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18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

21 NATIONAL EDUCATION ASSOCIATION,
22 CALIFORNIA TEACHERS ASSOCIATION,
23 SHANE HEIMAN,
24 KWYNN UYEHARA, and
25 STEPHANIE PORTILLA,
26
27
28 Plaintiffs,

Case No.: _____

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

[Administrative Procedure Act Case]

1 vs.

2 BETSY DEVOS, *in her official capacity as*
3 *Secretary of Education*, and

4 UNITED STATES DEPARTMENT OF
5 EDUCATION,

6 Defendants.

7
8 **INTRODUCTION**

9 1. Plaintiffs National Education Association (“NEA”), California Teachers
10 Association (“CTA”), Shane Heiman, Kwynn Uyehara, and Stephanie Portilla bring this action
11 and assert violations of the Administrative Procedure Act (“APA”) and the Higher Education Act
12 of 1965, as amended (“HEA”) by defendants Betsy DeVos, Secretary of the United States
13 Department of Education, and the United States Department of Education (collectively “ED” or
14 “Department”) for ED’s unlawful delay of the effective date of the State Authorization Rule, 81
15 Fed. Reg. 92,232 (Dec. 19, 2016) (“Final Rule”).

16 2. The Final Rule established important protections for students enrolled in, or
17 considering enrolling in, online, distance education, and correspondence courses at the
18 postsecondary level. Those protections include requirements that post-secondary institutions
19 make common sense disclosures to help prospective and enrolled students evaluate both the
20 online program and the institution that offers it, preventing students from wasting time and
21 money on programs that will not help them further their careers. The Final Rule required
22 institutions of higher education to provide students and prospective students with both public
23 disclosures and individualized disclosures regarding, among other items, whether the program
24 meets state licensure requirements and whether the school was subject to adverse action by the
25 state or accreditor for online programs. The disclosures would help a student evaluate whether a
26 particular online or distance education program meets or continues to meet her particular needs.

27 3. ED published the Final Rule on December 19, 2016 after a multi-year rulemaking
28 process. At that time, ED highlighted the importance of closing gaps in oversight to ensure

1 student protections over online and distance education, noting that its Office of the Inspector
2 General and the Government Accountability Office had voiced concerns over fraudulent
3 practices in this arena, and that “multiple” state Attorneys General had “filed lawsuits against
4 online education providers due to misleading business practices.”

5 4. In light of those concerns and others, ED issued the Final Rule and, consistent
6 with HEA § 482(c)(1), 20 U.S.C. 1089(c)(1) (the “Master Calendar” provision), announced it
7 would take effect on July 1, 2018.

8 5. Approximately one month after the Final Rule was published, on January 30,
9 2017, the Department announced that it “intends to take [action]” regarding the Final Rule. The
10 Department subsequently established a Regulatory Reform Task Force and conducted an
11 extensive review and analysis of the Department’s regulations, including regulations issued
12 under Title IV of the Higher Education Act. As part of this review and otherwise, the
13 Department was repeatedly made aware of questions by regulated entities regarding the
14 implementation of the Final Rule.

15 6. On July 3, 2018, more than 18 months after the Final Rule was published and two
16 days *after* the Final Rule took effect, ED rescinded the Final Rule by publishing a new rule to
17 purportedly “delay” the transpired effective date of the Final Rule for two years, until July 1,
18 2020. *See* 83 Fed. Reg. 31,296 (July 3, 2018) (hereinafter the “Delay/Rescission Rule”).

19 7. In developing and issuing the Delay/Rescission Rule, the Department did not use
20 negotiated rulemaking, opting instead to waive that statutory requirement. The HEA allows ED
21 to waive negotiated rulemaking only if using it is “impracticable, unnecessary, or contrary to the
22 public interest,” within the meaning of the “good cause” exception under the APA. 20 U.S.C. §
23 1098a; 5 U.S.C. § 553(b)(2)(B).

24 8. As alleged below, ED’s purported good cause for waiving negotiated rulemaking
25 does not comply with the statutory requirement. In issuing the Delay/Rescission Rule, ED
26 asserted that “good cause” exists because (1) in February 2018, the Department received two
27 letters raising questions and concerns about the Final Rule and which ED claims are “catalysts”
28 for the Delay/Rescission Rule; and (2) “further consultation in the form of negotiated rulemaking

1 was the appropriate vehicle by which to clarify” the Final Rule, but that “[t]he Department could
2 not have completed the negotiated rulemaking process between February 6, 2018 ... and the July
3 1, 2018 effective date” of the Final Rule.

4 9. These justifications are insufficient. ED’s assertion that the February 2018 letters
5 served as a “catalyst” for the Delay/Rescission Rule is inconsistent with its January 2017
6 statement of intent and its subsequent efforts to review regulations for reform, during which the
7 Department was made aware of the specific concerns expressed in the February 2018 letters
8 months before those letters were sent. The Department was also aware of the concerns expressed
9 in February 2018 prior to the issuance of the Final Rule. Had ED wanted to clarify any issues
10 with the Final Rule, it had ample time between January 2017 and July 2018 to do so.

11 10. By waiving the statutory negotiated rulemaking requirement without good cause,
12 ED has violated the HEA and has acted in a manner that was arbitrary, capricious, an abuse of
13 discretion, and otherwise not in accordance with law, in violation of the APA.

14 **JURISDICTION AND VENUE**

15 11. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 and
16 28 U.S.C. § 1331.

17 12. Venue is proper in this district because defendants are an officer or employee of
18 the United States acting in her official capacity and an agency of the United States, at least one
19 plaintiff resides in this judicial district, and no real property is involved in this action. 28 U.S.C.
20 § 1391(e).

21 13. INTRADISTRICT ASSIGNMENT: Pursuant to Civil Local Rule 3-2(c), this
22 action is properly assigned to either the San Francisco, Oakland, or San Jose Division of this
23 district because: 1) Plaintiff CTA is located in San Mateo County; 2) Plaintiff Kwynn Uyehara
24 resides in Alameda County; and 2) Plaintiff Stephanie Portilla resides in Monterey County.

