**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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| CAREER COLLEGES & SCHOOLS OF TEXAS,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, in his official capacity as the Secretary of Education,<br><br>Defendants. | Case No. 1:23-cv-00433-RP |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE EXPERT DECLARATION**

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## INTRODUCTION

Diane Jones has "worked extensively on issues relating to the implementation and administration of the Department's regulations regarding borrower defense." Those are not her words in this case; those are her words when the Department itself put Ms. Jones forward to testify as to how its borrower defense regulations worked and would affect regulated parties in *Sweet v. Cardona,* while she was serving as the Principal Deputy Under Secretary, Delegated the Functions and Duties of the Under Secretary, in charge of borrower defense regulations. CCST offers her testimony in this case for the exact same reason: to explain how the Department's borrower defense regulations will affect higher education institutions and their students. These are the same institutions that Ms. Jones regulated as a Department official and at which she has worked during her thirty-year career in higher education. It would be surprising were Ms. Jones able to testify to that subject in defense of the Department, but not against it. Yet, that is the Department's position here.

To reach this result, the Department's Motion ignores the law, misapplies established principles, and fundamentally misunderstands Ms. Jones's testimony.[1] First, the Department mistakenly assumes (without citing a single precedent) that *Daubert* applies in full at the preliminary injunction stage. Yet, courts in this District, in this Circuit, and across the country routinely do not apply *Daubert* as strictly, or even at all, to experts offered at the preliminary injunction stage. *See, e.g.*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 956 (W.D. Tex. 2011) (Sparks, J.), *vacated in part on other grounds*, 667 F.3d 570 (5th

[1] The Department could have avoided this fundamental misunderstanding had it complied with the local rules and this Court's "meet-and-confer" requirement. *See* W.D. Tex. LCvR 7(G). That failure is yet another reason—beyond its legal and factual errors—to deny the Department's motion.

Cir. 2012); *see infra* Section I. Tellingly, the Department does not cite a single case excluding an expert under *Daubert* at the preliminary injunction stage. If there were any legitimate objections to Ms. Jones's testimony (which there are not), they would not be pursuant to *Daubert*.

Second, the Department claims that Ms. Jones does not satisfy *Daubert* because she lacks the requisite expertise (notwithstanding the Government's prior reliance on her to testify about such matters) and offers simply legal conclusions without any basis in fact. This argument fundamentally misunderstands Ms. Jones's testimony. Ms. Jones is testifying to the effects of the Department's regulations on the higher education institutions that she regulated as a Senate-confirmed official and in which she served over her thirty-year career in higher education. Those effects, which are highly relevant to the "irreparable harm" element for a preliminary injunction, depend on a review of the regulations themselves (hence her discussion of them in the declaration, which is not a forbidden "legal conclusion") and on an understanding of higher education institutions. Given her background as regulator and regulated, it is hard to fathom a person more qualified to provide this testimony than Ms. Jones. Nor is there anything unusual about the facts and methodology underlying this type of testimony in an administrative law case. *See id.*

**BACKGROUND**

Diane Jones has worked in higher education for thirty years. *See* Dkt. No. 25, App-3—4. She served at four different types of higher education institutions, including career education institutions like CCST's member schools in this case, a community college, a four-year public institution, and an Ivy League University. *Id.* at App-4. During the Bush Administration, she served as Senate-confirmed Assistant Secretary for Postsecondary Education and as Principal Deputy Under Secretary, Delegated the Functions and Duties of the Under Secretary, during the Trump Administration. *Id.* at App-3. Critically, Ms. Jones was responsible for assessing the broad,

nation-wide effects of borrower defense regulations like those in this case. *Id.* Based on that experience alone, Ms. Jones has extensive knowledge regarding how borrower defense regulations affect higher education institutions and their students.

Indeed, the Department put forth Ms. Jones to explain to the court in *Sweet v. Cardona* the Department's regulatory efforts regarding borrower defense regulations, including how those regulations differed over time, how they affected institutions and students, and how the Department went about changing the regulations.[2] Nominally aimed at explaining the Department's delay in processing various borrower defense applications, the twelve-page declaration in *Sweet v. Cardona* describes how Ms. Jones "worked extensively on issues relating to the implementation and administration of the Department's regulations regarding borrower defenses," *id.* at 2, how the 2016 borrower defense regulations "did not reflect an appropriate balance of the responsibilities of the agency to protect taxpayers, and borrowers and to hold institutions accountable" and had "significantly changed the rules for considering borrower defense claims," *id.* at 3-4, how various courts had ruled on the 2016 regulations, *id.* at 3-4, 7, and how the Department "inform[ed] institutions of higher education of their responsibilities" under the various regulations, *id*. at 5, among other issues.

