpone the effectiveness of certain provisions of the final regulations until the judicial challenges to the final regulations are resolved.” 82 Fed. Reg. at 27621.

The scope of the Delay Rule is *not*, however, limited to those regulatory provisions specifically challenged in CAPPS’s lawsuit or preliminary injunction motion. For example, the Department stayed changes providing for the automatic discharge of federal loans where a student’s school closes, new 34 C.F.R. § 685.214(c)(2) & (f)(4)–(7), and requiring schools to produce to the Department judicial and arbitral records from proceedings involving students and borrower defense claims, new § 685.300—provisions that CAPPS did not specifically challenge. *See* Delay Rule, 82 Fed. Reg. at 27622. Yet the Department did not delay certain other portions of the Borrower Defense Rule—including provisions on death discharge, nursing loans, severability, and technical amendments—that took effect on July 1, even though those portions would be vacated if CAPPS were to obtain the complete vacatur it sought. *See* Delay Rule, 82 Fed. Reg. at 27622. The Department did not explain how it selected which portions of the Rule would be delayed.

Rather, the Department stated that postponing the selected portions of the Rule would “preserve the regulatory status quo while the litigation is pending and the Court decides whether to uphold the final regulations.” *Id.* at 27621. It contended without elaboration that CAPPS had “raised serious questions concerning the validity of certain provisions of the final regulations.” *Id.* Which provisions, or what serious questions were raised, the Department did not say.<sup>6</sup> It also stated that CAPPS had “identified substantial injuries that could result if the final regulations go into effect before those questions are resolved.” *Id.* But the only injuries that the Department described involved (1) modification of schools’ “contracts in accordance with the arbitration and class action waiver regulations,” which would impose costs on schools “in making these changes,” and (2) imposition of “financial responsibility trigger provisions” that identify adverse events involving a

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<sup>6</sup> The Department’s answer to CAPPS’s complaint likewise identifies no “serious questions”: It avers that CAPPS failed to state a claim upon which relief may be granted and that the Department’s actions were “fully consistent with applicable law.” *CAPPS*, Dkt. No. 52 at 41.

school's finances and require the school to provide a letter of credit or other financial protection insuring against later liabilities to the Department. *Id.* The Department did not determine that these purported injuries to schools, if they occurred, would be irreparable. *Id.*

In addition, the Department stated that the United States would “suffer no significant harm from postponing the effectiveness of the final regulations while the litigation is pending.” *Id.* It stated that the borrower defense provisions and separate provisions regarding cancellation of loans of students whose schools close (the latter of which were not expressly challenged by CAPPS) were the most costly portions of the Rule, and that postponing the Rule would “help to avoid these significant costs.” *Id.* at 27622. The costs ascribed to these portions of the Rule are solely attributable to the increased numbers of students the Department estimated would have their repayment liabilities cancelled under the Rule. Yet the Department inexplicably stated that delaying the final rule would “not prevent student borrowers from obtaining relief because the Department will continue to process borrower defense claims under existing regulations that will remain in effect during the postponement.” *Id.* at 27621. It made no attempt to reconcile these two sentences or to address the impact of the delay on borrowers in any other way.

The Department also stated that the Rule's delay “w[ould] allow” it to “review and revise the final regulations,” which the Department intended to do through a new negotiated rulemaking. *Id.* at 27622 (citing 20 U.S.C. § 1098a). The Department closed by stating that, “[b]ased upon the foregoing” analysis, it had “determined that it [was] necessary to postpone the effectiveness of the revisions to or additions of” a subset of the provisions of the Borrower Defense Rule. *Id.*

Alongside the Delay Rule, and in the months since, the Department made a series of statements indicating that the Trump Administration intends to roll back the Borrower Defense Rule in substantial part. Secretary DeVos issued a statement describing the delay as part of a “regulatory

reset” of the Rule. ED, Press Release, Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions, June 14, 2017 (“June 14 Press Release”), <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>. In a separate Federal Register notice, the Department provided additional information about its intent to initiate a new negotiated rulemaking to revise the Borrower Defense Rule, *see* 82 Fed. Reg. 27640 (June 16, 2017). Secretary DeVos heaped additional criticism on the Borrower Defense Rule in July. *See* Remarks from Secretary DeVos to the American Legislative Exchange Council, July 20, 2017, <https://www.ed.gov/news/speeches/remarks-secretary-devos-american-legislative-exchange-council>. And that same month, ED confirmed to Congress that, contrary to the assertion in the Delay Rule that it would continue to process borrower defense applications under preexisting law and regulations, it had not processed any borrower defense applications since the change in administrations. *See* July 7, 2017 Letter from Acting Under Secretary James F. Manning to Sen. Richard J. Durbin, <https://www.durbin.senate.gov/imo/media/doc/17-010570%20Durbin%20Outgoing.pdf> (“July 7 Letter”); *see also* Decl. of James F. Manning, Acting Under Secretary of Education, *Dieffenbacher v. DeVos*, Case No. 17-cv-342, Dkt. No. 32-2 (“Manning Decl.”) (C.D. Cal. filed Sept. 7, 2017), available at <http://www.legalservicescenter.org/wp-content/uploads/2012/10/32-ED-Status-Rpt.pdf> (noting only that ED is “currently evaluating *criteria* for Borrower Defense relief”).

After the Department announced the Delay Rule, CAPPS withdrew its motion for a preliminary injunction. The *CAPPS* litigation remains pending. After multiple delays, ED filed an answer on September 6, 2017 (Dkt. No. 52), and the Administrative Record on October 6, 2017 (Dkt. No. 54). No motion for summary judgment has been filed by either party, and no scheduling order has been entered.

### III. This Litigation and the Interim Final Rule

Plaintiffs filed this action on July 6, 2017. Dkt. No. 1. On August 30, 2017, defendants moved for a six-week extension of time to answer the complaint. Dkt. No. 12. Their motion did not reference pending regulatory action as a basis for their extension. *Id.* The Court granted the motion. *See* Minute Order dated Aug. 30, 2017. Plaintiffs filed a motion for summary judgment on September 26, 2017. Dkt. No. 15. The parties agreed upon a briefing schedule, and defendants filed an unopposed motion to extend their time to respond to both the motion for summary judgment and the complaint to October 31, 2017. Dkt. No. 21. Again, defendants did not mention any pending regulatory action. *Id.* The Court granted that motion. *See* Minute Order dated October 5, 2017.

On October 24, 2017, one week before defendants' filings were due, ED published in the Federal Register an "Interim Final Rule", which purported to amend the effective date of the sections of the Borrower Defense Rule that were subject to the Delay Rule, setting a new effective date of July 1, 2018. 82 Fed. Reg. at 49115.<sup>7</sup> The IFR noted the existence of the *CAPPS* litigation and the Delay Rule, *id.*, but not the existence of this litigation. The IFR does not supersede the Delay Rule, which continues to stay the effective date of the Borrower Defense Rule pending resolution of the *CAPPS* litigation. Should the Delay Rule be set aside (or expire by its own terms)

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<sup>7</sup> The same day, ED published a notice of proposed rulemaking seeking to *further* postpone the effective date to July 1, 2019. *See* ED, Notice of Proposed Rulemaking, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 49155 (Oct. 24, 2017). Although that notice has not yet culminated in final agency action, in the IFR, the agency *explicitly* admitted that the purpose of that proposed delay is "to allow for completion of the [new] negotiated rulemaking process before regulatory changes become effective in this area." 82 Fed. Reg. at 49117.

before July 1, 2018, though, the IFR imposes an additional period of delay by preventing the Borrower Defense Rule from becoming effective until that date. As justification for this action, ED stated, “Because the final regulations have been postponed beyond July 1, 2017, pursuant to the 705 Notice, the postponement of the final regulations must be for at least one year to comply with section 482 of the HEA (20 U.S.C. 1089).” *Id.* In other words, for the July 2017 Delay Rule “to be consistent with the HEA, [] the effective date of the Borrower Defense Rule must be July 1, 2018 (or July 1 of a later year).” 82 Fed. Reg. at 49116. ED thus pronounced that “even if the [CAPPS] litigation concludes before July 1, 2018”—in which case the Delay Rule’s purported section 705 stay would expire by its terms—“the final regulations will not take effect until that date consistent with the master calendar requirement.” *Id.*

As it had with the Delay Rule, ED invoked its June 16, 2017, notice of intent to initiate a negotiated rulemaking, along with ED’s “reevaluati[on] [of] its regulations in this area,” pursuant to Executive Order 13777, as justification for delaying the effective date of the validly promulgated Borrower Defense Rule. 82 Fed. Reg. at 49116. It also cursorily discussed the costs of delay, highlighting cost savings to the federal government, while disregarding any impacts on borrowers and the economy at large. *Id.* at 49115, 49118-19. It also noted a January 20, 2017, memorandum from then-White House Chief of Staff Reince Priebus directing agencies to consider 60-day postponements of regulations that had been published in the Federal Register but had not yet taken effect. 82 Fed. Reg. at 49116.