25 **PARTIES**

26 14. NEA is the nation’s largest professional employee organization and is committed
27 to advancing the cause of public education. NEA’s three million members work at every level of
28

1 education—from pre-school to university graduate programs. NEA has affiliate organizations in
2 every state and in more than 14,000 communities across the United States.

3 15. NEA is committed to ensuring a quality education for every student and stands as
4 an organization committed to social justice, willing to speak up to protect the rights of students
5 and taxpayers. NEA advocates for the highest quality professional development and educational
6 opportunities for all of its members, including those who enroll in online and distance education
7 programs, as well as those who teach such programs. NEA offers direct help to future and
8 current educators who need student loan assistance. NEA also advocates on behalf of its
9 members on college affordability, including through its Degrees Not Debt Campaign.

10 16. NEA is committed to quality professional development for its members, including
11 by promoting and assisting members with policies surrounding higher education. NEA has
12 resolved that “[f]ederally financed loan and grant programs should be established to encourage
13 students to become professional educators.” NEA’s statements regarding federal financing of
14 loan and grant programs have focused on higher education as a career stepping stone, having
15 resolved that student loan forgiveness programs should be tied to length of professional service.
16 NEA also supports proposals that provide “development and retention, through programs
17 including scholarships and loan forgiveness, of current and future teachers for the pursuit of
18 excellence in our nation’s schools and post-secondary institutions.” NEA also supports
19 “establishment and funding of professional development opportunities designed and directed by
20 teachers and education support professionals.” NEA also supports “loan forgiveness for students
21 who become educational employees in public education institutions.” NEA also supports
22 “abolishing all student loan predatory lending practices; terms on federal and private student
23 loans that support the educational and professional goals of lower and middle-class borrowers,
24 while protecting them from predatory lending practices, through strong federal regulation of loan
25 products, fair consumer protections, reasonable terms and interest rates, and accommodating
26 repayment options.”

27 17. CTA is California’s largest professional employee organization, with over
28 300,000 members. It is also NEA’s largest affiliate.

1 18. CTA advocates on behalf of its members for quality educational training and for
2 professional development, including those who enroll in online, distance, and correspondence
3 courses. CTA assists its members in beginning teacher support programs and teacher credential
4 programs. CTA advocates on behalf of its members on college affordability, including through
5 its Degrees Not Debt Campaign, together with NEA.

6 19. The NEA and CTA bring this suit on behalf of their members. Members of the
7 NEA and CTA are enrolled in and will enroll shortly in distance or correspondence programs
8 covered by the Final Rule. NEA and CTA members are injured by the Delay/Rescission Rule
9 because they are actively considering whether to enroll in or continue enrollment in certain
10 programs of higher education that would be required, under the Final Rule, to make certain
11 disclosures. Because of the Delay/Rescission Rule, NEA and CTA members may not receive
12 disclosures of adverse actions taken against a particular institution or program. NEA and CTA
13 members may not receive other information about institutions being considered for enrollment,
14 such as information about refund policies or whether a program meets state licensure
15 requirements. The disclosure of this information, required by the Final Rule, would help the
16 NEA and CTA members identify programs that offer credentials that potential employers
17 recognize and value. Delaying the requirement to provide these disclosures will require the NEA
18 and CTA members to obtain this information from another source, if available at all, or may lead
19 NEA and CTA members to choose sub-optimal programs for their preferred courses of study.
20 Because of the cost of these programs, and the debt that will be incurred by NEA and CTA
21 members to pay for such programs, NEA and CTA members are harmed by the Delay/Rescission
22 Rule. NEA and CTA members are also harmed by the Delay/Rescission Rule because the delay
23 of the disclosures related to the complaint resolution process will make it harder for students to
24 access available consumer protections.

25 20. Plaintiff Shane Heiman is a second-grade teacher in Lawrence, Kansas. He is a
26 member of the NEA. He is currently enrolled in an online master's in science degree as an
27 instructional specialist in elementary STEM (Science, Technology, Engineering, and Math) at
28 Emporia State University ("Emporia"). Mr. Heiman is not currently aware of certain

1 information that is required to be disclosed under the Final Rule, including whether Emporia has
2 faced adverse actions related to online courses from a state or accrediting agency for engaging in
3 misconduct. If Emporia made the disclosures required by the Final Rule, Mr. Heiman would
4 carefully review such disclosures and, depending on the information provided, the disclosures
5 could affect his decisions whether to continue his degree at Emporia, whether to transfer to a
6 different institution or program, and whether to take out additional loans to finance his education.

7 21. Plaintiff Kwynn Uyehara is a fourth-grade teacher in Fremont, California. She is
8 a member of the NEA and CTA. She is planning to apply for a Doctor of Education in
9 Educational Leadership at University of New England and plans to apply by the December 2018
10 deadline. Ms. Uyehara is not currently aware of certain information that is required to be
11 disclosed under the Final Rule, including whether University of New England has faced adverse
12 actions related to online courses from a state or accrediting agency for engaging in misconduct.
13 If University of New England, either publicly or in an individualized disclosure, disclosed the
14 existence of any adverse actions against it by a state or accrediting agency for engaging in
15 misconduct relating to University of New England online programs, Ms. Uyehara would
16 carefully review such a disclosure. Depending on the information provided, her review of such a
17 disclosure could affect her decision whether to enroll at University of New England, or whether
18 to enroll at a different school instead.