The Department relied heavily on this declaration in *Sweet v. Cardona*. It defended Ms. Jones and her declaration against plaintiffs' motion to exclude it in that case. *See* Partial Opp'n to Pls.' Mot. to Suppl. and Complete the Administrative R. and Exclude Defs.' Decls., *Sweet v. Cardona*, No. 3:19-cv-03674-WHA (N.D. Cal. Jan. 16, 2020), ECF No. 75. The Department cited

[2] *See* Decl. of Diane Auer Jones, *Sweet v. Cardona*, No. 3:19-cv-03674-WHA (N.D. Cal. Nov. 14, 2019) (the "*Sweet* Litigation"), ECF No. 56-3. For the Court's convenience, a true and correct copy of the declaration filed by the Department in the *Sweet* Litigation and obtained from N.D. Cal. court's PACER system is attached to this Response as Exhibit A.

Ms. Jones's declaration twenty-three times in its motion for summary judgment, *see* Defendants' Notice of Motion and Motion for Summary Judgment, *id.*, ECF No. 63, on issues ranging from the legal status of court cases, *id.* at 4, 9, 19-20, and how the Department's regulations on borrower defense claims work in practice, *id*. at 5, 20, to how the borrower defense regulations have differed over time, *id.* at 10, the use of Department resources, *id.* at 10-12, 20, 23, and how the borrower defense regulations affect student and institutional interests, *id.* at 9, 21-22.

Like the Department in *Sweet v. Cardona*, CCST offers Ms. Jones's testimony to explain how borrower defense regulations work and affect institutions and students. Ms. Jones explained that "[i]t was during my work at a proprietary institution that I came to understand just how difficult and costly it is for schools to respond to a significant change in regulations." App-4. She further explained that the Department's new rule would make it difficult to see "how a school can practicably comply with such a standard, without altogether prohibiting staff and faculty from engaging in open dialogue." App-8. She also stated proprietary schools "do not have the financial means or other resources to withstand the massive liability to which they are undoubtedly exposed" by the Department's new rule and that "if the New Rule is permitted to take effect on July 1, 2023, we will see numerous schools forced to close, unable to defend themselves or their reputations in the face of mass borrower defense claims and an all-or-nothing approach to loan forgiveness." App-10. Although Ms. Jones's declaration for CCST, like her declaration for the Department, discusses the substance of various borrower defense regulations, CCST relied on it to show how the regulations affect schools. *See* Dkt. No. 24, at 7 (citing Ms. Jones in Background Section to establish harm to schools); 22-24 (citing Ms. Jones in discussion of harm). Notably, nowhere does CCST argue that the final rule is unlawful because Ms. Jones says so.

## ARGUMENT

The motion to exclude the declaration of Ms. Jones (the "Motion") rests on flawed legal premises and misunderstandings of Ms. Jones testimony. First, the Motion mistakenly assumes (without citing any precedent) that *Daubert* applies in full at the preliminary injunction stage. Second, the Motion misunderstands that Ms. Jones is testifying to the immediate harms of the regulation, not its unlawfulness per se.

### I. At The Preliminary Injunction Stage, The Departments' Objections To Ms. Jones's Testimony Pertain (At Most) To The Weight Of The Testimony, Not Its Admissibility.

As Judge Sparks explained in *Lakey*, "[a]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence." *Lakey*, 806 F. Supp. 2d at 956, (quoting *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993). "One reason for this relative evidentiary laxity is because '[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.'" *Id*. (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). "'Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'" *Id*. "In short, '[a] party ... is not required to prove his case in full at a preliminary-injunction hearing.'" *Id*.