As for why it was proceeding without notice and comment, as required by the APA, 5 U.S.C. § 553, or negotiated rulemaking as required by the HEA, 20 U.S.C. § 1098a, ED claimed both were “unnecessary and impracticable.” 82 Fed. Reg. at 49117. The agency said these proce-

dures were unnecessary because, as a matter of law, “July 1, 2018, would be the earliest the regulations could take effect,” and thus the agency “lacked discretion.” 82 Fed. Reg. at 49117. It also stated that it would have been impracticable to conduct notice-and-comment or negotiated rulemaking between the filing of the CAPPs case in May 2017 and the original July 1, 2017, effective date, without explaining why that was relevant to its October action. *Id.*

#### **IV. The Plaintiffs**

Plaintiffs Meaghan Bauer and Stephano Del Rose brought this action to challenge the legality of the Department’s Delay Rule. They contend that the Delay Rule violates the APA because it is an improper invocation of 5 U.S.C. § 705; is arbitrary and capricious; and was adopted without public consultation, a negotiated rulemaking, and notice and an opportunity for public comment, as required by the HEA, 20 U.S.C. § 1098a, and APA, 5 U.S.C. § 553. Am. Compl., Dkt. No. 25. They challenge the IFR on the ground that it is based on an erroneous construction of the master calendar statute, is arbitrary and capricious, and was promulgated without notice and comment or a negotiated rulemaking, and without good cause for dispensing with those procedures. *Id.* Plaintiffs, who attended the for-profit New England Institute of Art (NEIA) in Brookline, Massachusetts, have been injured in at least two distinct ways by the postponement of the Borrower Defense Rule’s effective date, attributable to the Delay Rule and the IFR.

First, the Delay Rule and IFR harm Ms. Bauer and Mr. Del Rose because each has submitted and has pending a “borrower defense” application to the Department seeking cancellation of their federal loans. Ms. Bauer and Mr. Del Rose relied on numerous representations made by NEIA with respect to the quality of instruction and equipment, the school’s industry connections, NEIA graduates’ job prospects, the school’s job placement assistance, and the school’s affordability, especially in relation to its graduates’ purported success at landing well-paying jobs. Bauer Decl.

¶ 6; Del Rose Decl. ¶ 7. They later learned that many of these representations were untrue. Bauer Decl. ¶ 10; Del Rose Decl. ¶ 10. They also claim that their loans were structurally unfair because the education provided by NEIA would not allow them to earn income sufficient to repay them. Bauer Decl. ¶ 19; Del Rose Decl. ¶ 21. Each currently owes tens of thousands of dollars to the Department for federal Direct Loans used to attend NEIA. Bauer Decl. ¶ 13; Del Rose Decl. ¶ 13.

Although the preexisting regulations specify substantive standards that Ms. Bauer and Mr. Del Rose must meet to obtain cancellation of their loans based on school misconduct, they lack clarity with respect to the process that ED will use to adjudicate these borrower defense applications and their rights should ED deny their applications. *See* preexisting 34 C.F.R. § 685.206(c). The preexisting regulations specify the relief the Department may provide upon a successful application, but are silent as to the process for appealing a denial. *Id.* By contrast, if the Borrower Defense Rule took effect, the Department would be required to provide Ms. Bauer and Mr. Del Rose with significant protections in the adjudication of their borrower defense applications, including an automatic forbearance, the right to any information ED considers relevant to the defense, and the right to an explanation of any denial. *See* 81 Fed. Reg. at 76080 (new § 685.206(c)(2)), 76083-84 (new § 685.222(e)); *see also supra*, pp. 12-13.

Second, Ms. Bauer and Mr. Del Rose have been harmed by the delay of the arbitration and class action waiver provisions of the Borrower Defense Rule. On behalf of themselves and other former NEIA students, Ms. Bauer and Mr. Del Rose are preparing to file a class action lawsuit under the Massachusetts Consumer Protection Act against NEIA and its corporate parent, Education Management Corporation (EDMC), both of which participate in Title IV programs. Bauer Decl. ¶¶ 17-18; Del Rose Decl. ¶¶ 19-20; Merrill Decl. ¶ 3. As a legal prerequisite to suit under that statute, they have sent a demand letter to NEIA and EDMC, *see* Mass. Gen. Laws ch. 93A,

§ 9(3), describing the defendants' illegal and unfair practices, including defendants' misrepresentations to and targeting of vulnerable and low-income students and families to take advantage of their desire for educational attainment. Bauer Decl. ¶¶ 17-18, Exh. 1; Del Rose Decl. ¶¶ 18-19, Exh. 2. The letter also details the injuries to the students and their families, including unaffordable and unmanageable debt, which in turn has hindered students' later attempts to obtain meaningful education and training. *Id.*

Both Ms. Bauer and Mr. Del Rose signed enrollment contracts with NEIA that include a forced arbitration clause purporting to cover future claims between students and the school and to bar students from participating in a class action against the school. Bauer Decl. ¶ 8; Del Rose Decl. ¶ 8, Exh. 1. In their demand letter, Ms. Bauer and Mr. Del Rose called upon NEIA and EDMC not to enforce these provisions, so that they and other former NEIA students could proceed in court collectively. Bauer Decl. ¶ 21, Exh. 1; Del Rose Decl. ¶ 23, Exh. 2. NEIA and EDMC responded to the demand letter by explicitly refusing the students' request that the school and its parent company agree not to enforce the arbitration and class action waiver provisions in their enrollment contracts. Bauer Decl. ¶ 23; Del Rose Decl. ¶ 25.

Once the Borrower Defense Rule takes effect, NEIA's participation in the Direct Loan Program will, under the Rule and NEIA's PPA, be conditioned on NEIA's forgoing any reliance on forced arbitration clauses or class action waiver agreements it has entered into with students participating in the Direct Loan Program. *See* new 34 C.F.R. §§ 668.14, 685.300; Merrill Decl. ¶ 3 (noting NEIA's current participation). This condition will apply to claims related to its misrepresentations to Ms. Bauer and Mr. Del Rose. Absent the Borrower Defense Rule, however, Ms. Bauer and Mr. Del Rose would have to succeed in opposing NEIA and EDMC's efforts to compel them to resolve their claims in individual arbitrations in order to access the court on behalf of

themselves and a class of similarly situated borrowers. *See* Bauer Decl. ¶ 23; Del Rose Decl. ¶ 25. The delay of the Rule thus forces them to choose between (a) initiating litigation and facing the prospect of a contest over being compelled into arbitration, and (b) delaying the initiation of their action as applicable statutes of limitations continue to run on their claims. Bauer Decl. ¶¶ 26-27; Del Rose Decl. ¶¶ 28-29.

### STANDARD OF REVIEW

Under the APA, this Court “shall hold unlawful and set aside agency action” that is “found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “in excess of statutory jurisdiction, authority, or limitations,” or “without observance of procedure required by law.” 5 U.S.C. §706(2)(A), (C)-(D).

### ARGUMENT

Both the Delay Rule and Interim Final Rule are final agency actions that affect the rights and obligations of both student borrowers and Title IV-eligible institutions. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (per curiam) (delay of a rule’s effective date is final agency action). An agency has no “inherent authority” to delay the effective date of a duly-promulgated rule, *id.* at 9; it can do so only by utilizing procedures authorized by Congress. Even then, any delay must be the product of reasoned decisionmaking, and neither arbitrary nor capricious. Neither the Delay Rule nor the Interim Final Rule meets these standards.