19 22. Plaintiff Stephanie Portilla is currently enrolled full-time in an online program at
20 Western Governors University (“WGU”) in order to obtain her bachelor’s degree in elementary
21 education. She is currently enrolled in her first semester. She is a dues-paying aspiring-educator
22 member of CTA and NEA. When Ms. Portilla first enrolled in the online program, she
23 researched and confirmed through the State of California’s teacher certification website whether
24 her program would meet the California state standards for teacher certification. If her program
25 ceased to meet the standards, she is not aware whether WGU would notify her. If WGU did
26 provide her with an individualized disclosure that informed her that it had made a determination
27 that her program no longer meets California’s certification requirements, Ms. Portilla would
28 review this disclosure and the information, and, depending on the information, the disclosure

1 could affect her decision whether to continue her program at WGU, including whether to use her
2 grant funding, whether to stop attending the program, or whether to consider transferring
3 elsewhere. Ms. Portilla is also not currently aware whether her school has faced adverse actions
4 related to online courses from a state or accrediting agency for engaging in misconduct. If
5 WGU, either publicly or through an individualized disclosure, disclosed the existence of any
6 adverse actions against it by a state or accrediting agency for engaging in misconduct relating to
7 WGU's online programs, Ms. Portilla would carefully review such a disclosure. Depending on
8 the information provided, her review of such a disclosure could affect her decision to continue
9 her degree at WGU, including whether to use her grant funding, whether to stop attending the
10 program, or whether to consider transferring elsewhere.

11 23. The legal violations alleged in this Complaint have injured and continue to injure
12 Plaintiffs NEA, CTA, and their members, including individual plaintiffs Shane Heiman, Kwynn
13 Uyehara, and Stephanie Portilla, due to the illegal delay of the Final Rule. Granting the relief
14 requested in this lawsuit would redress these injuries.

15 24. Defendant Betsy DeVos is the Secretary of the United States Department of
16 Education and is being sued in her official capacity. Her official address is 400 Maryland
17 Avenue, S.W., Washington, D.C. 20202.

18 25. Defendant United States Department of Education is an executive agency of the
19 United States government and an agency of the United States within the meaning of the APA.
20 The Department's principal address is 400 Maryland Avenue, S.W., Washington, D.C. 20202.

21 **STATEMENT OF FACTS**

22 **History of State Authorization Requirement**

23 26. In order to participate in the programs authorized by Title IV of the Higher
24 Education Act (*e.g.*, Pell Grants and federally issued or guaranteed student loans) ("Title IV
25 Programs"), an institution of higher education must be legally authorized by the State in which it
26 operates to provide a program of education beyond secondary education.

27 27. State authorization is part of the "program integrity 'triad' under which States,
28 accrediting agencies, and the Department act jointly as gatekeepers for the Federal student aid

1 programs. This triad has been in existence since the inception of the HEA; and as an important
2 component of the triad, the HEA requires institutions of higher education to obtain approval
3 from the States in which they provide postsecondary educational programs.” 81 Fed. Reg.
4 48,598 (July 25, 2016).

5 28. Section 101(a)(2) of the HEA, 20 U.S.C. § 1001(a)(2) defines the term
6 “institution of higher education” to mean, in part, an educational institution in any State that is
7 legally authorized within the State to provide a program of education beyond secondary
8 education. Section 102(b) and (c) of the HEA provide, by reference to section 101(a)(2), that a
9 proprietary institution of higher education and a postsecondary vocational institution must be
10 similarly “authorized within a State.” HEA §§ 102(b)(1)(B), 102(c)(1)(B); 20 U.S.C. §§
11 1002(b)(1)(B), 1002(c)(1)(B).

12 29. In 2010, the Department established regulations to clarify the minimum standards
13 of state authorization that an institution of higher education must demonstrate in order to
14 establish eligibility to participate in the Title IV Programs. Although the 2010 regulations made
15 clear that all Title IV eligible institutions must have state authorization in the states in which they
16 are physically located, the U.S. Court of Appeals for the District of Columbia set aside the
17 Department’s regulations regarding authorization of distance education programs or
18 correspondence courses because the 2010 final rule was not a logical outgrowth of the proposed
19 rule. *Ass’n of Private Sector Colleges and Universities*, 681 F.3d 427 (D.C. Cir. 2012). The
20 2010 regulations did not address additional locations or branch campuses located in foreign
21 locations.

22 Procedural Requirements for Rules Issued Under Title IV of the HEA

23 30. Section 492(a) of the HEA, 20 U.S.C. § 1098a(a), requires the Secretary to
24 “obtain public involvement” in the development of proposed regulations pertaining to Title IV of
25 the HEA. Section 492(b)(2) of the HEA, 20 U.S.C. § 1098a(b)(2), requires that, “[a]ll regulations
26 pertaining to [Title IV] ... shall be subject to a negotiated rulemaking (including the selection of
27 the issues to be negotiated), unless the Secretary determines that applying such a requirement
28

1 with respect to given regulations is impracticable, unnecessary, or contrary to the public interest
2 (within the meaning of section 553(b)(3)(B) of title 5, U.S. Code).”

3 31. Title 5 of the U.S. Code, section 553(b)(3)(b) exempts from the requirement that
4 an agency publish in the Federal Register a “notice of proposed rulemaking” instances in which
5 an agency “for good cause finds (and incorporates the finding and a brief statement of reasons
6 therefor in the rules issued) that the notice and public procedure thereon are impracticable,
7 unnecessary, or contrary to the public interest.”

8 32. Pursuant to HEA § 492(b)(2), which incorporates § 492(b)(1), “[p]articipants in
9 the negotiations process shall be chosen by the Secretary from individuals nominated by groups
10 [involved in student financial assistance programs, such as students, legal assistance
11 organizations that represent students, institutions of higher education, State student grant
12 agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency
13 servicers, and collection agencies].” Negotiators must have “demonstrated experience or
14 expertise in the relevant subjects under negotiation, reflecting the diversity in the industry,
15 representing both large and small participants, as well as individuals serving local areas and
16 national markets.” 20 U.S.C. § 1098a(b)(1)-(2).