In light of these standards, courts in this district, in this circuit, and across the country routinely do not apply *Daubert* as strictly or even at all to experts offered at the preliminary injunction stage. *See Lakey*, 806 F. Supp. 2d at 956; *Half Price Books, Recs., Mags., Inc. v. Barnesandnoble.com, LLC*, No. CIV.A. 302CV2518-G, 2003 WL 23175432, at *1 (N.D. Tex. Aug. 15, 2003) (Fish, C.J.); *Miller v. City of Cincinnati*, 709 F. Supp. 2d 605, 620 (S.D. Ohio

2008), *aff'd* 622 F.3d 524 (6th Cir. 2010) ("in deciding the motion for preliminary injunction, the Court finds it unnecessary to strike Weaver's affidavit under Federal Rule of Evidence 702."); *Comput. Assocs. Int'l v. Quest Software, Inc*., 333 F. Supp. 2d 688, 693 (N.D. Ill. 2004) ("At this stage of the litigation defendants' motion to strike is largely unnecessary as they have the opportunity to challenge or rebut the opinions presented in Hubel's report."); *United HealthCare Ins. Co. v. AdvancePCS*, No. 01-CV-2320, 2002 U.S. Dist. LEXIS 28262, at *18 (D. Minn. Mar. 1, 2002) ("In the context of hearings on Motions for a Preliminary Injunction, it is even more apparent that Daubert, Kumho, and Rule 702 do not require the striking of this Affidavit.").

The decision in *Lakey* is instructive. There, plaintiffs offered three declarations from medical doctors in support of their motion for a preliminary injunction. The defendants moved to strike the declarations for failure to satisfy *Daubert*. The court held that "[t]hese arguments lack merit." 806 F. Supp. 2d at 956. In light of the law discussed above that preliminary injunction procedures are "less formal," the court concluded that the declarations "were properly read and considered by the Court at this stage." *Id.*

The Department does not cite any contrary authority. Indeed, the Department does not cite a single case that excludes an expert under *Daubert* at the preliminary injunction stage, let alone that excludes such an expert regarding irreparable harm in an administrative law challenge. Instead, the Department cites summary judgment or final judgment stage cases in far-flung substantive contexts, from air crashes and medical malpractice to 1983 claims against police and copyright infringement.

In sum, at the preliminary injunction stage, the Department's motion simply is not ripe. To the extent the Department's arguments should be considered at all (and, indeed, they should not

be), they go to the weight that this Court should give Ms. Jones's testimony, not to whether it should be excluded.

## II. Even Assuming Defendants' Objections Pertain To Admissibility Under *Daubert*, They Misapply The Law And Misunderstand Ms. Jones's Testimony.

Even assuming some sort of *Daubert* test should be applied at this point, Defendants' two arguments for excluding Ms. Jones fail. They misapply the law and also fundamentally misunderstand the nature of her testimony.

### A. Ms. Jones is undoubtedly qualified under *Daubert* to testify to the impact of borrower defense regulations on higher education institutions.

The Department argues (contrary to its prior declaration on behalf of Ms. Jones) that Ms. Jones does not have "the requisite expertise to testify in this case." Mot. at 5-6. Yet it is well established in this circuit that "the text of Rule 702 expressly contemplates that an expert may be qualified *on the basis of experience*." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 247 (5th Cir. 2002) (emphasis added). Here, Ms. Jones is able to testify as to how the borrower defense regulations that she applied while in government and that were applied to her institutions over the course of her career might work and affect regulated parties. That is exactly the topic for which the Department previously proffered her testimony, based on what was then "extensive" experience. *See supra* at 2-3. To be sure, the Department purported to claim she testified as a fact witness on that prior occasion (although her testimony there, like here, included the intricacies of various legal cases and regulations). Yet it is hard to see how what the Department previously supported as "extensive" experience is now somehow "limited political experience," Motion at 6, nor how the Department can ignore Ms. Jones's professional history.

Unable to cite a single case to support the argument that Ms. Jones cannot be qualified based on her experience alone, *see* Motion at 5-6 (citing only generalities from a treatise), the Department erects two straw men arguments. First, the Department protests that Ms. Jones

"purports to be an expert in the relevant federal laws," when she is not a lawyer. *Id.* at 6. But she was not a lawyer when the Department had Ms. Jones testify about the function and practice of the borrower defense framework in *Sweet v. Cardona.* More fundamentally, Ms. Jones does not proclaim to be a legal expert but rather an expert in the effect of borrower defense regulations on higher education institutions of the sort that she both regulated and worked at.

Second, the Motion protests that Ms. Jones's expertise cannot supplant the Department's "expertise . . . as to its own policies." Mot. at 6. That is either a misunderstanding of Ms. Jones's testimony or a dangerous self-aggrandizement. As to the former, Ms. Jones is testifying to the harms that the Department's regulation will impose, not the Department's policy judgments. As to the latter, to the extent that the Department is asserting that Ms. Jones cannot testify to the harm of the Department's regulations because that is within the competence only of Department officials, that assertion would be contrary to any meaningful judicial review.