#### **I. The Delay Rule should be set aside.**

The first issue presented by this case remains the validity of the Delay Rule. That action, until it is set aside, is what continues to prevent the Borrower Defense Rule from going into effect until the *CAPPS* litigation ends, regardless of the Interim Final Rule’s establishment of a July 1, 2018 effective date—which will only be operative if the Delay Rule is set aside or expires before

that date. As the sole basis for its authority to issue the Delay Rule, ED invoked APA section 705, which authorizes delays pending judicial review in certain circumstances. But the agency's failure even to address the appropriate considerations governing a section 705 delay, as well as the irrationality of its cursory attempt to justify the Delay Rule, require that the Delay Rule be set aside as arbitrary and capricious and contrary to law. In addition, the Delay Rule's transparent failure to pass muster under section 705, together with ED's statements tying its issuance to the agency's plans to revise key aspects of the Borrower Defense Rule, reveals it to be an unlawful effort to revoke a rule without the required process. *Cf. Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (“‘indefinite suspension’ does not differ from a revocation simply because the agency chooses to label it a suspension”). Because the agency's use of section 705 was unlawful, and the agency did not comply with the HEA's negotiated rulemaking requirements, 20 U.S.C. § 1098a, and the APA's notice-and-comment requirements, 5 U.S.C. § 553, the Delay Rule is unlawful and must be vacated.

**A. The Department's purported reliance on section 705 was arbitrary, capricious, and contrary to law.**

ED relied solely on section 705 of the APA as authority for the Delay Rule. Section 705 provides:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

The provision's meaning is plain on its face: Both courts and agencies may postpone the effective date of agency action pending judicial review, if and only if specified circumstances are met. Those

circumstances do not exist here, and the agency's brief explanation shows it was the product of arbitrary and capricious decision-making.

**1. The Department's failure to apply the appropriate four-part standard was arbitrary and capricious.**

Critical to any assessment of whether an agency has acted arbitrarily and capriciously is whether it has considered the factors that, by law, must guide its decision, and articulated a rational connection between those factors and the decision. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action must be set aside if it was not "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also Judulang v. Holder*, 565 U.S. 42, 53 (2011) (under APA, reviewing court is to assess, *inter alia*, "whether the decision was based on a consideration of the relevant factors"). Here, ED's decision on its face failed to set forth, analyze, or otherwise satisfy the standard that, as a matter of law, must guide an agency's decision whether to postpone a rule's effective date under section 705—namely, the familiar four-part equitable test used to determine whether to grant a request for interim relief pending litigation.

There is wide agreement that, in determining whether a judicial stay is appropriate under section 705, courts utilize "the same standards used to evaluate requests for interim injunctive relief." *Affinity Healthcare Servs., Inc. v. Sebelius*, 720 F. Supp. 2d 12, 15 n.4 (D.D.C. 2010) (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)); *see also Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958); *R.J.*

*Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 43 n.14 (D.D.C. 2011). These factors are (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm absent relief; (3) the balance of equities; and (4) the public interest. *See, e.g., Affinity Healthcare*, 720 F. Supp. 2d at 15 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In a leading decision construing section 705, this Court held in *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012), that “the standard for a stay at the agency level [under section 705] is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit.”

*Sierra Club*’s holding that the four-part standard applies to an agency’s own determination of whether a section 705 stay is appropriate rested on the court’s conclusion that neither the text nor policies of the APA support the view that courts and agencies should apply different standards. 833 F. Supp. 3d at 31. To the contrary, legislative history “makes clear the intent” that “the standard for the issuance of a stay pending judicial review is the same whether a request is made to an agency or a court.” *Id.* (citing APA, Legislative History, Pub. L. 1944-46, S. Doc. 248 at 277 (1946) (“This section permits *either agencies or courts*, if the proper showing be made, to maintain the status quo. ... The authority granted is equitable and should be used by *both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy.*”) (emphasis in original)). Allowing an agency to stay its own rule with less justification than a court would need to do the same would run the risk of encouraging agencies to “circumvent the rulemaking process through litigation concessions,” and would undermine the notice-and-comment process. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557 (D.C. Cir. 2015). “If an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules

would be a dead letter.” *Id.* (citing *State Farm*, 463 U.S. at 52). The four-factor test avoids this outcome by ensuring that an agency provides reasons for a court to review.<sup>8</sup>

In *Sierra Club*, the Court held that an agency’s failure to “employ[] [or] mention[] the four-part test” in its explanation for the delay “is arbitrary and capricious” and thus alone warranted setting aside the delay at issue. 833 F. Supp. 2d at 31. Here, in the brief text accompanying the Delay Rule, the Department similarly did not acknowledge this standard, analyze the determinative factors, or otherwise explain how a stay was justified under the four-part test. *See* 82 Fed. Reg. at 27621-22. The “‘complete absence of any discussion’ of ... statutorily mandated factor[s] ‘leaves [] no alternative but to conclude that the agency failed to take account of th[ese] statutory limit[s] on its authority,’ making the agency’s reasoning arbitrary and capricious.” *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004) (quoting *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989)).

## **2. The Department’s explanation is unreasonable and insufficient under any standard.**

Even if ED’s failure to acknowledge or apply the four-factor test were not in itself a basis for vacatur, the agency’s action must be set aside as arbitrary and capricious. Whether examined against the four factors or the more nebulous standard of “justice” referred to by the agency, ED’s reasoning “failed to consider ... important aspect[s] of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, [and] is so implausible that it could

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<sup>8</sup> Agencies have also recognized that the four-part test governs agency actions under section 705. *See McCafferty v. Centerior Energy*, No. 96-ERA-6, 1996 WL 897658 (Dep’t of Labor Adm. Rev. Bd. Oct. 16, 1996) (collecting cases); *see also* EPA, National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 76 Fed. Reg. 28318, 28326 (May 17, 2011); FERC, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 74 Fed. Reg. 30924, 30931 (Jun. 29, 2009); *In re Pub. Serv. Co. of New Hampshire, et al.*, 1 E.A.D. 389 (EPA Aug. 12, 1977).

not be ascribed to a difference in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43. The brief explanation did little more than “merely recite the terms” of section 705, *see State Farm*, 463 U.S. at 52, and conclude “that justice require[d]” a delay. 82 Fed. Reg. at 27621. That assertion, in turn, rested only on a conclusory and unexplained reference to “serious issues” raised by CAPPS’s legal challenge to the regulations, a factually flawed and arbitrary discussion of the potential irreparable harm, virtually no serious consideration of the impact of the delay on borrowers like Ms. Bauer and Mr. Del Rose, and an incomplete and illogical analysis of the implications for the public interest. Each part of the agency’s explanation, moreover, directly contradicted its previous findings concerning the benefits of the Borrower Defense Rule, its impacts on participating schools, and the harms to borrowers, the federal government and the general public that its provisions were designed to prevent. The agency neither acknowledged its change of mind nor provided the “reasoned explanation ... needed for disregarding facts and circumstances that underlay ... the prior policy”—hallmarks of arbitrary and capricious action. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

**a. The Department’s unexplained reference to “serious questions” fails to justify the delay.**

The first of the four factors governing issuance of preliminary relief pending litigation is the likelihood of success on the merits of the claims. *Winter*, 555 U.S. at 20. Here, ED did not evaluate the likelihood of success of CAPPS’s claims; it stated only that “the plaintiffs [sic] have raised serious questions concerning the validity of certain provisions of the final regulations.” 82 Fed. Reg. at 27621. It did not say what those questions were. Even assuming that “serious questions” may under some circumstances satisfy the test for preliminary relief, or that some more open-ended test applies under section 705, ED’s conclusory reference to serious questions fails to provide a rational explanation for its action.

ED's failure even to identify the serious questions, let alone explain what makes them serious, fails the most basic test for reasoned explanation: It explains exactly nothing. *Cf. Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (finding an "agency's failure of explanation renders [regulatory action] arbitrary and capricious"); *N.Y. State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110 (D.D.C. 2003) (failure to articulate any explanation is arbitrary and capricious).