17 The Final Rule

18 33. The Final Rule was a product of a multi-year rulemaking that included no fewer
19 than four public hearings, the establishment of a statutorily required negotiated rulemaking
20 committee consisting of seventeen individuals selected by the Department and fifteen alternate
21 members, three pre-scheduled meetings of the negotiated rulemaking committee, one additional
22 session of the negotiated rulemaking committee, the publication of a proposed rule through a
23 Notice of Proposed Rulemaking in the Federal Register, and the receipt and consideration of 139
24 comments in response to that Notice.

25 34. On May 1, 2012, the Department published a notice in the Federal Register of its
26 intent to establish a negotiated rulemaking committee to develop proposed regulations designed
27 to prevent fraud and otherwise ensure proper use of Title IV program funds, especially within the
28 context of technological developments. 77 Fed. Reg. 25,658 (May 1, 2012).

1 35. Although the May 2012 Notice did not specifically mention state authorization,
2 on April 16, 2013, the Department published a document in the Federal Register (corrected on
3 April 30, 2013), in which it announced additional topics for consideration by the negotiated
4 rulemaking committee and including the state authorization for programs offered through
5 distance education or correspondence education. 78 Fed. Reg. 22,467 (Apr. 16, 2013). The
6 April 2013 Notice also announced three public hearings at which interested parties could
7 comment on the topics for consideration by the negotiated rulemaking committee.

8 36. On May 13, 2013, the Department published a notice in the Federal Register
9 announcing a fourth public hearing at which interested parties were permitted to comment on the
10 topics suggested by the Department, including state authorization. 78 Fed. Reg. 27,880 (May 13,
11 2013).

12 37. On November 20, 2013, the Department announced its intention to establish a
13 negotiated rulemaking committee to address topics including “[s]tate authorization for programs
14 offered through distance education or correspondence education” and “[s]tate authorization for
15 foreign locations of institutions located in a State.” The Notice identified a series of
16 constituencies which it believed had interests that “are significantly affected by the topics
17 proposed for negotiations.” Those constituencies included students, legal assistance
18 organizations that represent students, consumer advocacy organizations, state higher education
19 executive officers, state attorneys general and other appropriate state officials, business and
20 industry, institutions of higher education, accrediting agencies, financial aid administrators,
21 business officers and bursars and postsecondary institutions, admissions officers at
22 postsecondary institutions, third party servicers who perform functions for postsecondary
23 institutions, state approval agencies, and lenders, community banks, and credit unions. 78 Fed.
24 Reg. 69,612 (Nov. 20, 2013).

25 38. The Department established the committee announced in November 2013 and it
26 met to develop proposed regulations on February 19-21, March 26-28, and April 23-25, 2014.
27 During the March 2014 session, the Department proposed adding a negotiated rulemaking
28 session to “give the negotiators more time to consider the issues and reach consensus on

1 proposed regulatory language.” A fourth session took place on May 19-20, 2014. The
2 committee did not reach consensus.

3 39. On July 25, 2016, the Department published a Notice of Proposed Rulemaking
4 (“NPRM”) and afforded the public thirty days (until August 24, 2016) to submit written
5 comments on the proposed state authorization rule. 81 Fed. Reg. 48,598 (July 25, 2018). The
6 Department received, reviewed, and considered 139 comments in response to the NPRM,
7 including comments on the definition of student residency, the format of disclosures to be made
8 by institutions of higher education, and the process within states for receiving and handling
9 complaints against an institution of higher education.

10 40. For example, with respect to the definition of residency, in response to the
11 NPRM, “[m]ultiple commenters asked for clarification on the meaning of ‘where a student
12 resides.’” In response to these comments, the Department stated that, “[t]he student’s State of
13 legal residence is the residency or domicile of a student’s true, fixed, and permanent home.” 81
14 Fed. Reg. at 92,250. The Department further provided that a student’s residence is “usually
15 where their domicile is located.” *Id.* Additionally, the Department stated:

16 For the purposes of this rulemaking, a student is considered to
17 reside in a State if the student meets the requirements for residency
18 under that State’s law. In general, when determining the State in
19 which a student resides, an institution may rely on a student’s self-
20 determination unless the institution has information that conflicts
21 with that determination.

22 81 Fed. Reg. at 92,236.

23 41. In addition, “[a] few commenters asked that the regulations include compliance
24 for their students from States such as California that reportedly lack oversight for their out-of-
25 State student complaints.” 81 Fed. Reg. at 92,238. Other commenters specifically noted that “the
26 California Bureau for Private Postsecondary Education (CA-BPPE) does not currently require
27 purely online institutions to be authorized and will not accept complaints against non-authorized
28 institutions.” The Department responded to these comments by stating that “if an institution

1 offers postsecondary education or correspondence courses to students residing in a State in
2 which the institution is not physically located, the institution must document that there is a State
3 complaint process in each State in which the institution's enrolled students reside or through a
4 State authorization reciprocity agreement." The Department further noted that "if a State does
5 not provide a complaint process as described in a State where an institution's enrolled students
6 reside, the institution would not be able to disburse Federal student aid to students in that State."
7 The Department further clarified that "[a] State is not required to have a complaint process,
8 although, if it does not, institutions would not be able to disburse Federal student aid to resident
9 students in that State." Finally, the Department noted that if it "determines that the complaint
10 process is not compliant with the State authorization regulations, it will notify the institution and
11 subsequently work with the institution to address this issue."

12 42. The Department also received comments about the form of public disclosures. In
13 response to these comments, the Department noted that "[a]n institution may combine these
14 disclosures or provide them separately as it sees fit in order to ensure that important information
15 will be presented to students in a clear and concise manner." 81 Fed. Reg. at 92,246. The
16 Department further provided that it believed that "institutions will make a good faith effort to
17 provide these disclosures to students in a way that will clearly convey the information, so the
18 Department declines to regulate the exact parameters of these disclosures at this time," but noted
19 that "the Secretary may provide additional guidance on this matter in the future."