B. Ms. Jones's testimony about the effect of borrower defense regulations on higher education institutions satisfies *Daubert*.

The Department also takes issue with Ms. Jones's testimony itself. But here it completely misunderstands Ms. Jones's testimony. Ms. Jones is testifying about the harm of the Department's borrower defense regulations on higher education institutions. As Ms. Jones explained, and as is apparent from any fair reading of her declaration, her opinions are (and in fact must be) based on her review of the Department's borrower defense regulations and an application of those regulations to higher education institutions based and her extensive knowledge and experience of those institutions and their behavior. *See* Dkt. No. 25 at App-5. This is the same type of testimony that Judge Sparks accepted in *Lakey*. There, the doctors testified that they had "reviewed House Bill No. 15" in order to ascertain its "requirements," and then, based on their medical experience with abortion practice in medicine, testified that it would could cause doctors to act "to the

detriment of patients." Grimes Declaration ¶ 11, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. 1:11-cv-00486-SS (W.D. Tex. June 30, 2011), ECF No. 18-2; *see* Lyerly Declaration ¶ 15, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. 1:11-cv-00486-SS (W.D. Tex. June 30, 2011), ECF No. 18-3 (similar). Here, Ms. Jones is testifying that she "reviewed" the Department's borrower defense regulations before forming opinions, based on her knowledge and experience, that those regulations would injure those institutions by causing them to act in certain ways.

Ignoring this established mode of testimony, the Department first criticizes Ms. Jones by invoking the uncontestable proposition that an expert should offer more than legal conclusions. *See* Mot. at 3-4. The fundamental flaw in this argument is that Ms. Jones does not offer testimony as to whether the Department's regulations violate the APA. Instead, she opines on the effect of the regulations on institutions. That is not the same, for the same reason that the likelihood of success and irreparable harm elements for a preliminary injunction are not co-extensive.

To be sure, to testify to the effects of the regulation, Ms. Jones must describe the regulation and how, as the Department puts it, the current regulation "compares to the 2019 borrower-defense rule." Motion at 3. As a result, her testimony describes changes in due process protections, substantive standards, and procedures, most of which directionally harm schools by exposing them to more liability. But that is no different from what the doctors did in *Lakey*, where they had to describe changes in Texas law, and in fact described it as more restrictive in its requirements, in order to opine on the law's effects on regulated parties. It also is no different from what Ms. Jones did for the Department in *Sweet v. Cardona*, where she analyzed changes in the borrower defense regulation in order to explain how those regulations worked. *See supra* at 2.

Next, the Department offers that Ms. Jones does not provide "facts forming a basis for her opinions" and does not include any "specific facts pertaining to any particular schools." Mot. at 4-5. Here, the Department simply misunderstands her testimony and imposes an impossible standard. Ms. Jones's declaration sets out in stunning detail—much to the criticism of the Department in other parts of its argument—an understanding of the substantive requirements of the borrower defense regulations and how higher education institutions will react to those requirements, by changing practices, closing campuses, or other behaviors. *See supra* at 2-5. It does not matter that she does not describe her opinions at the level of particular schools, *i.e.*, that School X will take Y step, or that she does not provide some sort of a "principle or method" to identify particular schools taking particular steps. Mot. at 4. Perhaps that would be required were Ms. Jones providing a class certification opinion intended to identify whether and which class members are harmed in similar ways. But it is no more necessary for her opinion in this case to be appropriate than it was for the doctors in *Lakey* to have to name individual doctors and patients whose behavior would be affected by the Texas law or to annunciate a "principle or method" by which those doctors could be identified.

## CONCLUSION

For the foregoing reasons, Defendants' motion to exclude Ms. Jones should be denied.

Dated: May 22, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2023, a true and correct copy of the foregoing document was served upon all counsel of record in this action via the Court's CM/ECF system.