Moreover, to the extent ED now asserts that there are "serious questions" about the validity of any portion of the Borrower Defense Rule, that view reflects a change in agency position from November 2016. In its final rulemaking notice for the Borrower Defense Rule, the agency extensively discussed and refuted challenges to its legal authority to promulgate the provisions of the proposed rule, specifically addressing the challenges asserted in CAPPS's complaint. *See, e.g.*, 81 Fed. Reg. at 75945-46, 75964-65, 75973-78 (addressing challenges to authority for borrower defense provisions); *id.* at 75978-80, 76005, 76010 (addressing challenges to authority for financial responsibility provisions); *id.* at 76014-21 (addressing challenges related to repayment warnings); *id.* at 76021-31 (addressing challenges to authority for forced arbitration and class action waiver provisions). Nowhere in its cursory statement that CAPPS has raised serious questions does ED acknowledge that it dismissed these questions as insubstantial only months ago. Of course, agencies are not precluded from changing their positions. When doing so, however, an agency must "display awareness that it is changing position" and provide "reasoned explication." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016); *see also Fox Television*, 556 U.S. at 516. The agency's statements here fall far short of that standard.

The Department's failure to provide an explanation here is analogous to the action considered by the D.C. Circuit in *International Union, United Mine Workers of America v. U.S. Department of Labor*, 358 F.3d 40 (D.C. Cir. 2004). There, MSHA had withdrawn a proposed rule because of the "possible adverse effect" of an Eleventh Circuit decision about another rule. *Id.* at 44. But as the D.C. Circuit noted, the agency had earlier suggested it could promulgate a rule that was consistent with that same decision. *Id.* The agency provided no elucidation of how its thinking had changed, failing to "explain why it came to deem the Eleventh Circuit decision fatal to that effort." *Id.* This lack of explanation, which the court found arbitrary and capricious, is not meaningfully different from ED's choice here to refer cryptically to "serious questions" without further explanation.

**b. The Department did not establish any imminent, serious harm to regulated entities.**

ED cited "substantial injuries" identified by CAPPS as a justification for the Delay Rule, claiming they made "maintaining the status quo [] critical." 82 Fed. Reg. at 27621.<sup>9</sup> Injury, however, must meet a high bar to justify a section 705 stay. Here, the only relevant injuries would be imminent or certain harms that would be irreparably suffered during the pendency of the CAPPS litigation. *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 47 (D.D.C. 2014). Where, as here, the injuries are solely financial, they must "threaten the very existence of [the plaintiff's] business, the only circumstance in which this Circuit has endorsed a finding of irreparable harm based on monetary

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<sup>9</sup> The Department also referenced "uncertainty," 82 Fed. Reg. at 27621, but "uncertainty" alone is not a non-speculative irreparable harm. *See, e.g., Sunday Sch. Bd. v. U.S. Postal Serv.*, No. 99-5018, 1999 WL 322746, at \*1 (D.D.C. Apr. 30, 1999); *Freeman v. Cavazos*, No. CIV. A. 90-2175-LFO, 1990 WL 141483, at \*3 (D.D.C. Sept. 20, 1990); *IBM Corp. v. U.S. Dep't of Energy*, No. CIV.A. 88-0874, 1988 WL 40291, at \*1 (D.D.C. Apr. 21, 1988).

loss.” *Id.* (brackets, citation, and internal quotation marks omitted). The purported harms to CAPPS on which ED relied do not reach this level.

The first purported harm ED referenced in the Delay Rule was that institutions “would be required, as of July 1, to modify their contracts in accordance with the arbitration and class action waiver regulations, which may be contrary to their interests.” 82 Fed. Reg. at 27621. That contracts will be modified, however, is no more than a description of the consequences of the Borrower Defense Rule; it is not, in itself, a harm. The vague assertion that such modifications “*may*” be “contrary to the[] interests” of schools does not elevate it to the level of imminent, irreparable harm. Notably, ED did not assert, let alone substantiate, that institutions will be prejudiced in their defense or otherwise irreparably harmed if they litigate claims in court rather than arbitrate them. And to the extent ED is concerned about the cost associated with the actual modification of contracts and provision of required notices as specified in the Rule, that cost hardly rises to the level of harm that would justify a stay: ED estimated modifying contracts would take 10 minutes per student—a drop in the bucket compared to the amount of time spent cajoling and recruiting students. 81 Fed. Reg. at 76067.<sup>10</sup>

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<sup>10</sup> CAPPS made additional arguments in its since-withdrawn preliminary injunction papers, but ED did not address these in its own notice and thus may not rely on them here. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (court “must judge the propriety of [agency] action solely by the grounds invoked by the agency”). Regardless, CAPPS’s arguments that schools would “need to amend their agreements” and to “retrain their admissions staffs [] and actually litigate cases, including class actions, in federal and state court,” CAPPS Dkt. No. 6 at 21, do not establish irreparable, imminent harm. The record on the Borrower Defense Rule is replete with evidence that schools provided their staff with little if any training about forced arbitration clauses and class action waivers in the past. *See, e.g.,* Comments of Public Citizen, *supra*, at 4. The costs of familiarizing staff with applicable regulations do not rise to the level of irreparable injury to merit a stay; nearly every regulation has such costs, and they are not particularly onerous here. Moreover, both these costs and the costs of preparing to modify new contracts would likely have already been incurred before the issuance of the Delay Rule, which occurred just two weeks before the Borrower Defense Rule was supposed to go into effect and more than seven months after the Rule was published. Regulatory familiarization and the preparation of new contract language for

Second, ED asserted that “institutions would be subject to financial responsibility trigger provisions that could impose substantial costs.” The Delay Rule itself, however, did not attempt to substantiate the existence or quantum of these potential “substantial costs” beyond stating that the plaintiff in the CAPPS case had “identified substantial injuries that could result if the final regulations go into effect.” 82 Fed. Reg. at 27621. But CAPPS’s preliminary injunction motion did not seek to enjoin the financial responsibility provisions or assert that CAPPS’s members would be irreparably injured if those provisions went into effect pending litigation. *See CAPPS*, Dkt. No. 6 at 19-23. ED’s explanation thus fails to demonstrate that the Delay Rule was the product of reasoned decision-making. Rather, ED has asserted that sections of its own rule would cause imminent, irreparable harm pending judicial review where CAPPS, the plaintiff in the underlying case, did not—while also incongruously saying that it was relying only on the “substantial injuries” that CAPPS identified to establish the harms purportedly justifying delay.

In any event, it is apparent from the face of the Borrower Defense Rule that any harm attributable to the financial responsibility provisions is both too speculative and too minimal to justify a stay. Under the Rule, an institution would be required to strengthen its financial stability by obtaining a letter of credit only upon the occurrence of a specified event, such as a court judgment, the imposition of a teach-out plan, or the de-listing of its stock on an exchange. 81 Fed. Reg. at 76073-74 (new § 668.171). Whether any of these events will occur is inherently speculative.<sup>11</sup>

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July 1 would necessarily have begun before that date. As to having to litigate in judicial fora as opposed to arbitration, or on a classwide basis, the possibility of facing an adjudication in a court of law does not threaten irreparable injury to a school’s ability to defend itself.

<sup>11</sup> If an institution were to argue that one of the triggers of the financial responsibility provisions was “imminent” and that requiring it to get a letter of credit would be so burdensome as to force it to close, it would be conceding how precarious its financial situation is. In such a case, the public interest would not support allowing the institution to continue to be eligible for Title IV funds. Likely for this reason, CAPPS did not seek a preliminary injunction as to these provisions.

And the agency has not attempted to explain or demonstrate how obtaining a letter of credit—which brings benefits to institutions—would be so costly as to inflict the kind of irreparable financial injury the D.C. Circuit has concluded is necessary for a stay. Additionally, the agency considered the argument that the financial responsibility provisions would impose unjustified substantial costs on certain institutions in the Final Rule—and rejected it. 81 Fed. Reg. at 76007-08. The agency’s failure to acknowledge, let alone give reasons for, this reversal of position is arbitrary and capricious.

The Department did not identify any harms resulting from the other provisions of the Rule that it stayed.

