IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN ASSOCIATION OF COSMETOLOGY SCHOOLS, Plaintiff, v. ELIZABETH DEVOS, in her official capacity as Secretary of Education, Defendant.	Civil Action No. 1:17-263 (RC)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION (AND SUMMARY JUDGMENT) AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2014, the Department of Education ("Department") promulgated regulations under Title IV of the Higher Education Act of 1965 ("HEA"), implementing a requirement that certain postsecondary programs—specifically, vocationally-oriented programs—"prepare students for gainful employment in a recognized occupation." *See* 20 U.S.C. §§ 1002(b)(1)(A)(i), (c)(1)(A), 1088(b)(1)(A)(i). Under those Gainful Employment ("GE") regulations, which went into effect in July 2015, programs subject to the requirement must meet certain minimum debt-to-earnings ("D/E") rates in order to remain eligible for Title IV federal financial assistance. Three courts have already upheld the GE regulations against facial challenges. *See Ass'n of Private Sector Colls. & Univs. v. Duncan* ("*APSCU III*"), 110 F. Supp. 3d 176 (D.D.C. 2015), *aff'd*, No. 15-5190, 640 Fed. Appx. 5 (D.C. Cir. Mar. 8, 2016) ("*APSCU IV*") (unpublished); *Ass'n of Proprietary Colls. v. Duncan* ("*APC*"), 107 F. Supp. 3d 332 (S.D.N.Y. 2015).

Despite these previous decisions, Plaintiff now seeks declaratory and emergency injunctive relief with respect to a purported "as-applied" challenge to the same GE regulations, based on the notion that the rules are arbitrary as applied to cosmetology programs. However, Plaintiff's challenge fails as a matter of law. For one thing, Plaintiff has not identified a final agency action whereby the Department has actually applied the regulations to any cosmetology program. No school has lost Title IV eligibility as a result of the Department's issuance of D/E rates for the first time this year, and the only member schools that Plaintiff has identified as affected by the issuance of those rates have explained that they are still in the process of challenging their rates by preparing alternate earnings appeals, which are not due until July 1, 2017. To the extent that Plaintiff seeks to challenge the GE regulations themselves, its challenge is facial, not as-applied, and has already been rejected by this Circuit.

Plaintiff's argument also fails because the GE regulations are neither arbitrary nor capricious with respect to cosmetology programs. The focus of Plaintiff's argument is the assertion that graduates of cosmetology programs are likely to file false or fraudulent income tax returns that fail to report tip income as required by law. According to Plaintiff, the Department unreasonably failed to take such allegedly unreported income into account when it decided to use Social Security Administration ("SSA") data, which identifies only reported income, in its D/E rate calculations, including its calculations for cosmetology programs. Plaintiff provides no evidence of unreported income being an actual—much less widespread—practice among cosmetology program graduates nor any reason why this purported underreporting would have adversely affected fewer than 9% of eligible cosmetology programs and not the remaining 91%. Moreover, contrary to Plaintiff's contention, the Department reasonably explained its decision to use SSA data in the GE Final Rule; its decision to do so was already upheld by this Court and affirmed by the D.C. Circuit; and Plaintiff has not identified any existing earnings data that would be more reliable than the SSA data. Summary judgment therefore should be entered in favor of Defendant.

Plaintiff also continues to press its Motion for a Preliminary Injunction, which was merged with briefing on the merits after the March 10 deadline for appealing D/E rates to the Department—originally cited as the basis of its claimed emergency—was extended to July 1. Plaintiff's Motion should be denied because it is unlikely to succeed on the merits for the same reasons explained above. In addition, the Department's extension of the March 10 deadline, along with Plaintiff's delay in filing suit until weeks after the Department issued draft D/E rates and its additional two-week delay before filing its Motion, undermine the claimed irreparable harm and asserted need for emergency relief. Importantly, no GE program is in imminent danger

of losing Title IV eligibility. While such an eligibility loss would occur if a program receives a "failing" D/E rate for two out of three years, 34 C.F.R. § 668.403(c)(4), this was the first year that the Department has calculated D/E rates. Thus, no GE program will become ineligible until 2018, at the earliest, and then only if it had failing D/E rates this year and has failing rates again in 2018.

Plaintiff's assertion of irreparable harm focuses not on the ultimate loss of Title IV eligibility, but on the requirement in the GE regulations that schools with failing programs provide warnings to students and prospective students of the *possibility* of losing Title IV eligibility the next year. 34 C.F.R. § 668.410(a)(1). According to Plaintiff, the need to provide such warnings will by itself harm GE programs. Aside from being a speculative harm, the warning requirement does not even apply to those schools if they timely submitted a notice of intent to appeal the Department's D/E rate determination for their failing program, and if such an appeal remains pending. 34 C.F.R. § 668.406(e)(2). Given the Department's recent extension of the appeal deadline, all appeals will likely remain pending at least until July 1. Schools with failing programs that did not submit a notice of intent to appeal were well aware, as of the January 23 deadline for doing so, that they would be required to provide warnings to their students, and sought no relief from that deadline. Plaintiff also has failed to identify a single school that is allegedly already providing warnings, nor has it submitted any evidence regarding the harm faced by such a school. The balance of hardships and public interest weigh in favor of allowing the Department to implement its regulations, promulgated under authority delegated by Congress. Accordingly, Plaintiff's Motion for a Preliminary Injunction should be denied.

STATUTORY AND REGULATORY BACKGROUND

I. Title IV of the Higher Education Act's Gainful Employment Requirement

The HEA's Title IV, 20 U.S.C. §§ 1070 *et seq.,* authorizes the Department to enter into agreements with postsecondary schools that allow students at those schools to receive federal loans. While the schools benefit when students use loan money to pay their tuition, the United States government guarantees the loans, and if students fail to repay their loan debt, the Department (and thus the taxpayer) is ultimately responsible for paying off defaulted student loans with federal funds. *See APSCU v. Duncan* ("*APSCU II*"), 681 F.3d 427, 433 (D.C. Cir. 2012). In fiscal year 2017, the Department will provide some $139.7 billion in Title IV aid to almost 12.1 million students.[1]

The HEA provides loan eligibility not only for students earning traditional degrees at traditional colleges and universities, but also for students at for-profit trade and vocational schools. *See* 20 U.S.C. §§ 1002(a), 1088(b). However, Congress imposed limits on the latter category of schools in order "'to ensure that participating schools actually prepare their students for employment, such that those students can repay their loans.'" *APSCU III*, 110 F. Supp. 3d at 181 (quoting *APSCU II*, 681 F.3d at 434). In particular, as relevant here, students enrolled in a program at a for-profit or postsecondary vocational school are eligible for Title IV funding only if the program "prepare[s] [its] students for gainful employment in a recognized occupation." *Id.* (quoting 20 U.S.C. §§ 1002(b)(1)(A)(i), (c)(1)(A), 1088(b)(1)(A)(i)).