20 43. On December 16, 2018, the Department published the Final Rule in the Federal
21 Register. Consistent with the Master Calendar rule, ED announced an effective date of July 1,
22 2018. The HEA master calendar rule provides that "any regulatory changes initiated by the
23 Secretary affecting the [Title IV] programs ... that have not been published in final form by
24 November 1 prior to the start of the award year shall not become effective until the beginning of
25 the second award year after such November 1 date." HEA § 482(c)(1), 20 U.S.C. § 1089(c)(1).
26 In practice, this provision means that regulations issued by or on November 1 of a given year
27 shall become effective no sooner than July 1 of the following year, subject to the early
28 implementation provision in HEA § 482(c)(2), 20 U.S.C. § 1089(c)(2).

1 44. The Final Rule contains requirements on state authorization for distance education
2 or correspondence courses offered to student residing in a state where the institution is not
3 physically located, the definition of a state authorization reciprocity agreement, documentation
4 for state complaint processes, additional locations or branch campuses located in a foreign
5 location, and public and individual disclosures.

6 45. *State Authorization Required For Distance and Correspondence Courses.* The
7 Final Rule requires an institution offering distance education or correspondence courses to
8 students residing in a state where the institution is not physically located to meet that state’s
9 requirements for the institution to legally offer postsecondary distance education or
10 correspondence courses. The Final Rule also provides an alternative, by which an institution that
11 offers distance education or correspondence courses in a state that participates in a “State
12 authorization reciprocity agreement” is considered to meet state requirements for legally offering
13 postsecondary distance education or correspondence courses in the state, “subject to any
14 limitations in that agreement and to any additional requirements of that State.”

15 46. *State authorization reciprocity agreement.* The Final Rule defines a “State
16 authorization reciprocity agreement” or SARA, as “[a]n agreement between two or more States
17 that authorizes an institution located and legally authorized in a State covered by the agreement
18 to provide postsecondary education through distance education or correspondence courses to
19 students residing in other States covered by the agreement.” The Final Rule further defines a
20 SARA as an agreement that “does not prohibit any State in the agreement from enforcing its own
21 statutes and regulations, whether general or specifically directed at all or a subgroup of
22 educational institutions.”

23 47. *Complaints.* The Final Rule also required that “to be considered legally
24 authorized,” an institution offering distance education or correspondence courses to students
25 residing in states where the institution is not physically located must document that there is “a
26 process for review and appropriate action on complaints from any of those enrolled students
27 concerning the institution” in the state where the students reside or available through a
28 reciprocity agreement.

1 48. *Foreign location.* The Final Rule places certain requirements on institutions that
2 have an additional location or branch campus that is located in a foreign country, including the
3 requirement that they must be authorized by an appropriate government agency of the country
4 where the additional location or branch campus is located, and, if at least 50 percent of an
5 educational program can be completed at the foreign location or branch campus, it must be
6 approved by the institution’s accrediting agency and be reported to the state where the
7 institution’s main campus is located.

8 49. *Disclosures.* The Final Rule includes a requirement that covered distance and
9 correspondence programs make certain public disclosures and make additional disclosures on a
10 “direct[] and individual[ized]” basis.

11 50. The required public disclosures include: whether an institution is authorized by
12 each state in which students reside; whether an institution is authorized by a state by virtue of a
13 reciprocity agreement; the consequences, “including ineligibility for title IV, HEA funds” for a
14 student who changes his or her residence to a state where the institution is not authorized;
15 information regarding the process for submitting complaints to state authorities; information
16 about adverse actions against the institution; information about refund policies; and information
17 about whether an institution’s programs satisfies educational prerequisites for state licensure or
18 certification.

19 51. As part of the required public disclosures, “in the case of a G[ainful]
20 E[mployment] program, as defined under [34 C.FR.] § 668.402,” an institution covered by the
21 Final Rule must publicly explain “the consequences, including ineligibility for title IV, HEA
22 funds, for a student who changes his or her State of residence to a state where the institution does
23 not meet licensure or certification requirements in the State.” Thus, the Final Rule is expressly
24 tied to the Department’s Gainful Employment regulations.

25 52. With respect to the required individual disclosures, an institution that offers
26 distance and correspondence programs covered by the Final Rule must disclose “directly and
27 individually” and “[p]rior to each prospective student’s enrollment, any determination by the
28 institution that the program does not meet licensure or certification prerequisites in the State of

1 the student’s residence.” If a prospective student receives such a disclosure and subsequently
2 enrolls in the program, the institution must receive, and must be able to demonstrate that it
3 received, acknowledgement from that student that the student received the disclosure.

4 53. Additionally, as part of the required individual disclosures, an institution that
5 offers distance and correspondence programs covered by the Final Rule must disclose adverse
6 actions initiated against the programs and determinations that the program ceases to meet
7 licensure or certification requirements.

8 54. When it announced the Final Rule on December 16, 2016, the Department
9 estimated that these disclosures would protect more than 5.5 million students, including nearly
10 three million that attend programs exclusively online. “Education Department Announces Final
11 Rule on State Authorization of Postsecondary Distance Education, Foreign Locations,” Dec. 16,
12 2016, [https://www.ed.gov/news/press-releases/education-department-announces-final-rule-state-
13 authorization-postsecondary-distance-education-foreign-locations](https://www.ed.gov/news/press-releases/education-department-announces-final-rule-state-authorization-postsecondary-distance-education-foreign-locations).

14 Post-Publication Guidance to Regulated Entities Regarding the Final Rule

15 55. The Department has provided guidance to representatives of regulated entities
16 regarding the Final Rule.

17 56. On or about January 10, 2017, the Department received a letter from Marshall
18 Hill (Executive Director, NC-SARA) and Russ Poulin (Director, Policy & Analysis, WCET)
19 seeking clarification regarding the Final Rule. A true and correct copy of that letter is attached
20 hereto as Exhibit A. On January 18, 2017, the Department responded by letter, providing
21 clarification regarding certain of the issues raised. A true and correct copy of that letter is
22 attached hereto as Exhibit B.