/s Allyson B. Baker
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# EXHIBIT A

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**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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| THERESA SWEET, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>ELISABETH DEVOS, in her official capacity as Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION<br><br>Defendants. | No. 19-cv-03674-WHA<br><br>**DECLARATION OF DIANE AUER JONES**<br><br>Honorable William H. Alsup |

**DECLARATION OF DIANE AUER JONES**

I, Diane Auer Jones, declare as follows:

1. My name is Diane Auer Jones, I am over the age of 18, and serve as Principal Deputy Under Secretary, Delegated the Duties of the Under Secretary, in the United States Department of Education ("ED"). I have personal knowledge of the matters set forth herein and if called as a witness, I could and would testify competently thereto.
2. As Principal Deputy Under Secretary, I am the senior higher education official responsible for overseeing Federal Student Aid, the Office of Postsecondary Education, and the Office of Career, Technical and Adult Education at ED. In particular, I advise the Secretary of Education on policies and issues relating to the Federal student financial aid programs, authorized and administered by the Department under Title IV of the Higher Education Act of 1965, as amended, including the Federal Direct Loan Program.
3. I was appointed Principal Deputy Under Secretary at ED on June 25, 2018 and delegated the duties of Under Secretary on June 27, 2019. I also served as Acting Assistant Secretary for Postsecondary Education. Previously, I served as the Assistant Secretary for Postsecondary Education in ED during the administration of President George W. Bush. Earlier in my career, I was a biology professor at the Community College of Baltimore County in Maryland and I later worked at Princeton University and the Career Education Corporation. I have also worked at the National Science Foundation, the U.S. House of Representatives Committee on Science, and the White House Office of Science and Technology Policy, and as a senior policy advisor to the Secretary of Labor.
4. As part of my responsibilities in the Department, I have worked extensively on issues relating to the implementation and administration of the Department's regulations regarding borrower defenses to the collection of Federal student loans.

**The Department's Federal Student Aid Priorities 2018-2019**

5. In November 2016, the Department promulgated new "borrower defense" regulations addressing, among other things, standards and procedures for student borrowers to seek relief from certain federal student loan obligations based on misconduct by an educational institution ("the 2016 regulations"). Those regulations were scheduled to become effective on July 1, 2017. However, , the Department determined that the 2016 regulations did not reflect an appropriate balance of the responsibilities of the agency to protect taxpayers, and borrowers and to hold institutions accountable. Also, the 2016 regulations did not provide due process rights to institutions during the claim adjudication process. Accordingly, in June 2017, the Department initiated a process to develop new rules governing borrower defense. The Department then delayed the effective date of the 2016 regulations pending, *inter alia*, the completion of that rulemaking process.

6. When I started in my current position in 2018, the Department had just completed the statutorily required negotiated rulemaking process to develop its new borrower defense regulations, a process that required the Department to solicit the input of a broad group of stakeholders and hold public hearings over a multiple-month period. When the negotiating parties failed to reach consensus, the Department drafted new regulations and issued a Notice of Proposed Rulemaking (NPRM) with proposed borrower defense regulations on July 31, 2018.

7. In the fall of 2018, the United States District Court for the District of Columbia found the Department's delays of the 2016 regulations unlawful under the Administrative Procedure Act and vacated them. *See Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C.

2018); 332 F. Supp. 3d 181 (D.D.C. 2018). Shortly thereafter, the court denied a motion to preliminarily enjoin the 2016 regulations, and so they took effect. *California Association of Private Postsecondary Schools v. DeVos*, 344 F. Supp. 3d 158 (D.D.C. 2018). Copies of those decisions are Exhibits 1 and 2 to this Declaration.

8. The 2016 regulations significantly changed the rules for considering borrower defense claims. Under the Department's original regulations, the determination of whether a defense existed was based on whether the borrower defense claimant could establish a cause of action under applicable state law. The 2016 regulations adopted a new federal standard that allowed a borrower to assert a defense on the basis of a school's substantial misrepresentation (as defined by the Department), breach of contract, or the existence of a favorable, nondefault contested judgment against the school. In addition, the 2016 regulations established a new evidentiary standard for reviewing allegations made by students or others and required the Department to issue written decisions on borrower defense claims.

9. The 2016 regulations also included other provisions unrelated to borrower defense that imposed new conditions on institutions participating in the Department's Title IV student loan program. Among these were new "financial responsibility" standards that included a requirement that all institutions of higher education report to the Department all litigation filed against them; "repayment rate" provisions that created a number of new reporting requirements for institutions; provisions disallowing participating institutions' use of predispute arbitration agreements and class action waivers in their enrollment contracts with students; and new procedures governing loan discharges based on a school's closing.