Courts have repeatedly recognized that "[t]here is no unambiguous meaning of what makes employment 'gainful.'" *APC*, 107 F. Supp. 3d at 359 (quoting *APSCU v. Duncan* ("*APSCU I*"), 870 F. Supp. 2d 133, 146 (D.D.C. 2012)); *accord APSCU III*, 110 F. Supp. 3d at

[1] Fiscal Year 2017 Budget Summary, U.S. Department of Education, https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf.

186. By declining to define such terms in the HEA, Congress therefore "le[ft] a policy gap, which it is the Department's prerogative to fill." *Id.*

II. The Department's Gainful Employment Regulations

A. Scope and Background as Described in the 2014 Final Rule

The Department issued the Gainful Employment regulations at issue here in 2014 with an effective date of July 1, 2015. *See generally* 79 Fed. Reg. 16426 (Mar. 25, 2014) (Notice of Proposed Rulemaking ("NPRM")); 79 Fed. Reg. 64890 (Oct. 31, 2014) (Final regulations ("2014 Final Rule")). Programs that are subject to the gainful employment requirement ("GE programs") provide occupational training in fields including cosmetology, business administration, medical or dental assistance, and massage therapy. *Id.* at 65025.

The background of the requirement has been described in detail in prior briefing and decisions as well as in the 2014 Final Rule. *See APSCU III*, 110 F. Supp. 3d at 191-83; *APSCU I*, 870 F. Supp. 2d at 137-40; *APC*, 107 F. Supp. 3d at 339-41; 79 Fed. Reg. at 65031-35. In brief, the GE regulations were designed to address the Department's observation that many students receiving Title IV funding to attend vocational programs, particularly those offered by for-profit schools, default on their loans, leaving the federal government, and U.S. taxpayers, to bear the cost. *See APC*, 107 F. Supp. 3d at 339 (explaining that while programs at for-profit schools are more accessible, they also tend to be more expensive, and their attendees are less likely to graduate and more likely to be unemployed and thus "have substantially higher short- and long-term default rates on their student loan debt than their peers at comparable not-for-profit schools"). The consequences for students of defaulting on their loans are severe. They include substantial collection and interest charges; adverse credit reports that hinder their ability to rent or buy a home, buy a car, or get a job; garnishment of wages; and the loss of tax refunds and

even Social Security benefits. 79 Fed. Reg. at 65031. The consequences of student loan defaults for schools, on the other hand, are nil.[2] Their tuition revenues are based on how many students they enroll, not on whether those students are able to repay their loans. The schools get the benefit of the loans being made without bearing any of the costs of students not being able to repay the loans. As a means of distinguishing between programs based on their students' outcomes, the regulations thus curtail Title IV funding "to those students who choose programs whose graduates regularly are un—or under—prepared for 'gainful employment in a recognized occupation' and have 'unaffordable levels of loan debt in relation to their earnings.'" *APC*, 107 F. Supp. 3d at 340.

B. Regulatory Framework

The resulting GE regulations have three goals: (1) to assess whether programs indeed prepare students to earn enough to repay their loans, or are sufficiently low cost, such that students are not unduly burdened with debt, (2) to ensure that schools have a meaningful opportunity and reasonable time to improve their programs after the regulations take effect, and (3) to safeguard the federal investment of Title IV student aid dollars. 79 Fed. Reg. at 64891.[3] The regulations establish two debt-to-earnings ("D/E") rate measures—the discretionary income rate and the annual earnings rate—to assess whether a program prepares its students for gainful employment in a recognized occupation. 34 C.F.R. § 668.403(b). These D/E rates evaluate the

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

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

amount of debt students who completed a GE program incurred to attend that program in comparison to those same students' discretionary and annual earnings after completing the program. *Id.* § 668.404. The Department calculates both rates for each GE program, and determines, based on the results, whether a GE program "passes," "fails," or is "in the zone." *Id.* § 668.403(b)-(c). A program need only pass one of the two D/E rates to satisfy the gainful employment requirements. *Id.* § 668.403(c).

Both the discretionary income rate and the annual earnings rate are calculated using the mean or median annual earnings of a program's graduates during a specified period. *Id.* § 668.404(a). This mean or median annual earnings figure is in turn calculated using data obtained from the Social Security Administration's ("SSA") Master Earnings File ("MEF"). 79 Fed. Reg. at 64950. The MEF is used to calculate Social Security benefit amounts for individuals, as well as for policy analysis and research both within and outside SSA.[4] It is populated using earnings information reported to SSA and the Internal Revenue Service on various tax forms under penalty of law. Such earnings are not limited to earnings in an occupation related to the training provided by the program. *See* 79 Fed. Reg. at 64951.

In a given year, a program passes if its graduates' average annual loan payment is less than or equal to 20% of discretionary income[5] or 8% of annual earnings. 34 C.F.R. § 668.403(c)(1). A program fails if its graduates' average annual loan payment is more than 30%

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[4] *See* SSA's Master Earnings File: Background Information, U.S. Social Security Administration, available at https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p29.html .

[5] The Department calculates discretionary income by subtracting (1.5xPoverty Guideline) from the higher of the mean or median annual earnings of a program's graduates within a two- or four-year cohort period. *See* 34 C.F.R. § 668.404(a)(1). 150 percent of the Poverty Guideline "is considered to be protected or reserved to enable students to meet basic living costs," for a family size of one. 79 Fed. Reg. at 64934. Thus, "[o]nly the remaining amount of annual earnings is considered to be available to make loan payments." *Id.*

of discretionary income and 12% of annual earnings. *Id*. § 668.403(c)(2). A program that does not pass and has at least one D/E rate in between these figures is "in the zone." *Id*. § 668.403(c)(3). A program loses eligibility for Title IV funds if it has failing D/E rates for 2 out of 3 consecutive years, or has a combination of D/E rates that are in the zone or failing for 4 consecutive years. *Id*. § 668.403(c)(4).

Under the GE regulations, the Department must afford schools the opportunity to weigh in at several points during the D/E rate calculation process as well as afterwards. *Id.* § 668.405. First, schools may submit corrections to the Department's list of the students who completed a school's GE program during the relevant time period. *Id.* § 668.405(c). Second, the Department must also furnish schools with draft D/E rates as well as the underlying data used to calculate those rates, including mean and median annual earnings and individual student loan information, and schools then have 45 days within which to challenge the student loan debt information before the Department issues final D/E rates. *Id.* § 668.405(e)-(f).

Finally, after the expiration of this 45-day period, the Department must provide the calculated final D/E rates for each GE program to the school in a "notice of determination." *Id.* § 668.405(a)(6)-(7), (g). If the notice of determination shows that a GE program is in the zone or failing, the school running that program has the opportunity to file an "alternate earnings appeal." *Id.* § 668.406(a). In order to prevail in such an appeal, the school must show that its program would achieve a better result (either passing or falling in the zone) if, rather than SSA earnings data, the Department used alternate earnings either from a survey conducted by the school or from a State-sponsored data system. *Id.* § 668.406(b)(1), (c), (d). A school seeking to file an appeal must notify the Department of its intent to submit an appeal no later than 14 days after the date of the notice of determination. *Id.* § 668.406(e)(1)(i). The school must then submit

recalculated D/E rates using alternate earnings, as well as supporting documentation, no later than 60 days after the date of the notice of determination. *Id.* § 668.406(e)(1)(1)(ii).