**c. The Department’s balancing of harm was unreasonable.**

If ED had been able to identify any irreparable harm to regulated institutions, it would then have had to balance that harm against the interests of both the government and other interested parties, including student borrowers, in the implementation of the Rule. *See, e.g., Safari Club Int’l v. Salazar*, 852 F. Supp. 2d 102, 124-25 (D.D.C. 2012); *Virginia Petroleum Jobbers Ass’n*, 259 F.2d at 925. ED’s purported balancing of those interests does not meet minimal standards of rational explanation, for two fundamental reasons: First, the agency’s assertion that delay will not harm borrowers is contradicted by its simultaneous claim that the delay will benefit the government by reducing transfers of funds from the government to students resulting from loan cancellations. Second, ED completely ignores other harms that both student borrowers and the federal government will suffer as a result of delaying the Borrower Defense Rule and disregards its own

prior findings that substantiate the existence of those harms and demonstrate that the benefit of eliminating them justifies issuance of the Borrower Defense Rule.

**i. The Department ignored the obvious harm to borrowers caused by delay of the borrower defense provisions.**

In justifying the Delay Rule, ED asserted that the government would benefit financially by not allowing the Borrower Defense Rule to go into effect. 82 Fed. Reg. at 27621-22. Specifically, ED stated that it would save billions of dollars of costs over ten years that would be attributable to the “discharge of borrowers’ loans” if the Borrower Defense Rule went into effect. *Id.* at 27621. But the agency completely ignored the inherent harm that goes hand-in-hand with this cost savings: Borrowers whose loans would have been, but now will not be, discharged are significantly harmed by the Delay Rule. The Borrower Defense Rule’s regulatory impact analysis is the source of the \$16.6 billion “cost” figure cited to support the assertion that the government’s interests will not be harmed by delay. That analysis explains at length that any such costs are the result of increased “transfers” to student borrowers—more of whom will receive discharges under the Borrower Defense Rule, particularly since that Rule would automatically grant discharges to students who attended schools that closed, rather than requiring eligible borrowers from closed schools to apply for discharges. Thus, any cost savings to the government necessarily comes at expense to the borrowers who were to be protected by the Rule.

ED’s “balancing” of harm ignored this obvious consequence and rested entirely on the illogical and inconsistent statement that students would not be harmed at all by the indefinite stay of the Borrower Defense Rule. ED also ignored that every dollar saved by the government—the claimed benefit of the Delay Rule—represents more than a dollar of harm to a student borrower. Whereas the Government would recover some of the costs associated with discharge from the

institutions students attended, *see* 81 Fed. Reg. at 75930-32,<sup>12</sup> student borrowers—who can withstand the budgetary impact far less than the federal government—have limited avenues for relief, particularly in light of the class action waivers and forced arbitration clauses that institutions are free to invoke during the indefinite stay. It is arbitrary and capricious for an agency to claim the benefit of cost savings, while entirely ignoring the interests of the borrowers at whose expense those savings would come.

The government not only committed a blatant logical error in failing to recognize the adverse consequences to student borrowers from delay, it also ignored its own prior conclusion that the benefits to students of the new provisions amply justify the costs of the Borrower Defense Rule. In promulgating the Borrower Defense Rule, ED noted that existing regulations had “led to much confusion among borrowers regarding what protections and actions for recourse are available to them when dealing with cases of wrongdoing by their institutions.” 82 Fed. Reg. at 76047. The Rule, therefore, gave “students access to consistent, clear, fair, and transparent processes to seek debt relief,” not just with respect to the borrower defense provision of the statute, but also the closed-school discharge and other provisions. *Id.* ED provides no explanation whatsoever as to why it is ignoring these findings, made only eight months earlier, as well as its own 15-page, detailed regulatory impact analysis, which concluded that costs to the public fisc are outweighed by the benefits of the Rule. *See id.* at 76046-61.

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<sup>12</sup> ED’s discussion of costs was also incomplete and disingenuous in referencing language from the Rule stating that “the largest quantified impact of the regulations is the transfer of funds from the Federal government to borrowers who succeed in a borrower defense claim,” 81 Fed. Reg. at 76050 (referenced at 82 Fed. Reg. at 27621), while ignoring the second half of that sentence: “a significant share of which will be offset by the recovery of funds from institutions whose conduct gave rise to the claims.” *Id.*

A letter from ED to Senator Durbin shows the magnitude of the harms caused by the Delay Rule. ED received 14,949 borrower defense applications in the less than six months between January 20, 2017, and July 7, 2017. July 7 Letter. All of these borrowers, and many more, including plaintiffs Mr. Del Rose and Ms. Bauer, are being deprived of the procedural protections that would have been provided had the Rule not wrongfully been delayed.

The harm to student borrowers caused by the delay is real and irreparable. For example, Mr. Del Rose and Ms. Bauer have had borrower defense applications pending with ED since August 2015 and September 2015, respectively. Del Rose Decl. ¶¶ 30-31; Bauer Decl. ¶¶ 28-29. Had the Rule gone into place, ED would have been required to provide automatic forbearance on payments toward any non-defaulted loans for which cancellation is sought through the borrower defense process. *See* 81 Fed. Reg. at 76083 (new § 685.222(e)(2)(i)); *see also id.* at 76080 (new § 685.205(b)(6)(i), (vi)). Ms. Bauer has requested that ED place loans at issue in her borrower defense application in forbearance, but to date she has not been able to secure that status. Bauer Decl. ¶¶ 31-32. The loans at issue in Mr. Del Rose's borrower defense application have been placed in forbearance, but this administrative status is currently set to expire in January 2018, and its renewal is uncertain. Del Rose Decl. ¶¶ 32-33.

Notably, in the Borrower Defense Rule, ED recognized that the economic and psychological harms of continuing debt are well-established. *See* 81 Fed. Reg. at 76051. Each month that passes causes borrowers like Ms. Bauer and Mr. Del Rose additional anguish as they wait for ED to rule on their borrower defense applications—currently in an opaque and confusing process—while interest continues to accrue. Had the Rule gone into effect, each of them would have been able to take advantage of a clarified and expanded process—one that would have provided them

access to records ED considered in the process, new § 685.222(e)(3)(ii)), and a reasoned, written decision if their requests were denied, new § 685.222(e)(4)).

ED failed to consider *any* of these harms to student borrowers. The *only* statement it made about harm to student borrowers was that they would not be harmed “because the Department will continue to process borrower defense claims under existing regulations that will remain in effect during the postponement.” 82 Fed. Reg. at 27621. Not only does this statement fail to recognize that the purported financial benefits to the government from delay are entirely attributable to estimates that fewer students will receive loan forbearance or cancellations, it also rests on a false factual assertion that the Department has continued to process borrower defense claims. But as the Department confirmed in its July letter to Senator Durbin, the agency has not processed a *single* borrower defense claim since January 20, 2017. *See* July 7 Letter, *supra*. And in a recent court filing, the Department stated only that it is “currently evaluating *criteria* for Borrower Defense relief.” Manning Decl., *supra* (emphasis added). “[A]n agency decision is arbitrary and must be set aside when it rests on a crucial factual premise shown by the agency’s records to be indisputably incorrect.” *Mizerak v. Adams*, 682 F.2d 374, 376 (2d Cir. 1982); *see also Resolute Forest Prod., Inc. v. U.S. Dep’t of Agric.*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016) (“[W]here an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon, its decision is arbitrary and capricious and should be overturned.”). ED’s recent official statements indicate that the agency’s purported balancing rested both on an arbitrary and capricious failure to acknowledge that any savings to the government come directly from the pockets of students, and also on the indisputably incorrect factual premise that the agency was continuing to process discharge applications as it would under the Rule.

**ii. The Department ignored other harms caused by an indefinite delay of other provisions of the Rule.**

ED also “failed to consider an important aspect of the problem,” *State Farm*, 463 U.S. at 43, when it failed to give any consideration at all to the harm to borrowers of delaying provisions of the Rule other than the ones clarifying the procedural and substantive standards for asserting borrower defenses. The most obvious such provision is the one concerning forced arbitration clauses and class action waivers. It was arbitrary and capricious for ED to consider the harms that institutions would face if the ban on forced arbitration and class action waivers went into effect, but not the harms that borrowers would suffer if it did not. These real harms are irreparable.