23 The New Administration and the Department’s Efforts to Deregulate in 2017 and 2018

24 57. Following the election and inauguration of President Trump, and thirty-two days
25 after the Final Rule was published in the Federal Register, the Chief of Staff to the President of
26 the United States issued a memorandum (hereinafter “Regulatory Review Memorandum”) that
27 instructed federal agencies, including the Department, to “review[] questions of fact, law, and
28

1 policy” with respect to all regulations, including the Final Rule, that had been published in the
2 Federal Register, but which had not yet taken effect. *See* 82 Fed. Reg. 8,346 (Jan. 24 ,2017).

3 58. The Department announced six days later in the Federal Register its intent to take
4 action regarding the Final Rule. On January 30, 2017, the Department announced in the Federal
5 Register that it was delaying an unrelated rule, issued under the Every Student Succeeds Act
6 (“ESSA”). 82 Fed. Reg. 8,669 (Jan 30, 2017). In that same notice, the Department announced
7 that the delay of the ESSA regulations was the “first of several regulatory actions the Department
8 intends to take regarding regulations that have been published in the Federal Register but had not
9 taken effect as of January 20, 2017, including the Department’s regulations for ... State
10 Authorization (RIN 1840–AD20) issued under title IV of the Higher Education Act of 1965, as
11 amended.”

12 59. On February 24, 2017, President Trump issued Executive Order 13,777. 82 Fed.
13 Reg. 12,285 (March 1, 2017) (“Deregulation Order”). The Deregulation Order required the head
14 of each agency to designate a Regulatory Reform Officer to oversee the regulatory reform
15 initiatives. The Deregulation Order also required each agency to establish a Regulatory Reform
16 Task Force to evaluate existing regulations and “make recommendations to the agency head
17 regarding their repeal, replacement, or modification, consistent with applicable law.” Each
18 Regulatory Reform Task Force was required to produce a report to the agency head within 90
19 days of the Executive Order and on a schedule the agency head set thereafter, “detailing the
20 agency’s progress toward ... implementing the regulatory reform initiatives [of the Executive
21 Order]; and ... identifying regulations for repeal, replacement, or modification.”

22 60. On April 25, 2017, the Chief of Staff to Secretary Betsy DeVos appointed Robert
23 S. Eitel as the Department’s Regulatory Reform Officer. On that same date, the Secretary’s
24 Chief of Staff established the Department’s Regulatory Reform Task Force (“RRTF”), which
25 “meets weekly” and which convened on at least May 4, 2017, May 11, 2017, and May 18, 2017.

26 61. On June 22, 2017, the Department published a request for comments entitled
27 “Evaluation of Existing Regulations.” 82 Fed. Reg. 28,431 (June 22, 2017) (“June 2017
28 Solicitation”). In that request, the Department sought “input of regulations that may be

1 appropriate for repeal, replacement, or modification.” The Department sought comment on all of
2 its regulations, codified in subtitles A and B of title 34 of the Code of Federal Regulations, and
3 all of its significant guidance, which include the subtitles in which the Final Rule was to take
4 effect on July 1, 2018.

5 62. On August 25, 2017, the Department published a notice of two public hearings to
6 “seek[] public input on Department regulations and guidance specific to postsecondary education
7 programs that may be appropriate for repeal, replacement, or modification.” 82 Fed. Reg.
8 40,518, 40,519. The Department noted that its request for public input included “regulations and
9 guidance for the Federal Student Aid programs authorized under title IV of the Higher Education
10 Act of 1965, as amended, as well as regulations and guidance for the institutional service,
11 international and foreign language education, and student service programs.” The public hearings
12 were held on September 26, 2017 in Sandy, Utah, and October 4, 2017 in Washington, D.C.

13 63. On October 18, 2017, the RRTF issued its second Status Report to Secretary
14 DeVos. The October 2017 status report states that the “RRTF met during June, July, August,
15 and September,” and indicates that the RRTF and each Principal Office within ED were
16 reviewing the comments received by the Department in response to the June 22, 2017
17 Solicitation.

18 64. In addition to the work of the RRTF, on June 16, 2017, the Department published
19 a notice in the Federal Register announcing its intention to establish two negotiated rulemaking
20 committees to prepare proposed regulations for the Title IV Programs. As noticed by the
21 Department, one committee (the “2017-18 Gainful Employment Negotiated Rulemaking
22 Committee”) was “to develop proposed regulations to revise the gainful employment regulations
23 published by the Department on October 31, 2014.” The second committee (the “2017-18
24 Borrower Defense Negotiated Rulemaking Committee”) was “to develop proposed regulations to
25 revise the regulations on borrower defense to repayment of Federal student loans and other
26 matters, published on November 1, 2016.” *See generally* 82 Fed. Reg. 27,640 (June 16, 2017).
27 Both committees were established in the fall of 2017.
28

1 comment stated that “[t]his is a major flaw in the current language. We would be grateful for
2 guidance.” The WICHE/WCET Comment further stated that “[w]e highly recommend that the
3 Department abandon its new definitions of ‘reside’ and return to the word ‘located’ that was used
4 in the drafts during the 2014 Negotiated Rulemaking process.”

5 69. The WICHE/WCET Comment also sought guidance on complaint processes,
6 stating “[p]lease address the ability for an out-of-State public or non-profit institution to be in
7 authorization compliance for activities which it provides in California.” The comment provided
8 that California “does not regulate out-of-State public or non-profit institutions serving students
9 within its borders” and noted that “there is no complaint process provided by any agency in
10 California for out-of-State public or non-profit institutions serving students located within their
11 borders.” According to the comment, “[a]s the regulation currently reads, those students would
12 not be eligible for title IV aid after July 1, 2018.” The comment stated “[w]e doubt that is the
13 Department’s intent.” The comment then inquired: “Is there a way for the Department to work
14 with California on a compromise, as it did in resolving the issue of having a complaint process
15 for the State authorization regulation for in-state non-profit institutions?” Finally the comment
16 noted that “[t]his same issue may arise with other States, but most of them at least have
17 complaint processes for SARA member institutions. California has not yet joined SARA.”