While an appeal is pending, a school is not subject to the requirements imposed on schools that are or may become ineligible for Title IV funding in the next year. *Id.* § 668.406(e)(2) (cross-referencing requirements set forth in 34 C.F.R. § 668.410). If no appeal is submitted, or if an appeal is unsuccessful, a school with a program at risk of losing eligibility for Title IV funding based on its final D/E rates for the following year must provide warnings of the possibility of future Title IV ineligibility to students and prospective students and must refer students and prospective students to information about other similar programs. *Id.* § 668.410(a).

C. The Department's Responses to Comments During Rulemaking

In the 2014 Final Rule, the Department responded to comments challenging its proposed reliance on SSA data for purposes of determining students' mean or median annual earnings for a particular program. *See* 79 Fed. Reg. at 64953-59. Commenters presented a variety of bases for their contention that the use of SSA data would skew D/E rate results. Mirroring Plaintiff's arguments here, commenters asserted that SSA data may be flawed with respect to self-employed individuals because such individuals "may fail to report or significantly underreport earnings, . . . particularly earnings from tips," which one commenter contended (without presenting data to substantiate the claim) "account for about half of earnings in service occupations such as cosmetology." *Id.* at 64955.

In response, the Department explained that it disagreed with the commenters "for several reasons." *Id.* For one thing, while "some self-employed individuals may fail to report, or underreport, their earnings," the Internal Revenue Code requires self-employed individuals to file a return if they earn $400 or more during the year, and failure to do so may result in a penalty

or criminal prosecution. *Id.* (citing 26 U.S.C. §§ 6017, 6662, 7201 *et seq*.). Failure to report tip earnings when an individual receives more than $20 in tips during a month is similarly subject to penalties. *Id.* at 64955-56 (citing 26 U.S.C. §§ 6107, 6652(b)). The Department further pointed out that "millions of taxpayers, as well as the government, rely on the SSA MEF data as an authoritative source of data that controls annually hundreds of billions of dollars in Federal payments" as well as entitlement to future Social Security benefits. *Id.* at 64957.

The Department also observed that commenters had failed to suggest a feasible solution to remedy the supposed failure of self-employed individuals and/or individuals with tip income to report their full earnings. The Department pointed out that commenters had "suggest[ed] no practicable alternative that would eliminate" any impact from "misreported and underreported earnings" and "provide more reliable data sufficient to accomplish [the Department's] objective" of "determining earnings of individuals who completed a particular GE program offered by a particular institution." *Id.* at 64955.

The Department rejected the proposal that it "[i]mput[e] some percentage of added earnings to account for underreported tips and other compensation" because no data source had been identified that would allow the Department to determine an appropriate percentage, and to do so "in a way that would distinguish between programs." *Id.* at 64956. The Department explained, for example, that the U.S. Census Bureau's Current Population Survey ("CPS") earnings data was not a viable alternative because it was not possible to link CPS data to students in particular GE programs; instead, "any inference drawn from CPS respondents' earnings could only benefit a whole category of programs," which "would mask poorer performing programs and thwart a major purpose of the GE assessment." *Id.*; *see also id.* at 64958 ("[M]easuring the earnings of a particular cohort of graduates of a GE program offered by a particular institution

requires that the Department use data that allow it to differentiate among the outcomes of identical GE programs offered by separate institutions."). Moreover, even if it were possible to connect CPS data to a particular GE program, the data likely would not reflect earnings in the years immediately after an individual finished such a program—which the Department had determined was the relevant period when individuals might encounter the most difficulty attempting to repay their loans—but instead may reflect earnings "years, even decades, into [such individuals'] careers." *Id.* at 64956.

The Department concluded that commenters had failed to demonstrate that "a different and more reliable source of earnings data" was available "with respect to workers in occupations that involve significant tip income or a high percentage of income from self-employment," and that the alternate earnings appeal process already provided a means for an institution to submit information from State databases or a survey. *Id.*; *see also id.* at 64956-57 ("[T]o address any perceived flaws in the SSA aggregate earnings data, in § 668.406, we provide institutions an opportunity to appeal their final D/E rates using alternate earnings data obtained from a student survey or State-sponsored data system.").

III. Courts' Rejection of Facial Challenges to the GE Regulations

The 2014 GE regulations, including the methodology for calculating annual earnings, have been upheld against facial challenges in recent decisions both in this District, upheld by the D.C. Circuit, and in the Southern District of New York. *APSCU III*, 110 F. Supp. 3d at 198, *aff'd*, *APSCU IV*, 640 Fed. Appx. at 8; *APC*, 107 F. Supp. 3d 332, 368 (S.D.N.Y. 2015). In *APSCU III*, Judge Bates rejected arguments that the regulations were arbitrary and capricious, instead holding that the Department "cogently explain[ed] why [it] has exercised its discretion in a given manner," and that the regulations were "the product of reasoned decisionmaking."

APSCU III, 110 F. Supp. 3d at 191. The Court rejected thirteen separate arguments raised by the plaintiff in that case in support of its facial challenge to the D/E rate calculation, concluding in each instance that the plaintiff had failed to meet its heavy burden to show the Department's regulations were unreasonable. *Id.* at 190-98.

Among the arguments that Judge Bates rejected was the plaintiff's challenge to the Department's use of data from the SSA's MEF. *Id.* at 195. While the plaintiff contended that the SSA data distorted or understated students' earnings, the Court held that the Department met the "best data available" standard because it decided to use SSA data "only after determining that no better data existed" and "only after answering commenters' concerns regarding the data." *Id.*

The D.C. Circuit confirmed the district court's ruling, noting that the Department had "addressed the subjects of concern to [the plaintiff in that case] and . . . conducted analyses that led it 'not [to] agree' with or to find 'no evidence' to support the concerns identified by the [plaintiff]." *APSCU IV*, 640 Fed. Appx. at 8. Indeed, the D.C. Circuit observed that the Department's responses during the rulemaking to comments regarding the use of SSA data particularly "underscore[d] the reasonableness of [the Department's] approach." *APSCU IV*, 640 Fed. Appx. at 8 (citing 79 Fed. Reg. 64957-58).

In *APC*, the court similarly held that the methodology set forth in the GE regulations for calculating the D/E rates was a result of "reasoned decisionmaking" and therefore was neither arbitrary nor capricious. *APC*, 107 F. Supp. at 368.