As noted above, Ms. Bauer and Mr. Del Rose intend to sue the school they attended, NEIA, and its corporate parent, EDMC. If the Rule were in effect, they could bring a class action in Massachusetts state court under the Massachusetts Consumer Protection Act, and NEIA and EDMC would be forced to defend that suit on the merits. With the Rule delayed, NEIA’s and EDMC’s explicit statements demonstrate that they would respond to such a suit by moving to compel arbitration and ban Ms. Bauer and Mr. Del Rose from pursuing relief on a classwide basis. If they prevailed, Ms. Bauer and Mr. Del Rose would be forced to either abandon their claims, as so many borrowers do, or confront the difficulties associated with individual arbitration. The Department has explained at length the harms these options impose on borrowers and the public:

[C]lass action lawsuits not only provide a vehicle for addressing a multitude of relatively small claims that would otherwise not be raised—or raised only as borrower defense claims—but create a strong financial incentive for both a defendant school and other similarly situated schools to comply with the law in their business operations. Pre-dispute arbitration agreements coupled with class action waivers eliminate this incentive by preventing the aggregation of small claims that may reflect widespread wrongdoing. We believe that banning class action waivers as they pertain to potential borrower defense claims would promote direct relief to borrowers from the party responsible for injury, encourage schools’ self-corrective actions, and, by both these actions, lessen the amount of financial risk to the taxpayer in discharging loans through the defense to repayment process.

NPRM, 81 Fed. Reg. at 39383; *see also id.* at 39384-85; 81 Fed. Reg. at 76022-23. The agency's failure even to acknowledge its prior findings about the harmful impact of arbitration and class action waiver provisions on students, let alone explain its change in view, is arbitrary and capricious. *See, e.g., Am. Wild Horse Pres. Campaign v. Perdue*, \_\_\_ F.3d \_\_\_, 2017 WL 4385259 (D.C. Cir. Sept. 29, 2017).

Moreover, Ms. Bauer, Mr. Del Rose, and other borrowers in comparable situations cannot avoid the harms imposed by arbitration agreements and class action waivers by simply waiting until the unspecified end of the stay to take legal action. Their claims are subject to statutes of limitations. Those statutes of limitations continue to run. If they expire before the stay is lifted, the harm will be irreparable.

Other stayed provisions also cause harms to borrowers not addressed by ED. One such provision is the closed-school discharge provision, which is not even discussed in CAPPs's Complaint. In light of the recent closure of for-profit Charlotte School of Law, the Department has issued guidance that makes clear that it will not be providing students of that institution the benefits they would have received under the Rule (including, for example, automatic closed-school discharges). *See* ED, Fact Sheet: School Closure, Charlotte School of Law Located in Charlotte, North Carolina at 2, <https://studentaid.ed.gov/sa/sites/default/files/charlotte-law.pdf>. Staying the Rule's loan repayment disclosure requirement will also irreparably harm students. Students who enroll in institutions, taking out loans without knowing about the abysmal repayment rate of those institutions' borrowers, cannot go back in time and reverse their enrollment once the repayment disclosures go into effect.

ED also ignored the harms to the government caused by other provisions delayed by the Delay Rule. Parts of the Borrower Defense Rule like the financial responsibility provisions and

loan repayment disclosure requirement *protect* the public fisc by preventing a new generation of students from being saddled with debt they will be unable to repay because their degrees are worthless. As the agency noted when issuing the Borrower Defense Rule, the financial responsibility provisions “introduce far stronger incentives for schools to avoid committing acts or making omissions that could lead to a valid borrower defense claim than currently exist.” 81 Fed. Reg. at 76050. ED also concluded that the Borrower Defense Rule, as a whole, would lead to a reduction in school closures over time. *Id.* at 76051. Delaying the applicability of these provisions is bad for the American taxpayer—as recognized in the agency’s previous conclusions that it now ignores. The Delay Rule’s utterly incomplete consideration of the harms of delay defies the norms and requirements of reasoned decisionmaking.

**d. The Department insufficiently analyzed the public interest.**

Although ED asserted that “the public interest” required the indefinite delay of the Rule, 82 Fed. Reg. at 27621, the accompanying discussion was woefully inadequate, as it failed to consider the impact on borrowers—who are members of the public—and disregarded all “public interests” other than the savings to the government that would result from granting fewer discharges to distressed student borrowers. 82 Fed. Reg. at 27621-22. As discussed above, delaying implementation of the Borrower Defense Rule imposes real harms on both borrowers and the public fisc itself. “The public interest may, of course, have many faces.” *Virginia Petroleum Jobbers Ass’n*, 259 F.2d at 925. ED’s simplistic conclusion that “the United States will suffer no significant harm from postponing the effectiveness of the final regulations,” 82 Fed. Reg. at 27621, ignores the fact that American students and borrowers will suffer, and provides no coherent account of how it is genuinely in the public interest for the government to save money by denying student borrowers discharges to which they are entitled under the governing legal standard. Completely ignoring the

impact that an indefinite stay of the *Borrower* Defense Rule would have on *borrowers* in analyzing the “public interest” is perhaps the epitome of arbitrary and capricious—particularly because it represents a *sub silentio*, unreasoned reversal of position from the November 2016 Final Rule. *Cf. Fox*, 556 U.S. at 516; *see also St. Lawrence Seaway Pilots Ass’n, Inc. v. U.S. Coast Guard*, 85 F. Supp. 3d 197, 207 (D.D.C. 2015).

Equally important, ED had already explicitly considered the costs and benefits of a delay of the Rule when it promulgated the Borrower Defense Rule, and found that the public interest did *not* justify a delay:

The Department has weighed the benefits of delay against these costs in making the decision to proceed with the regulation. With respect to borrower defense, if the Department did not proceed with the final regulations, the existing borrower defense provisions would remain in effect and some of the costs associated with potential claims would be incurred whether or not the final regulations go into effect. The final regulations build in more clarity and add accountability and transparency provisions that are designed to shift risk from the taxpayers to institutions. . . . Delaying the regulations would delay the improved clarity and accountability from the regulations without developing additional data within a definite timeframe, and we do not believe the benefits of such a delay outweigh the costs.

81 Fed. Reg. at 76049. ED’s sudden reversal of its view of the public interest neither acknowledged nor explained why it had abandoned its previous findings on exactly the same point.

**3. Section 705 does not authorize an agency to delay a rule for the purpose of undertaking a new rulemaking.**

In publishing the Delay Rule, ED stated:

The postponement will allow the Department to consider and conduct a rulemaking process to review and revise the final regulations and ensures regulated parties will not incur costs that could be eliminated under any future regulations the Department promulgates on these matters.

82 Fed. Reg. at 27622.

The agency’s reliance on its interest in revising the rule is impermissible under section 705. Section 705 is specifically tied to judicial review. Although ED may find it inconvenient that the

HEA and APA create a lengthy process for promulgating (or revising) rules, section 705 is not a means of evading those requirements. *Cf. Am. Trucking Associations, Inc. v. Reich*, 955 F. Supp. 4, 7 (D.D.C. 1997) (“salutary as its motive may be,” an agency cannot “avoid the rulemaking process, thereby silencing any ... opposition and saving it the cost, delay, and uncertainty associated with such proceedings”). If the Delay Rule notice left any doubt that this impermissible consideration played a role in ED’s invocation of section 705, the contemporaneous public statement of the Secretary confirms that the agency issued the Delay Rule as part of a “regulatory reset,” not based on the equitable balancing the agency must use in determining whether to grant a stay pending litigation. *See* June 14 Press Release, *supra*. The agency’s intention to engage in new rulemaking was an impermissible consideration under section 705, and requires vacatur of the Delay Rule. *See Public Citizen, Inc. v. Lew*, 127 F. Supp. 2d 1, 7 (D.D.C. 2000) (where agency “has relied on impermissible factors ... the court must undo its action”).

As its plain text demonstrates, section 705 exists for one purpose—to provide for a stay of a regulation where justice warrants during a period of judicial review. A Section 705 stay is not warranted “simply because litigation ... *happens to be pending*.” *Sierra Club*, 833 F. Supp. 2d at 34 (emphasis in original). The agency “must [articulate], at a minimum, a rational connection between its stay and the underlying litigation.” *Sierra Club*, 833 F. Supp. 2d at 34; *see also Alpha Pharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (citing *State Farm*, 463 U.S. at 43) (agency must “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”). Here, ED’s failure to explain why the *CAPPS* litigation necessitates any stay at all, much less the specific stay it imposed, shows that the agency improperly sought to use section 705 as a substitute for revising the Borrower Defense Rule.