10. Once the court decisions were issued and the 2016 regulations became effective, the Department had to implement them, including the development of mechanisms to collect information on years of litigation filed against institutions that participate in the Federal student financial aid programs and to identify borrowers who qualify for automatic closed school discharges and provide loan relief. The Department also had to develop processes for implementing the new financial responsibility requirements of the 2016 regulations, which included substantial reporting requirements. The Department spent considerable time and effort identifying which offices would handle different parts of the process and developing the necessary instructions.

11. The Department also needed to issue guidance to regulated parties in light of the delay of the 2016 regulations' effective date. On March 15, 2019, the Department issued an electronic announcement to inform institutions of higher education of their responsibilities under those regulations and published a Final Rule announcing the effective date of the regulations and providing further information for program participants on how the regulations would be implemented and enforced by the Department. The electronic announcement is included as Exhibit 3 and the Final Rule is included as Exhibit 4 to this Declaration.

12. At the same time, the Department was reviewing the public comments it received on the new borrower defense NPRM published on July 31, 2018, evaluating what changes, if any, were needed to those proposed regulations, and preparing a final rule responding to the comments received and explaining any changes from the NPRM. The Department received comments on the NPRM from 38,450 parties and made significant changes to those rules to respond to those comments. We also consulted

with other government agencies which provided comments during the agency review process for the final regulations.

13. The Department published its revised final regulations on borrower defenses to repayment on October 23, 2019. The final regulations are included as Exhibit 5 to this Declaration.

Development of a new methodology for determining the amount of borrower relief

14. Neither the 1995 regulations, the 2016 regulations nor the new final regulations published in 2019 set forth a methodology to determine the appropriate relief once a borrower establishes a successful borrower defense claim. Developing such a methodology has been an important priority of the Department under Secretary DeVos' leadership. Given the difficulties associated with assessing the harm suffered by the hundreds of thousands of borrowers who have filed claims for relief based on the asserted misconduct of numerous institutions, the consideration and development of relief methodologies has required significant time and resources.

15. In 2017, the Department conducted a thorough review of its existing methods for adjudicating borrower defense claims and calculating relief and concluded that it did not have an adequate process to handle the growing list of borrower defense claims. As a result of that review, the Department developed a new methodology for determining the amount of relief to be given to successful borrower defense claimants who attended certain schools operated by Corinthian Colleges, Inc. ("Corinthian").

16. In contrast with the Department's previous approach, which had assumed that all Corinthian students received nothing of value from their education, the new methodology developed in 2017 sought to rely on empirical evidence to measure the harm that students suffered as the result of Corinthian's violations of California state

law. It did so by comparing the average earnings of borrower defense claimants who attended certain Corinthian programs with the average earnings of students who had completed similar programs at schools that received passing scores under the Department's then-operative gainful employment regulations. To the extent that Corinthian students, on average, earned less than their peers at comparable programs, the Department determined that they were harmed by the misrepresentations giving rise to their borrower defense claims and awarded proportionally tiered relief based on the earnings comparison.

17. On May 25, 2018, the U.S. District Court for the Northern District of California concluded that the process used by the Department to obtain earnings data from the Social Security Administration for use in the Department's methodology likely violated the Privacy Act and preliminarily enjoined that methodology. *Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018). The Court enjoined the Department from using that methodology "as it currently exist[ed], to the extent that the Secretary relies upon information provided by the Social Security Administration in violation of the Privacy Act." Amended Order at 1, *Manriquez v. DeVos*, 3:17-cv-7210 (N.D. Cal. June 19, 2018), ECF No. 70.

18. The Department appealed the District Court's decision in *Manriquez* and is still waiting for a decision from the appellate court. In the meantime, the Department has undertaken significant efforts to explore and develop an alternative approach for determining the amount of relief to be given not just to Corinthian borrowers but to all borrowers with approved borrower defense claims.

19. The Department continues to believe that the relief awarded to a borrower should be based on the financial harm suffered by the borrower and the value received from the

borrower's institution. As the court found in *Manriquez*, the 2017 methodology's "attempt to create a policy to determine whether students obtained value and if so, how much, is a legitimate exercise of the Secretary's discretion under the Higher Education Act." 345 F. Supp. 3d at 1103. The value received by the participants in a program is best determined by using measures of aggregate outcomes for all participants rather than individual measures that are more dependent upon the individual circumstances of each participant.