IV. The Department's Implementation Thus Far

The 2014 Final Rule went into effect on July 1, 2015. *See* 79 Fed. Reg. at 64890. The Department provided draft D/E rates to schools for the first time on October 20, 2016. *See* GE

Electronic Announcement ("EA") #93 (Oct. 20, 2016).[6] The 45-day period for schools to challenge the student loan debt information in the draft D/E rates, pursuant to 34 C.F.R. § 668.405(e)-(f), expired December 7, 2016. *See* GE EA #94. Pursuant to § 668.405(g)(1), for those schools that did not file such challenges within this 45-day period, or those whose challenges were denied, the draft rates would become final. The Department made the final appealable D/E rates available on January 9, 2017. *See* GE EA #101. The published D/E rates show that over 91% of cosmetology programs had passing or "in the zone" D/E rates for the 2015 debt measure year, which is the only year where D/E rates have been calculated so far. Only 8.83% of such programs had failing rates.[7]

The deadline for schools to file a notice of intent to appeal the "failing" or "in the zone" D/E rate for any program was January 23, 2017, and the deadline to submit an alternate earnings appeal, together with supporting documentation, was originally March 10, 2017. *Id.* However, on March 6, 2017, the Department extended the March 10 deadline to July 1, 2017. *See* GE EA

[6] Available at https://ifap.ed.gov/GainfulEmploymentInfo/GEDCLandEAV2.html (#93). Because Plaintiff does not identify a Department action following the promulgation of the 2014 Final Rule as the object of its APA challenge, information concerning the Department's implementation is not included in the administrative record for this case, as it was not considered by the Department when promulgating the 2014 Final Rule. However, the Court may take judicial notice of material on the Department's website. *Pharm. Research & Mfrs. v. U.S. Dep't of Health & Human Servs.,* 43 F. Supp. 3d 28, 33 (D.D.C. 2014) ("Courts in this jurisdiction have frequently taken judicial notice of information posted on official public websites of government agencies.").

[7] *See* https://studentaid.ed.gov/sa/about/data-center/school/ge (containing link to downloadable spreadsheet containing final D/E rates). Programs included for purposes of the percentage calculations were programs with CIP codes 120401 (cosmetology), 120402 (barber), 120404 (electrolysis), 120406 (make-up artist), 120407 (hair stylist), 120408 (facial treatment specialist), 120409 (aesthetician), 120410 (nail technician), 120412 (salon/manager), 120412 (cosmetology, barber/styling, and nail instructor), 120414 (master aesthetician), 120499 (cosmetology and related personal grooming arts, other). The Department's spreadsheet identifies 1359 programs within these categories. Of these programs, 120 had failing D/E rates, 315 had "in the zone" rates, and 924 had passing rates.

#105 (Mar. 6, 2017).[8] This extension also extended the time during which schools that filed a notice of intent to appeal need not provide warnings pursuant to § 668.410(a). *See id.* The Department has not yet issued a decision regarding any appeal.

V. Procedural History of This Litigation

On February 10, 2017, approximately four months after the Department published draft D/E rates[9], and one month after the Department published final D/E rates, Plaintiff, an association of proprietary schools offering cosmetology programs, filed suit. *See* Compl. [ECF No. 1]. In its Complaint, Plaintiff invokes the cause of action set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), and claims that the Department's GE regulations are "arbitrary and capricious as applied to cosmetology programs" based on the allegedly flawed nature of SSA data with respect to such programs. Compl. ¶¶ 53-56. According to Plaintiff, SSA data is flawed when it comes to such programs because individuals who are self-employed and receive income in the form of cash tips "have an incentive to underreport such income in order to reduce their federal and state payroll tax liabilities." *Id.* ¶ 38. In its Complaint, Plaintiff asks the Court to "[d]eclare that the Department's GE regulations are arbitrary and capricious as applied to [Plaintiff's] members' schools," and "[e]njoin the [Department] from enforcing the Department's GE regulations against [Plaintiff's] members' schools." *Id.* at 10.

Approximately two weeks after the Complaint was filed, on February 23, 2017, Plaintiff filed a Motion for a Preliminary Injunction and Request for Expedited Consideration. [ECF No. 8.] The relief requested in this Motion focused solely on two regulatory requirements.

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[8] Available at https://ifap.ed.gov/GainfulEmploymentInfo/GEDCLandEAV2.html (#105).

[9] As described above, by regulation, the draft D/E rates would become the final rates unless a school successfully challenged the Department's student loan debt information. *See* 34 C.F.R. § 668.405(g)(1). Plaintiff does not indicate that any of its members filed such challenges.

Specifically, through this Motion, Plaintiff asks the Court to "(1) stay the requirement of completing an alternate earnings appeal under 34 C.F.R. § 668.406," and to "(2) stay the requirement of posting warnings . . . required by 34 C.F.R. § 668.410(a)(2)(i)." Plaintiff originally contended that such relief was necessary by March 10, 2017, because that was the original deadline for schools to submit alternate earnings appeals. *See* Pl. Mot. at 22 ("it is imperative that these Cosmetology Schools receive relief by March 10" because, if they fail to submit their appeal, or if their appeal is denied, they will be subject to the warning requirement).

However, after the Department extended the March 10 deadline to July 1, 2017, Plaintiff changed course. While Plaintiff has not amended its Motion or filed any supplemental evidence, it has refused to withdraw its PI Motion in light of the Department's action and instead has asserted, in opposition to an extension request by Defendant, that emergency relief is still necessary because some programs (although Plaintiff fails to identify any) may already be required to post warnings, and because the Department posts D/E rates on its website—a fact that was true when Plaintiff originally filed its Motion but was not included in Plaintiff's request for emergency preliminary relief. *See* Pl. Opp. to Emergency Enlargement Mot. (ECF No. 15), at 2.

In light of the Department's extension of the appeal deadline and Defendant's associated emergency motion for an extension to oppose Plaintiff's PI Motion, the Court on March 7, 2017, vacated the previous briefing and hearing schedule. Order of Mar. 7, 2017 (ECF No. 16). The Court noted that Plaintiff's PI Motion sought "to change the status quo rather than preserve it"; that the Department's extension "delays most, if not all, of the claimed irreparable harm for several months"; and that Plaintiff's delay in seeking preliminary injunctive relief and its changing and unsupported assertions of economic injury "undercut[] its claim that [schools that did not file appeals] are subject to ongoing irreparable harm." *Id.* at 3. The Court further noted

that Plaintiff had not made "any non-conclusory showing that [the Department's posting of D/E rates on its website] alone will lead to irreparable harm." *Id.* at 4. Following a telephonic conference on March 15, 2017, the Court set an expedited briefing schedule consolidating further briefing on Plaintiff's PI Motion with briefing on the merits. Scheduling Minute Order of Mar. 15, 2017. Pursuant to the schedule, Plaintiff elected to rely on its previously-filed PI Motion and supporting memorandum as its opening memorandum in support of summary judgment.