In *Sierra Club*, the Court concluded that EPA’s invocation of section 705 violated the APA because the agency only “paid lip service to the pending litigation” and was actually focused on plans to reconsider the rules. *Id.* at 34. ED’s actions here are no different: Not only did the Department explicitly acknowledge that its desire to change the rule motivated its action, but the scope of its stay confirms that the action had little relation to the *CAPPS* litigation. The Delay Rule postpones the effective date of over twenty provisions (but not every provision) of the Borrower Defense Rule. *See* 82 Fed. Reg. at 27622. At a minimum, ED was required to explain how the litigation justified a stay of each of the major provisions of the Rule it subjected to delay. It did not. Instead, it referenced generic “serious questions” and relied solely on the injuries asserted by *CAPPS* in connection with its preliminary injunction motion—although *CAPPS* only sought a preliminary injunction of one of the Rule’s four major provisions (the arbitration and class action waiver ban). *See CAPPS*, Dkt. No. 6 at 25. In staying parts of the rule that *CAPPS* did not seek to preliminarily enjoin, ED showed its hand. If imminent injury revealed in the *CAPPS* litigation were genuinely the reason for the delay, the Delay Rule would have been more narrowly tailored. The disproportionate scope reveals that the litigation is merely a pretext for anticipated deregulation. The APA requires more than a pretextual justification. *See State Farm*, 463 U.S. at 52.

**B. The Delay Rule is otherwise invalid without negotiated rulemaking, notice, and an opportunity for public comment.**

“The suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553.” *Env’tl. Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *see also Steed*, 733 F.2d at 98. Because ED’s action cannot be justified as a rational application of section 705, its delay of the Rule’s effective date could be sustained only if it had followed the notice-and-comment procedures set forth in the APA, *as well* as the negotiated rule-making precursors required by the HEA, 20 U.S.C. § 1098a. It indisputably failed to do so.

The effective date of a regulation is a substantive element that triggers the HEA and APA procedural requirements for rulemaking. *See, e.g., Env'tl. Def. Fund, Inc.*, 716 F.2d at 920; *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981); *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 566 F. Supp. 2d 995, 1004 (D.S.D. 2008). Reflecting this point, the July 1 effective date was an integral part of the proposed rule considered by ED and addressed by interested parties during the comment period on the Borrower Defense Rule. *See, e.g., NPRM*, 81 Fed. Reg. at 39331, 39337. This date was incorporated into specific provisions of the NPRM that would have significant implications for regulated entities' obligations and borrowers' rights. Moreover, as discussed above, some commenters, including CAPPS, addressed the effective date in their comments on the proposed rule. *See supra* at 12. The agency's issuance of the final rule reflected its determination that the July 1, 2017, effective date was an important element of the Borrower Defense Rule.

Because, as demonstrated above, section 705 cannot justify the agency's action here, and because the Department has invoked no exception to notice-and-comment requirements that could otherwise justify altering a substantive term of the Borrower Defense Rule without compliance with the rulemaking procedures normally required by law, the Delay Rule must be vacated because it was issued without observance of procedure required by law. 5 U.S.C § 706(2); *see, e.g., AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 90-91 (D.D.C. 2007).

## **II. The Interim Final Rule should be set aside.**

Once it sets aside the Delay Rule, this Court must also consider whether the Interim Final Rule is lawful to the extent it purports to prevent the Borrower Defense Rule from going into effect before July 1, 2018. Substantively, the rationale of the Interim Final Rule depends entirely on an error of law: The agency's conclusion that a one-year delay is compelled by its earlier invocation

of section 705 rests on an erroneous interpretation of the HEA—one unsupported by case law and contrary to the statute’s unambiguous text. In addition, the Interim Final Rule is arbitrary and capricious, because ED considered only the benefits to predatory institutions, and not the costs to borrowers and the public fisc. Moreover, ED failed to establish “good cause” to evade negotiated rulemaking, as required by the HEA, and the notice-and-comment process, as required by the APA.

**A. The Department’s rationale was arbitrary, capricious, and contrary to law.**

**1. The master calendar requirement does not mandate a one-year delay.**

The agency’s rationale for the Interim Final Rule is that because the eleventh-hour “stay” it purported to issue pursuant to section 705 prevented the November 2016 Borrower Defense Rule from going into effect on its stated effective date, the Rule’s effective date must, as a matter of law, be advanced by *at least* one year. *See* Interim Final Rule, 82 Fed. Reg. at 49115-16. But the provision of the HEA on which ED relies, the master calendar provision, requires no such thing, as ED has previously acknowledged. And ED’s interpretation would allow the Department to create an unreviewable extension of the effective date of a rule for a minimum of a year, without engaging in any of the procedures required by the APA or HEA, merely by issuing an invalid stay whose lawfulness could not be reviewed in time to allow the rule to go into effect on its stated effective date. There is no indication Congress intended to allow such a radical departure from the basic principles of administrative law in enacting the master calendar requirement.

The master calendar provision states, in relevant part:

any regulatory changes initiated by the Secretary affecting the programs under this subchapter 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. This plain text provides that a rule must be published in final form by the November 1 preceding the award year in which it becomes effective. As ED has previously argued,

the term “final form” in the statute merely distinguishes a final rule from a proposed rule. *See* Br. for Appellees at 19-26, *Career College Ass’n v. Riley*, 74 F.3d 1265 (D.C. Cir. 1996) (No. 94-5270), 1995 WL 17204770 (hereafter *Career College Br.*). Because ED promulgated the Borrower Defense Rule “in final form” on November 1, 2016, the statute poses no obstacle to its becoming effective during the 2017-18 award year. If this Court were to vacate the Delay Rule stay, or if the dormant *CAPPS* litigation were to terminate and the section 705 stay expire by its terms, the Rule published in final form on November 1, 2016, could thus go into immediate effect.

ED now abandons (without acknowledging) the position it took in *Career College Ass’n*. ED’s failure to recognize its reversal of position is itself a sign of arbitrary and capricious decisionmaking. *See, e.g., Am. Wild Horse Pres. Campaign*, 2017 WL 4385259, at \*5 (“the agency must at a minimum acknowledge the change and offer a reasoned explanation for it”). But ED’s new reading could not pass muster in any event. ED argues that it would “frustrate the notice objectives of the HEA and deny schools the assurance of the master calendar” if, as the result of the dissolution of a stay, the Borrower Defense Rule became effective in the middle of an award year. 82 Fed. Reg. at 49116. But ED does not connect this policy argument to the text of the statute, nor does it identify anything about the “final form” of the Borrower Defense Rule that was changed by ED’s unilateral invocation of section 705 two weeks before the start of the award year. Nor could it: Section 705 authorizes agencies to issue “stays” of rules, not to modify them or their “form.” ED would convert the master calendar provision into a rule that “no regulation may ever

become effective on a date other than July 1.” That is not what the statute says.<sup>13</sup> Such a legal error warrants vacatur.

ED does not cite any case law in support of its new interpretation of the master calendar requirement. The only case that appears to address the meaning of the master calendar requirement is *Career College Association*, and the D.C. Circuit’s opinion there strongly suggests that the only relevant inquiry is whether the “normative standard” at issue was published in the Federal Register by November 1, even if other things had to happen after that date for the Rule to be effective. 74 F.3d at 1268-69.

*Career College Association* concerned an interim final rule ED published on April 29. At the relevant time, the master calendar provision required regulations to be “published in final form by May 1” to be effective the next award year (*i.e.*, the award year beginning July 1 of that same year). 74 F.3d at 1267, citing 20 U.S.C. § 1089(c) (1992). In its April 29 publication, ED stated that the rule would be effective July 1, except for those provisions containing information collection requirements (ICRs) for which Office of Management and Budget (OMB) approval was required under the Paperwork Reduction Act. *Id.* at 1268. As to those provisions, ED would publish a notice of the effective date at a later time—which it did not do until July 7, seven days *after* the

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<sup>13</sup> As explained by Judge Hogan in the district court proceedings in *Career College Ass’n*, ED is not entitled to *Chevron* deference in interpreting this provision. *See Career College Ass’n v. Riley*, Civ. A. No. 94-1372, 1994 WL 454713, at \*6 (D.D.C. Aug. 9, 1994). Even if the agency’s interpretation of the statute were one of multiple permissible ones, ED proceeded as if it were the only construction of the statute, and used it as a basis to evade notice-and-comment rulemaking, claiming it had no discretion. Its action thus cannot be upheld as an exercise of interpretive discretion entitled to deference. *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002).

start of the award year, when it issued a notice stating that the information collection requirements had been approved and would be effective for the award year that had begun six days earlier.