18 70. The WICHE/WCET Comment also suggested prompt responses from the
19 Department in preparation for the July 1, 2018 effective date of the Final Rule: “We request that
20 the Department indicate a timeline to expect to receive a response to comments. Please note that
21 compliance requirements for the federal state authorization regulations will require time to
22 implement a process to achieve compliance by July 1, 2018. Your response and direction will be
23 very important. WCET and SAN intend to provide the members of our organizations guidance
24 and support as these regulations are implemented. We would be very pleased to offer further
25 assistance to the Department and to assist with communication to institutions.” A true and
26 correct copy of the WICHE/WCET Comment is attached hereto as Exhibit C.

27 71. At the October 4, 2017 Public Hearing, Cheryl Dowd, from the WCET State
28 Authorization Network testified. In her testimony, Ms. Dowd suggested that the Department

1 clarify the use of the term “reside,” noting she had a question about “compliance location,” and
2 stating that “[w]hen one reads the regulation, it’s hard to determine what is the exact requirement
3 by the regulation. There is language in regard to the use of the word reside.” Ms. Dowd
4 requested that the “basic tenants of the regulations remain” but that the Department provide
5 “guidance ... in a timely fashion due to the current effective date of July 1, 2018.” A true and
6 correct copy of excerpts of the transcript of that hearing is attached hereto as Exhibit D.

7 The Alleged “Catalyst” Letters

8 72. On or about February 6, 2018, the Department received a letter from the
9 American Council on Education (“ACE”), a true and correct copy of which is attached hereto as
10 Exhibit E. The letter stated that institutions had raised concerns with ACE that “the regulations
11 appear to make students who are residents of certain states ineligible for federal financial aid if
12 they are studying online at institutions located outside their states.” The ACE letter explained
13 that the concern “is related to the requirement imposed by the state authorization regulations that
14 mandates institutions disclose to students the appropriate state complaint process for their state
15 of residence.” The ACE letter further stated that “[a] number of states, including California, do
16 not currently have complaint processes for all out-of-state institutions.” ACE expressed the
17 concern that this would “appear to effectively bar some of their residents from receiving federal
18 financial aid if they choose to study online at institutions located outside their states.” The ACE
19 letter requested that the Department “clarify the Department’s position on the eligibility of the
20 students so situated.”

21 73. The ACE letter did not request that the Department delay the effective date of the
22 Final Rule.

23 74. On or about February 7, 2018, the Department received a letter from the WICHE,
24 the National Council for State Authorization Reciprocity (“NC-SARA”), and the Distance
25 Education Accrediting Commission (“DEAC”).

26 75. The Department did not include a cite to the February 7, 2018 letter in its Notice
27 of Proposed Rulemaking (“Delay Proposal”), 83 Fed. Reg. 24,250 (May 25, 2018), or the
28 Delay/Rescission Rule. It also did not place the letter in the docket for the rulemaking.

1 Commenters did not have a full opportunity to comment meaningfully on the letter, which the
2 Department stated was part of the basis for its proposed delay. On information and belief, a copy
3 of that letter (“WICHE Letter”) is attached hereto as Exhibit F.

4 76. According to the WICHE Letter, representatives of WICHE, NC-SARA, and
5 DEAC had met with the Acting Assistant Secretary for Postsecondary Education “about critical
6 issues on ... distance education,” including a “discussion on state authorization.”

7 77. The WICHE Letter sought “clarification” on ED’s “desired format for the
8 disclosures” required by the Final Rule.

9 78. The WICHE Letter also raised a “concern” about the definition of “residence” in
10 the Final Rule. No further detail was provided regarding that “concern.”

11 79. The WICHE Letter suggested the Department had two options; it could “(1) delay
12 the rules and submit the issues to additional negotiated rulemaking or (2) issue clarification via a
13 dear colleague letter on USDE’s expectations for compliance.”

14 The Department Proposes to Delay the Final Rule

15 80. Despite the January 2017 Regulatory Review Memorandum instructing the
16 Department to “review[] questions of fact, law, and policy” with respect to rules that had not yet
17 taken effect, and the Department’s statement in January 2017 that it “intends” to take action
18 regarding the Final Rule, the Department took no action in this regard until May 2018. On May
19 25, 2018, the Department published the Delay Proposal in which it proposed a two-year delay, to
20 July 1, 2020, of the effective date of the Final Rule.

21 81. In proposing to delay the Final Rule, the Department claimed that the “catalysts
22 for the delay are the February 6 and February 7 [2018] letters.” The Department further stated in
23 the Delay Proposal that it could not address the concerns asserted in the February 2018 letters
24 through guidance because it did “not believe guidance would be sufficient to address the
25 complexities institutions have encountered, even prior to the rule’s effective date. Specifically,
26 we believe that we will need significant detail to properly operationalize [the term “residency”]
27 and will need to work with impacted stakeholders to determine how best to address a concern
28

1 that is complex and potentially costly to institutions and students.” The Department also stated
2 that the WICHE and ACE letters “in particular prompted this proposed delay.”

3 82. Consistent with its announcement in the Spring 2018 Unified Agenda, the
4 Department also announced in the Delay Proposal its plans to conduct a negotiated rulemaking
5 regarding the state authorization of distance education. And on July 31, 2018, the Department
6 published in the Federal Register a notice of intent to establish a new negotiated rulemaking
7 committee to consider, among other topics, the requirements related to programs offered through
8 distance education or correspondence courses, including disclosures about such programs to
9 enrolled and prospective students, and other State authorization issues.