ARGUMENT

I. PLAINTIFF'S AS-APPLIED APA CLAIM FAILS AS A MATTER OF LAW

A. Plaintiff Fails to Identify a Final Agency Action for Purposes of an As-Applied Challenge to the GE Regulations

Plaintiff invokes the cause of action available under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, which provides for review of "final agency action," *id.* § 704, and allows a court to "set aside" such action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A). In order for an agency action to be reviewable under the APA, it must be "final." *See Hall v. Sebelius*, 689 F. Supp. 2d 10, 17 (D.D.C. 2009) ("Courts may not . . . review non-final agency action."). Plaintiff styles its claim as a challenge to the Department's GE regulations "as applied to cosmetology programs." Compl. ¶¶ 54-56. However, Plaintiff's claim should be rejected because it fails to identify a final agency action through which the Department "applied" its regulations to cosmetology programs, in general, or to a named member of Plaintiff.

A final agency action must "'mark[] the consummation of the agency's decision making process'" and must also be an action "'by which rights or obligations have been determined or from which legal consequences will flow.'" *Hall*, 689 F. Supp. 2d at 17 (quoting *Bennett v. Spear*, 520 U.S. 154, 177 (1997)). While an agency's final rule may set forth general obligations

or standards, the way in which the rule might apply to a specific party may vary, depending on how or whether that party ultimately is deemed to meet certain criteria. Courts thus have held that a plaintiff may not raise an *as-applied* challenge to federal regulations under the APA unless the agency "took some action with respect to the plaintiff in connection with the regulations." *Nat'l Wildlife Fed'n v. EPA*, 945 F. Supp. 2d 39, 45 (D.D.C. 2013) (citing *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.,* 112 F.3d 1283, 1288 (5th Cir. 1997); *Cellular Telecomms. & Internet Ass'n v. FCC,* 330 F.3d 502, 508–09 (D.C. Cir. 2003)); *see also Alaska Legislative Council v. Babbitt*, 15 F. Supp. 2d 19, 25 (D.D.C. 1998) (rejecting as-applied APA claim where plaintiffs "failed to identify a 'final agency action involving' themselves—such as an enforcement action against a named plaintiff"). Plaintiff here points to no such action taken against it or any of its member cosmetology schools. Plaintiff instead relies on the promulgation of the 2014 GE regulations themselves as the claimed final agency action, even though courts, including this Court, have already reviewed and upheld those regulations. *See APSCU III*, 110 F. Supp. 3d at 198; *APC*, 107 F. Supp. 3d at 368.

Significantly, Plaintiff cannot plausibly claim to challenge a decision by the Department that a specific GE program's students are not eligible for Title IV funding because no such decision has been issued. Indeed, no program can become ineligible for Title IV funding unless it has failing D/E rates for 2 out of 3 consecutive years, or has a combination of D/E rates that are in the zone or failing for 4 consecutive years. 34 C.F.R. § 668.403(c)(4). Because this is the first year the Department has issued D/E rates, the earliest that a program could be deemed ineligible would be 2018. Moreover, before that time, a program may file an alternate earnings appeal in order to appeal the rates calculated for this year, next year, or both. If a program succeeded in its appeal for either year, it would not lose Title IV eligibility in 2018. Thus, the Department has

taken no final action regarding the Title IV eligibility of any GE program, and no program can predict with certainty what action might be taken in the future.[10] Any as-applied challenge to a future final action by the Department applying the GE regulations to Plaintiff's members is not reviewable under the APA and is unripe. *See Alaska Legislative Council*, 15 F. Supp. 2d at 25 (recognizing that an as-applied challenge based on the possible future application of an agency's regulations is "not ripe for review"). Plaintiff's as-applied APA claim fails for this reason alone.

B. To the Extent Plaintiff Seeks to Assert a Facial Challenge to the 2014 Final Rule, Such a Claim Is Precluded

To the extent Plaintiff seeks to challenge the 2014 Final Rule on its face, but only with respect to a particular category of GE programs, its claim is "some admixture of a facial and an as-applied challenge," *Alaska Legislative Council*, 15 F. Supp. 2d at 25, and as such is untenable. The essence of Plaintiff's claim appears to be that the 2014 Final Rule should not have adopted the use of SSA data for D/E rate calculations—either in general or for cosmetology programs specifically—because these data do not account for allegedly unreported cash income. This is not an as-applied challenge. Rather, Plaintiff's claim, like *APSCU III*, challenges the GE regulations themselves—but with respect to a subset of GE programs. In *Reno v. Flores*, 507 U.S. 292 (1993), the Supreme Court recognized that such a challenge was facial. *Id.* at 301 (a challenge to an INS regulation was facial where respondents did not "challenge [a regulation's] application in a particular instance," and there was "no record" concerning the agency's "interpretation of the regulation or the history of its enforcement").

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[10] If Plaintiff had asserted a genuine as-applied challenge to a Department decision applying the GE regulations to a particular GE program, its claim would be subject to dismissal for lack of associational standing because such a claim would require the participation of the member school or schools to which the GE regulations had been applied. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013).

Accordingly, Plaintiff could only prevail if there is "no set of circumstances" under which the GE regulations' provision for the use of SSA data could be valid. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But that standard cannot be met in light of this Court's prior decision in *APSCU III* upholding the Department's use of SSA data. *See APSCU III*, 110 F. Supp. 3d at 195. Indeed, in *APSCU III*, the plaintiff made the same argument that Plaintiff makes here—that the SSA MEF "excludes . . . earnings of graduates who are self-employed or work in jobs that rely heavily on tips." *See APSCU III*, 1:14-cv-1870-JDB, Pl. S.J. Mem., ECF No. 13, at 46 n.55 (D.D.C. filed Feb. 6, 2015). However, the Court broadly held that the Department had reasonably addressed commenters' criticisms on this issue, and that the decision to use SSA data was reasonable. *APSCU III*, 110 F. Supp. 3d at 195.

Plaintiff's challenge is thus barred simply because the holding in *APSCU III*, which was upheld by the D.C. Circuit, demonstrates that Plaintiff cannot meet the "no set of circumstances" standard that applies to facial challenges.[11] Plaintiff's claim therefore fails as a matter of law at the threshold stage, without reaching the merits. However, as discussed below, Plaintiff's challenge also fails on the merits.

C. The Department's Decision in the 2014 Final Rule to Use SSA Data for the D/E Rate Calculation, Without Accounting for Allegedly Unreported Income, Was Not Arbitrary or Capricious

Plaintiff's APA claim fails on the merits because the Department reasonably addressed commenters' arguments regarding the use of SSA data for students who are self-employed or

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[11] To the extent that any member of Plaintiff is, or was at the time *APSCU III* was litigated, also a member of APSCU, Plaintiff's challenge to the use of SSA data is also barred under the doctrine of claim preclusion. *Univ. of Colo. Health v. Burwell*, No. CV 14-1220 (RC), 2017 WL 535246, at *5 (D.D.C. Feb. 9, 2017) (claim preclusion applies if there has been "prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction").