A group of for-profit colleges sued, arguing that the rule had not been “published in final form by May 1.” The Court of Appeals rejected that argument. First, the court held that the designation of a rule as an “interim final rule” did not mean the rule as published was not in “final form.” 74 F.3d at 1269. Second, and more germane to this case, the court held that neither the lack of a specific effective date as to the provisions relating to ICRs, nor the possibility that OMB would not approve them at all, affected “the published rule’s finality.” *Id.* Thus, although the effective date of those provisions was not published until July 7, they could still be effective during that award year because OMB’s approval did not (and indeed could not) change the terms of the provisions from what had been published on April 29. *See id. See also Career College Br.*, 1995 WL 17204770 at \*29 (“[E]ven if OMB had delayed consideration or even denied approval of the specific parts of the April 29 Regulations that were subject to the Paperwork Reduction Act, the regulations would be ‘in final form’ for purposes of the Master Calendar provision.”).

Under the master calendar provision, a stay of a rule published in final form, as in this case, is indistinguishable from a delay in the effectiveness of a rule published in final form pending review by another agency, as in *Career College Ass’n*. If the lack of an effective date in the rule in *Career College Ass’n* did not affect whether the regulation was in “final form,” the agency’s purported indefinite stay of the Rule here did not do so either. The regulated community has been on notice of the normative standard since November 1, 2016. That ED has chosen not to enforce it does not mean the November 1, 2016 “publication was not ‘final’ within the meaning of the

Master Calendar Provision.” 74 F.3d at 1269. As in *Career College Ass’n*, “[t]he published regulation [] gives a maximum regulatory exposure; an institution knows fully the substantive requirements.” *Id.* at 1269 n.2.

The consequences of ED’s new contrary reading of the statute would be absurd. That the Borrower Defense Rule did not become effective on July 1 is a problem of ED’s own making—at the time ED acted, there was a preliminary injunction motion pending as to only one part of the rule. Adopting ED’s interpretation would allow ED to delay the effective date of *any* Title IV regulation by at least year without *any* process whatsoever—including without any judicial reviewability. At any time, the agency could announce a “stay” or “postponement” or delay of a rule—by invoking section 705, perhaps, or by simply issuing an “interim final rule” or an order resting on nothing more than administrative fiat.<sup>14</sup> If that stay or postponement lasted a single day past July 1, it would convert into at least a one-year delay automatically, even if the delay was unlawful when issued. And ED could insulate the lawfulness of its initial order from judicial review by waiting until shortly before July 1 to make its pronouncement, as it did here. There is no indication that Congress intended to confer such unbridled discretion upon the Secretary of Education. The master calendar requirement is about predictability, not about giving the agency a way to evade the procedural and review requirements of the APA.

As ED argued in *Career College Ass’n*, the master calendar provision “requires only that some advance notice be given of the regulations that will govern a particular award year,” not “that regulations be issued with the belief that they are immutable” in future rulemakings. *Career College Br.*, 1995 WL 17204770 at \*25. The agency’s 705 stay did not alter the “final form” of the

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<sup>14</sup> Under ED’s logic, if a court were to issue a temporary stay under section 705, that stay would also automatically lead to at least a one-year delay of the rule’s effective date.

Borrower Defense Rule, nor did it deprive the regulated community of the notice it has had since November 1, 2016. Because the Interim Final Rule was based on an incorrect (and unreasonable) interpretation of the law, it must be vacated. *See, e.g., Waterkeeper All. v. Env'tl. Prot. Agency*, 853 F.3d 527, 534 (D.C. Cir. 2017); *see also Daiichi Sankyo Co. v. Lee*, 791 F.3d 1373, 1379 (Fed. Cir. 2015) (“An agency abuses its discretion when its decision is based on an erroneous interpretation of the law.”).

## **2. The Department failed to adequately assess the impact of delay.**

In issuing the Interim Final Rule, as in issuing the Delay Rule, ED did not engage in a reasoned consideration of the impact of delay. By framing the reduced relief to borrowers as cost savings to the federal government, *see* 82 Fed. Reg. at 49119, ED disregarded the Rule’s positive economic impacts on borrowers and the economy at large, discussed extensively above. *See supra* at 36-44; *see also* Rule, 81 Fed. Reg. at 76051. ED also failed to acknowledge that, for the many borrowers whose enrollment agreements include forced arbitration clauses and class action waivers, the delay would continue to preclude broad-scale relief that could be obtained in the courts through class-wide claims. Instead, ED minimized the costs of the delay to borrowers, asserting that neither the number of claims nor the amount recovered would “change greatly” as a result. 82 Fed. Reg. at 49119. This assertion is inconsistent with ED’s analyses in issuing the Borrower Defense Rule, which found that the costs to borrowers of delaying the Rule were sufficient to outweigh any benefits to be gained by gathering more data on its potential effects. *See* 81 Fed. Reg. at 76049. As with its analysis in the Delay Rule, ED’s failure to acknowledge its previous findings and explain its reversal was arbitrary and capricious. *See Fox*, 556 U.S. at 516.

**B. The Interim Final Rule is also invalid for a failure to comply with the procedural requirements of the APA and HEA.**

ED acknowledges that the Interim Final Rule does not comply with either the notice-and-comment requirements of the APA, 5 U.S.C. § 553, or the negotiated rulemaking requirements of the HEA, 20 U.S.C. § 1098a. It argues that this noncompliance is excused under both statutes' "good cause" exceptions, which allow bypass of procedural rulemaking requirements "when the agency for good cause finds" they are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B); 20 U.S.C. § 1098(b)(2). ED's assertion here that "notice-and-comment and negotiated rulemaking are unnecessary and impracticable," 82 Fed. Reg. at 49117, does not meet the high bar required to invoke this narrow exception.

The D.C. Circuit has "repeatedly made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced," *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (citations omitted), and that an agency's invocation of the exception is owed no deference. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

The "unnecessary" prong of the exception "is confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Mack Trucks*, 682 F.3d at 94 (quoting *Util. Solid Waste Activities Grp.*, 236 F.3d 749, 755 (D.C. Cir. 2001)). ED suggests that its issuance of the Interim Final Rule fits this paradigm because the master calendar provision left it no discretion to act differently. As explained above, this interpretation of the law cannot provide "good cause" because it is erroneous.

"Impracticability" applies "when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in [§ 553], as when a safety investigation shows that a new safety rule must be put in place immediately." *Util. Solid Waste Activities*

*Grp.*, 236 F.3d at 754 (quoting U.S. Dep’t of Justice, Att’y Gen.’s Manual on the Admin Proc. Act 30–31). The D.C. Circuit has found this exception to apply, for example, in circumstances “where delay would imminently threaten life or physical property.” *Sorenson Commc’ns*, 755 F.3d at 706; *see also Mack Trucks*, 682 F.3d at 93 (providing examples where this exception would apply). The facts here obviously present no such threat.

Citing no such threat, ED argues that following the statutory procedures would have been “impracticable” because litigation was commenced on May 24, 2017, only a short amount of time before the initial effective date of July 1, 2017. 82 Fed. Reg. at 49117. Although these statements are true, they have nothing to do with an October 24, 2017, Interim Final Rule. ED had no obligation to do anything at all before July 1, 2017: Even if a section 705 stay were permissible here, it would not have been mandatory, and ED could have allowed this Court to consider whether to grant the more limited preliminary injunction CAPPS sought. More importantly, and more relevant to the agency action at issue, the Interim Final Rule was not promulgated until four months after the Delay Rule. To proceed with notice and comment or negotiated rulemaking in that time would not have been “impracticable.”

### **CONCLUSION**

For the foregoing reasons, the Plaintiffs’ renewed motion for summary judgment should be granted and the Delay Rule and Interim Final Rule should be vacated.

Respectfully submitted,

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