10 83. The Department provided a 15-day period for the public to comment on the Delay
11 Proposal. That period included six weekend days and one Federal holiday (Memorial Day, May
12 28, 2018). To justify the 15-day length of the comment period, the Department stated that “the
13 2016 rule is scheduled to take effect on July 1, 2018, and a final rule delaying the effective date
14 must be published prior to that date.”

15 84. In the Delay Proposal, the Department also noted that it planned to conduct
16 negotiated rulemaking to consider possible revisions to the Final Rule, but that it could not
17 complete the negotiated rulemaking process for a rule to go into effect before July 1, 2020 in
18 light of the Master Calendar rule. The Department stated that “[b]ecause November 1 has
19 already passed, there is no way for the Department to publish a final rule that would be effective
20 by July 1 of this year.” Therefore, the Department claimed that “[i]t would be confusing and
21 counterproductive for the final regulations to go into effect before the conclusion of this
22 reconsideration process.”

23 85. The Department did not submit the subject of the delay to negotiated rulemaking
24 as required by HEA § 492(b), 20 U.S.C. § 1098a(b) and stated that it “has not had sufficient time
25 to effectuate this delay through negotiated rulemaking.” Although the Department stated that
26 negotiated rulemaking “requires a number of steps” and that such a process “typically takes the
27 Department well over 12 months to complete,” the Department provided no citation or evidence
28 that the length of the process was required by law.

1 86. The Department stated that it “has good cause to waive the negotiated rulemaking
2 requirement with regard to its proposal to delay the effective date of the final regulations to July
3 1, 2020, in order to complete a new negotiated rulemaking proceeding to address the concerns
4 identified by some of the regulated parties in the higher education community.” The Department
5 further provided that “it would not be practicable, before the July 1, 2018 effective date specified
6 in the final regulations published December 19, 2016 (81 FR 92232), to engage in negotiated
7 rulemaking and publish a notice of final regulations to delay the effective date.”

8 87. The Department also stated that it believed that “it will be in the public interest to
9 delay the effective date of these regulations so that these issues can be resolved before the
10 regulations go into effect. The approach may also benefit from input from States that are in the
11 process of changing requirements for distance education programs.”

12 88. Despite the unreasonably short comment period, ED received 41 comments on its
13 Delay Proposal, including a comment from plaintiff National Education Association. A true and
14 correct copy of NEA’s comment is incorporated herein and attached hereto as Exhibit G.

15 The Department Delays/Rescinds the Final Rule

16 89. On June 29, 2018, the Department put the Delay/Rescission Rule on public
17 inspection with the Federal Register.

18 90. The Federal Register Act requires that the Office of the Federal Register file
19 documents for public inspection at least one business day before publication in the Federal
20 Register. 44 U.S.C. §§ 1503, 1507.

21 91. The Freedom of Information Act requires “substantive rules of general
22 applicability” to be published in the Federal Register and provides that “except to the extent that
23 a person has actual and timely notice of the terms thereof, a person may not in any manner be
24 required to resort to, or be adversely affected by, a matter required to be published in the Federal
25 Register and not so published.” 5 U.S.C. 552(a)(1).

26 92. The Delay/Rescission Rule did not publish in the Federal Register until July 3,
27 2018. The Department provided that the effective date of the Delay/Rescission Rule was June
28 29, 2018, four days before the rule was published in the Federal Register.

1 93. The Department acknowledged in the preamble to the Delay/Rescission Rule that
2 an “effect” of the delay was to harm students. For example, the Department noted that: “[a]s a
3 result of the proposed delay, students might not receive disclosures of adverse actions taken
4 against a particular institution or program. Students also may not receive other information
5 about an institution, such as information about refund policies or whether a program meets
6 certain State licensure requirements. Increased access to such information could help students
7 identify programs that offer credentials that potential employers recognize and value, so delaying
8 the requirement to provide these disclosures may require students to obtain this information from
9 another source or may lead students to choose sub-optimal programs for their preferred courses
10 of study.”

11 94. As another example of the “effect” of the Delay, the Department noted that: “the
12 delay of the disclosures related to the complaints resolution process could make it harder for
13 students to access available consumer protections. Some students may be aware of Federal
14 Student Aid’s Ombudsman Group, State Attorneys General offices, or other resources for
15 potential assistance, but the disclosure would help affected students be aware of these options.”

16 95. The Department reiterated that the letter received from ACE and WICHE in
17 February 2018 were the “catalysts” for the delay, even though it did not dispute that the issues
18 raised in the catalyst letters had been previously made known to the Department. Nor did the
19 preamble recognize that the Department had indicated in January 2017 that it intended to take
20 action with respect to the Final Rule. Nor did the preamble recognize the extensive reviews of
21 the Department’s regulations that were taking place in 2017, where the issues raised in the
22 “catalysts” were specifically raised. Nor did the preamble recognize that ED had been engaged
23 in negotiated rulemaking regarding Gainful Employment, which is expressly tied to the Final
24 Rule. Rather, in the preamble to the Delay/Rescission Rule, the Department stated only that “we
25 only more recently determined that further consultation in the form of negotiated rulemaking was
26 the appropriate vehicle by which to clarify the 2016 final regulations, and it was the cited letters
27 that changed our understanding of the extent of stakeholder concerns.”
28

1 Delay/Rescission Rule and failing to conduct a negotiated rulemaking before adopting the
2 Delay/Rescission Rule;

3 (B) Declare unlawful, set aside, and vacate the Delay/Rescission Rule;

4 (C) Enjoin defendants from implementing the Delay/Rescission Rule;

5 (D) Order the Defendants to implement and give effect to the Final Rule.

6 (E) Award plaintiffs their costs and expenses, including reasonable attorney's fees and
7 expert witness fees; and

8 (F) Grant such other relief as this Court deems just and proper.

9
10 Date: August 23, 2018

/s/ Brian Schmidt

Brian Schmidt

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