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

Plaintiff cannot meet its heavy burden here. Plaintiff contends that the GE regulations are arbitrary with respect to its members' cosmetology programs because the regulations require that the Department calculate D/E rates using SSA data but, according to Plaintiff, cosmetologists generally fail to report cash tips in their earnings—even though they are legally required to do so—so the SSA data pertaining to them is supposedly inaccurate. *See* Pl. Mot. at 6-7 ("Notwithstanding laws requiring accurate reporting of self-employment and gratuity income, as a group, individuals receiving such income tend to underreport it either because of a lack of accurate records or in order to reduce their tax liability."). However, as described above, the Department addressed such comments in the 2014 Final Rule and "explained why [the purported] shortcomings pointed out [by Plaintiff would] not lead to seriously flawed results." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1167 (D.C. Cir. 1987); *see* 79 Fed. Reg. at 64955-57.

For one thing, the Department pointed out that individuals are required by law to report

tips to the IRS as income, if tip income exceeds a minimal amount. *Id.* at 64955-56. The Department reasonably rejected the notion that it should change its methodology for calculating D/E rates based on an assumption that individuals receiving tips violate the law by failing to report such income. *See id.*

The Department also considered methodologies for addressing any shortcomings in the SSA MEF data, including the imputed earnings approach advocated by Plaintiff and Dr. Eric Bettinger, on whose report Plaintiff relies, *see* Pl. Mot. at 9; Pl. Ex. 10 (ECF No. 8-4, at 150). But the Department determined that this approach, which would impute a percentage increase across the board, is not appropriate for calculating D/E rates because it does not permit the Department to "distinguish between programs." 79 Fed. Reg. at 64955-56. Because there was no way to determine whether students in a specific program failed to report tips, or to what extent, such a solution would simply "benefit a whole category of programs" while "mask[ing] poorer performing programs." *Id.*[12] (Indeed, despite Plaintiff's claim that significant numbers of cosmetology schools' former students under-report their income, over 91% of these programs did not receive failing rates in 2017. *See supra.*)

The Department thus concluded that commenters had failed to identify "a different and more reliable source of earnings data" with respect to "workers in occupations that involve

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

significant tip income or a high percentage of income from self-employment." *Id.* Plaintiff provides no support for its assertion that the Department left "credible alternatives unaddressed," and indeed, Plaintiff identifies no such supposedly unaddressed alternative. Pl. Mot. at 20.[13] In addition, contrary to Plaintiff's assertion, Pl. Mot. at 9, the Department independently considered other sources of earnings data that had not even been proposed by commenters, but found no sources superior to the SSA MEF. *See* 79 Fed. Reg. at 64941-42 (explaining why the Department declined to use data from the Bureau of Labor Statistics ("BLS")); *id*. at 64956 (noting that the Department conferred with SSA, but it did not have data superior to that in the MEF).

At the same time, the Department explained that the alternate earnings appeal process that was already part of the 2014 Final Rule would allow schools to provide data that was linked to the earnings of students in a specific program. *See id.* at 64956-57. Under that process, if a school believes that the mean or median earnings reported by SSA that give a program a failing or zone rate are inaccurate (because the reported earnings do not include cash tips or otherwise), it may file an appeal using alternate earnings data from an institutional survey or State-sponsored data system. 34 C.F.R. § 668.406(b)(1); *see also* 79 Fed. Reg. at 64950. If an appeal is successful, the recalculated D/E rates using these alternative earnings data become the program's new final D/E rates for that year. 34 C.F.R. § 668.406(f)(2).

The Department's responses to comments on this issue are reasonable and meet its obligations. As this Court has recognized, "the accuracy of any particular [data] cannot be weighed in a vacuum, but instead must be evaluated by reference to the data that was available to

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[13] It is worth noting that other commenters pointed out that GE programs would benefit from the use of SSA data because such data would "capture all earnings regardless of whether the earnings were in an occupation related to the training provided by the program." 79 Fed. Reg. at 64952. Here, as well, the Department observed that no better data were available. *See id.*

the agency at the relevant time." *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 41 (D.D.C. 2008). "[T]he best available data standard leaves room for error, so long as more reliable data did not exist at the time of the agency decision." *Id*. at 49; *see also Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 567 F.2d 1016, 1046 (D.C. Cir. 1977) ("Courts cannot fairly demand the perfect at the expense of the achievable."). Here, the Department considered alternatives and reasonably determined that the SSA MEF provides the best available data. That is all the APA requires. *See City of Brookings*, 822 F.2d at 1169; *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1229, 1233 (9th Cir. 1993) (concluding agency's reliance on data that failed to account for part-time workers was permissible, despite the resulting underestimation of labor costs, because it was the most reliable data available).

Like the commenters, Plaintiff similarly fails to identify any source of earnings data that is currently available and also would provide a more accurate way of determining mean or median earnings for graduates of a specific program. Plaintiff's suggestion that the Department should conduct its own survey, Pl. Mot. at 9, misses the mark because the Department need not *create* new data; again, its obligation is to use the best available data that already exists. *Baystate Med. Ctr.*, 545 F. Supp. 2d at 41.

To the extent Plaintiff seeks to argue that the option of submitting an alternate earnings appeal is insufficient, such an argument does not render the Department's use of SSA data arbitrary. Plaintiff fails to point to any allegedly superior alternatives that were identified during the rulemaking but that the Department failed to address. In addition, as explained above, the Department is not required to conduct its own survey in order to create data that are not already available. Moreover, the Department may reasonably decline to undertake efforts that would in effect endorse and facilitate the decisions of individuals to fail to report their income accurately

in violation of federal law. While Plaintiff contends school surveys are burdensome, it does not identify any comments on this issue during the rulemaking process that the Department failed to address. Indeed, the Department pointed out in the 2014 Final Rule that schools may begin to conduct surveys well before final D/E rates are published. 79 Fed. Reg. at 64959-61 (explaining that draft D/E rates, which are provided at least 105 days before the appeal deadline, "should provide an institution with sufficient information to determine whether it intends to submit an alternate earnings appeal," and that a school "can begin collecting alternate earnings data well before draft D/E rates are issued," since it "will know in advance the cohort of students and calendar year for earnings that will be considered as a part of an appeal").

In sum, the Department gave a reasoned explanation for its rejection of proposed alternatives and reasonably concluded that the SSA MEF provides the best data available. Plaintiff's APA claim thus fails as a matter of law, and Defendant therefore is entitled to summary judgment.