20. While there are various sources of data for earnings, the Department does not have that information and it has taken the Department time to identify a source of such information that would allow for an accurate comparison of earnings across academic institutions. In particular, because the Department believes that the best way to assess financial harm is to compare earnings data for borrowers who attend academic programs that are asserted to have engaged in misconduct with the same information at comparator programs not affected by such misconduct, the Department needed data identifying earnings for occupations in terms similar to those used by educational institutions. Moreover, to avoid the problem identified by the court in *Manriquez*, the Department intends to use publicly available earnings data to impute earnings to both the applicant and the comparison group.

21. In some instances, a successful borrower defense applicant may have been enrolled in a program so small that median earnings are not available for use in the formula for determining the amount of relief to provide or that there is no comparable program to use for comparison purposes. This situation presents unique challenges to the Department's ability to fairly and efficiently determine financial harm and

corresponding borrower defense relief. The Department is evaluating how best to ensure that these borrowers receive the appropriate level of debt relief.

22. The Department is working towards announcing and implementing a new partial relief methodology within the next few weeks.

23. As indicated above, the development of a new methodology has required significant time and resources for the Department. The process has involved a team of employees from the Department's Federal Student Aid office and other experts from appropriate offices as well as senior officials in the Department. The Department has had to address a number of challenges in developing a new methodology, including the identification of an accurate, reliable and accessible source of earnings data that would not raise concerns about privacy. In addition, since different institutions often assign different names to programs that are essentially the same, the Department had to determine how it would classify programs for the purpose of the earnings calculation. Finally, we have had to develop an algorithm to use to calculate the level of financial harm suffered by a successful BD applicant and therefore the level of financial relief that should be provided. It has taken months to develop the potential options, assess each option for validity, ensure that the Department would have access to the data needed to use the chosen method, and discuss the options with appropriate offices and leaders in the Department, while also avoiding the Privacy Act issues identified in *Manriquez*. Our goal throughout this process has been to develop an approach that provides an appropriate evaluation of the level of harm experienced by the borrower and a fair level of relief.

24. The Department's consideration of a borrower's application for a borrower defense discharge includes two steps: (1) a determination of whether the borrower has

submitted a borrower defense claim supported by evidence submitted by the borrower or otherwise available to the Department in accordance with the applicable standard; and if the borrower has satisfied the first step, (2) a determination of the amount of relief that the borrower should receive.

25. As explained in other declarations submitted as part of this administrative record, the Department has continued to adjudicate claims since the injunction was issued in *Manriquez*, consistent with that injunction, including making Step (1) determinations that some borrowers have established a successful borrower defense in accordance with the applicable standard. As explained above, however, the Department has not yet finished its development of a comprehensive methodology for determining the amount of relief to award successful claimants. The Department has prioritized development of this methodology and believes it is imperative to have it in place before finalizing decisions approving borrower defense claims and awarding relief. Once established, the new methodology will allow the Department to expeditiously determine the level of relief to award to successful BD applicants in a clear, consistent, and fair manner.

26. In some cases, the Department has determined that the borrower's claim for a discharge is not supported by the evidence submitted by the borrower or information otherwise available to the Department. For example, in some instances, the Department has determined that the borrower actually did not have a Federal loan to enroll at the institution that is the subject of the borrower's claim. In other instances, the borrower provided such scant information that the Department simply lacked a basis for making a determination favorable to the borrower. The Department has been working to develop documents to provide a more robust explanation for borrowers

whose claims are denied. Once these documents are developed, the Department needs to work with each of its servicers to put the process of loan relief and borrower notification in process, which requires contract updates with each of the Federal student aid loan servicers that service Direct Loans. It takes longer to develop decision letters that provide an explanation for each borrower of why their claim was denied, but we believe this investment of time is important so that borrowers understand the basis for the decision, which is vital for instilling confidence in the process. This has taken longer than we hoped but the notices are finished and we are now working with our contracting officials and loan servicers to enter these notices into servicer systems.

27. The Department plans to issue its decisions denying these borrowers' claims in the coming weeks. The Department believes that if it issued denials in advance of issuing approvals, borrowers could be confused and believe that the Department would not be approving any claims – which is not the case. Therefore, in order to prevent confusion or distress to borrowers who are eligible for relief, the Department decided that it should not issue denials until it has a methodology in place that will also allow it to issue approvals and relief. As explained above, after the Department announces its new methodology, currently anticipated in the next few weeks, it can begin expeditiously processing approvals and issuing decisions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of November 2019 in Washington, DC.

Diane Auer Jones