II. A PRELIMINARY INJUNCTION IS NOT WARRANTED

Plaintiff's Motion for a Preliminary Injunction should be denied. "Preliminary injunctive relief is an 'extraordinary remedy never awarded as of right.'" *N. Air Cargo v. U.S. Postal Serv.*, 756 F. Supp. 2d 116, 121 (D.D.C. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). The party seeking relief must "by a clear showing, carr[y] the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). A court should grant a preliminary injunction "only when the moving party shows '(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'" *John Doe Co. v. Consumer Fin. Prot.*

Bureau, No. CV 17-0049 (RC), 2017 WL 663528, at *4 (D.D.C. Feb. 17, 2017) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). The third and fourth factors "'merge when the Government is the opposing party.'" *Colo. Wild Horse v. Jewell*, 130 F. Supp. 3d 2015, 220-21 (D.D.C. 2015) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

A. Plaintiff Is Unlikely to Succeed on the Merits

"The likelihood of success requirement is the most important of these factors." *Elec. Privacy Info. Cntr. v. FTC*, 844 F. Supp. 2d 98, 101 (D.D.C. 2012). "When [a] plaintiff has failed to show a likelihood of success on the merits, the 'court need not proceed to review the other three preliminary injunction factors.'"[14] *Id.* (quoting *Ark. Dairy Coop. Ass'n v. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009)). Here, for the reasons explained above, Plaintiff's as-applied APA claim fails as a matter of law, and for that reason alone, its Motion for a Preliminary Injunction should also be denied. In addition, as discussed below, none of the other three factors weigh in favor of emergency injunctive relief.

B. Plaintiff Has Failed To Demonstrate Irreparable Harm

"The standard for irreparable harm is particularly high in the D.C. Circuit." *Fisheries Survival Fund v. Jewell*, No. 16-CV-2409 (TSC), 2017 WL 629246, at *3 (D.D.C. Feb. 15, 2017). A plaintiff must meet its "considerable burden" to prove that its purported injuries are "certain, great and actual—not theoretical—and imminent, creating a clear and present need for

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[14] "The D.C. Circuit has, in the past, followed the 'sliding scale' approach to evaluating preliminary injunctions. . . . The continued viability of the sliding scale approach is highly questionable, however, in light of the Supreme Court's holding in *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2007)." *Singh v. Carter*, 185 F. Supp. 3d 11, 16 (D.D.C. 2016) (citing *In re Navy Chaplaincy*, 738 F.3d 425, 428 (D.C. Cir. 2013)). Preliminary injunctive relief is inappropriate here under any standard.

extraordinary equitable relief to prevent harm." *Id.* (quoting *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005)). The plaintiff also must provide "some evidence of irreparable harm" in order to substantiate its claim that such harm is likely to occur in the near future. *Id.* The mere possibility of irreparable harm in insufficient. *Id.* Moreover, "[i]f a party makes no showing of irreparable injury," a court may deny a motion for a preliminary injunction "without considering the other factors." *Id.* (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

Plaintiff's delay in filing suit and seeking preliminary emergency relief "weighs against a finding of irreparable harm" because "'such delay implies a lack of urgency and irreparable harm.'" *AARP v. EEOC*, No. CV 16-2113 (JDB), 2016 WL 7646358, at *10 (D.D.C. Dec. 29, 2016) (quoting *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005)); *see also Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975). In *AARP*, the court noted that the plaintiff's five-month delay in challenging a final rule undermined its argument that an injunction was "urgently needed." 2016 WL 7646358, at *10. Similarly here, Plaintiff's delay in filing its PI Motion undermines its claim of irreparable harm. Schools have been on notice of their rates (absent a successful challenge to student loan debt information) since October 2016,[15] well before the final appealable rates were issued on January 9, 2017, and before any obligation to provide warnings went into effect. In fact, two of Plaintiff's declarants indicate that their schools filed notices of an intent to file an alternate earnings appeal (which also stayed any obligation to provide warnings) last November or December, even though the deadline for such notices was not until January 23, 2017. *See* Declaration of Mez Varol ("Varol Decl.") (ECF No. 8-3) ¶ 7 (notice filed November 4,

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[15] *See* Gainful Employment Electronic Announcement #93 (Oct. 20, 2016), available at https://ifap.ed.gov/eannouncements/102016GEAnnounce93DERatesDistributedViewerToolAvail.html (announcing the issuance of draft D/E rates to schools with GE programs).

2016); Declaration of Robert Rosenberg ("Rosenberg Decl.") (ECF No. 8-2) ¶ 7 (notice filed December 16, 2016). Yet Plaintiff waited until February 10, 2017 to file its Complaint, and it waited an additional 13 days to file its PI Motion. Plaintiff has as yet failed to provide any persuasive explanation for this delay.[16]

Plaintiff also fails to show any likelihood of irreparable injury that a preliminary injunction would prevent. As explained above, the earliest that a program could lose eligibility for Title IV funding is in 2018 after the next round of D/E rates are published. Plaintiff seeks emergency preliminary relief not to preclude such a loss of eligibility—a result that it entirely fails to address in its Motion—but solely to stay the deadline for schools to appeal "failing" or "in the zone" D/E rates for this year, and the obligation of certain schools to distribute warnings that certain programs may be ineligible for Title IV funding next year. Plaintiff identifies this warning requirement as the basis for its alleged irreparable injury.

With respect to Plaintiff's contention that warnings are the cause of its asserted irreparable harm, it should be noted first that only a relatively small number of cosmetology programs are subject to the warning requirement. The requirement can only apply to programs with failing D/E rates this year because those are the only programs at risk of losing Title IV eligibility next year if they again have failing D/E rates. The warning requirement thus does not

[16] In an e-mail attached to Plaintiff's opposition to Defendant's emergency enlargement motion, Plaintiff suggests that the delay in seeking preliminary injunctive relief was due, in part, to "a reasonable expectation that the need for Court relief might be avoided by action from the Department in light of the arrival of the new Administration." ECF No. 15-1, at 3. However, Plaintiff's explanation is not in accord with the fact that, even if the new Administration were to decide to adopt a new policy with respect to the GE regulations, any action to amend or revoke the regulations would have to go through notice and comment rulemaking procedures. Furthermore, the Department would be required to follow the negotiated rulemaking procedures required by the HEA, 20 U.S.C. § 1098a, and the final regulations must be published on or before November 1 in order to go into effect the following July 1 pursuant to the Master Calendar, *see id.* § 1089. Plaintiff could not reasonably claim that it expected such a process to be completed before the time that, in its view, relief would be needed.

apply to programs with passing or "in the zone" D/E rates because such programs could not lose Title IV eligibility next year. As indicated above, only 8.83% of programs that could be considered within the category of "cosmetology" received failing D/E rates. Moreover, some of those programs will file alternate earnings appeals. If those programs succeed in their appeals, they will not have to issue warnings, and the warning requirement is in any event stayed until their appeals are decided. 34 C.F.R. §§ 668.406(e)(2), 668.410. Thus, any program that has filed a notice of intent to appeal cannot claim that the warning requirement is a source of certain or imminent harm. Indeed, in light of the Department's extension of the deadline to submit appeal documentation from March 10 to July 1, 2017, it is far from certain when any such program might become subject to the warning requirement.

In regard to the small percentage of cosmetology programs that were determined to have "failing" D/E rates but that did not file a notice of intent to appeal, and that are therefore currently subject to the warning requirement, Plaintiff fails to support its contention that emergency relief is warranted. For one thing, Plaintiff has not submitted a declaration from any school offering such a program or, for that matter, even identified any such program. Plaintiff also has offered no reason why any of its members with such programs, who presumably would have been required to provide warnings before this case was filed, waited to seek relief until after that requirement went into effect.

In addition, neither of the two schools that provided declarations have posted warnings yet. Rosenberg Decl. ¶ 15; Varol Decl. ¶ 13. The alleged impact that they describe therefore was not caused by their provision of such warnings. One declarant states that his school experienced reduced enrollment after the 2014 Final Rule was published, and that students "have expressed heightened interest in leaving the school and/or attending a [different program]" since the D/E

rates were published on January 9, 2017. Rosenberg Decl. ¶¶ 22-23 (ECF No. 8-2). The other declarant states that enrollments in his school's cosmetology program, which received a "failing" D/E rate, have fallen 25 percent since the rate was published in January. Varol Decl. ¶ 13 (ECF No. 8-3). As indicated, Plaintiff has failed to provide declarations from any school that had a "failing" D/E rate but did not file a notice of intent to appeal. Thus, any impact that the warnings may have on such schools remains speculative. Indeed, such schools could conceivably mitigate any alleged impact of warnings by answering questions from students and prospective students and explaining any plans the school might have, for example, to improve the program to obtain better outcomes in the future.[17]

Moreover, even if Plaintiff had provided evidence that the warnings will cause reduced enrollments, "economic loss alone does not warrant the extraordinary remedy of a preliminary injunction." *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 50 (D.D.C. 2011). Plaintiff's assertion that some schools may close depends on a chain of speculative possibilities, none of which may come to pass. Indeed, even if a program with a failing D/E rate currently has a proportionally large enrollment in a particular school, the school may have other programs with passing D/E rates. If enrollment falls in the failing program, the school could make changes to

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[17] As Plaintiff acknowledges, even without the warnings, information about a program's failing D/E rates is publicly available on the Department's website. Pl. Mot. at 22 ("students are paying attention to [D/E rate] information even if school are not specifically posting warnings about them"). Yet, even while acknowledging that is the case, Plaintiff failed to seek emergency relief with respect to the Department's website—where this information has been available since January 2017. Only after the Department extended the March 10 alternate earnings appeal deadline, and in the course of opposing Defendant's deadline to respond to its Motion for a Preliminary Injunction, did Plaintiff suggest for the first time that it wishes to seek relief in connection with the website. *See* Pl. Enlargement Opp. at 2. However, Plaintiff has yet to amend its Motion for a Preliminary Injunction to seek such relief, nor has it filed any evidence that would support such a request. This delay and sudden change in its position significantly undermines Plaintiff's assertions of irreparable harm. *AARP*, 2016 WL 7646358, at *10.

improve the program or it could shift resources in an attempt to increase enrollment in more successful programs. Indeed, such a result would be consistent with the purpose of the GE regulations. Because Plaintiff fails to demonstrate irreparable harm, its Motion should be denied.

C. The Balance of Hardships and Public Interest Weigh Against a Preliminary Injunction

Plaintiff also fails to show that the balance of hardships weighs in its favor or that a preliminary injunction would be in the public interest. Courts have recognized that "there is inherent harm to an agency in preventing it from enforcing regulations" promulgated pursuant to authority delegated from Congress. *Cornish v. Dudas,* 540 F.Supp.2d 61, 65 (D.D.C.2008); *accord Labnet Inc. v. United States Dep't of Labor*, 197 F. Supp. 3d 1159, 1176 (D. Minn. 2016). While Plaintiff attempts to minimize the hardship to the agency in this case, its attempt to do so only undermines its request for preliminary injunctive relief. On the one hand, Plaintiff suggests that enjoining the warning requirement is only a limited form of relief because students can get the same information from the Department's website. Pl. Mot. at 22. On the other hand, Plaintiff repeats its irreparable injury argument by suggesting that once schools post warnings, their failing programs will almost immediately close, disrupting current students' education. *Id.* at 22-23. Plaintiff's argument here fails for the same reasons explained above. Again, because Plaintiff provides no evidentiary support for the notion that its asserted harms would occur, these harms must be considered speculative. On the other hand, the injunction that Plaintiff proposes, which would halt the warning requiring and halt the alternate earnings appeal process, but only for AACS member schools, would impose administrative and logistical burdens on the Department, requiring it to identify and keep track of which programs were affected by the injunction, and to treat those programs differently from others. A delay in implementation for some programs is also likely to disrupt the timeline for the Department's calculation of D/E rates

for all programs in subsequent years. Even more importantly, while Plaintiff's requested injunction remained in effect, students and prospective students would be unable to obtain D/E rate information as easily and thus may be less likely to avoid incurring debt that they will be unable to repay. *Singh*, 168 F. Supp. 3d at 233 (an assessment of the balance of hardships "may consider whether the requested injunctive relief would substantially injure other interested parties" (internal quotation omitted)). Plaintiff thus cannot show that the balance of hardship favors an injunction.

For similar reasons, the public interest is served by allowing the Department to go forward with implementing the GE regulations. The regulations are intended to protect students and taxpayers by providing warnings about programs with relatively high loan debt compared to the earnings their students could hope to achieve after graduating from those programs. Plaintiff fails to support the notion that there is a public interest in withholding information about a cosmetology program's failing D/E rates and about the potential that the program may become ineligible for Title IV funding next year, or for protecting schools' ability to attract students who obtain Title IV loans if students ultimately will not earn enough money to repay those loans. To the contrary, those students and prospective students may benefit from D/E rate information because it could prevent them from taking on debt that they will not be able to repay, and they could more reasonably evaluate whether they would prefer to enroll in programs that have been more successful in enabling their students to find employment that would allow them to repay their loans. Taxpayers will also benefit to the extent this information prevents students from defaulting on Title IV loans.

While Plaintiff asserts that "[a]s a group," cosmetology schools' default rates do not exceed the threshold under the Cohort Default Rule, Pl. Mot. at 22, Plaintiff provides no

information about the default rates in schools providing the 8.83 percent of cosmetology programs that have failing D/E rates. Even where a cohort default rate is calculated for a particular program instead of for all programs offered at an institution, the Department has noted that the program cohort default rate and the D/E rates measure different things. 79 Fed. Reg. at 64927 ("The D/E rates measure certain outcomes of students who completed a program, while pCDR [(the program cohort default rate)] measures certain outcomes of both students who do, and do not, complete a program. . . . While the pCDR measure identifies programs where a large proportion of students have defaulted on their loans, it does not recognize programs where too many borrowers are experiencing extreme difficulty in making payments and reducing loan balances but have not yet defaulted as the D/E rates measure does."). The balance of hardships and public interest therefore weigh against granting a preliminary injunction.

CONCLUSION

For all of the foregoing reasons, the Department respectfully requests that the Court deny Plaintiff's Motion for a Preliminary Injunction and for Summary Judgment and grant Defendant's Cross-Motion for Summary Judgment.

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Respectfully Submitted,

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