

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

CAREER COLLEGES & SCHOOLS
OF TEXAS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
EDUCATION; MIGUEL CARDONA,
in his official capacity as the Secretary
of Education,

Defendants.

Case No. 1:23-cv-00433-RP

**PLAINTIFF’S SUPPLEMENTAL BRIEF REQUESTING
PRODUCTION OF THE ADMINISTRATIVE RECORD BY JULY 28, 2023**

CCST respectfully asks that the Court order the Department of Education to produce the administrative record by July 28, 2023. Over four months have passed since the Department first received CCST’s complaint. ECF No. 8 (noting receipt on March 2, 2023). Since that time, the parties have litigated to decision a motion to transfer venue and a motion for preliminary injunction. The Rule itself has gone into effect, subject to a narrow administrative injunction that ends on July 28. *See CCST v. Dep’t of Educ.*, No. 23-50491, ECF No. 37-1 (5th Cir. July 20, 2023) (extending the previous injunction by one week). Yet the Department still has not produced the administrative record.

In general, “a court can engage in judicial review of an agency action based only on consideration of the record amassed at the agency.” Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* §10.5 (6th ed., 2023-2 Cum. Supp. 2018). Certification of an agency

record is not always necessary since the Court may decide a matter on the parts of the record cited by a party, *see* 5 U.S.C. § 706, and certain challenges to the lawfulness of regulations can be resolved without reference to the administrative record, *see Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266-67 (D.C. Cir. 2001); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 440 n.37 (5th Cir.2001). Though not always strictly necessary, it is nevertheless important, and standard practice, for the agency to file a copy of the record, or a certified list of the materials in the record, with the reviewing court. This facilitates both the parties' litigation of the merits and the court's consideration of them. It also allows access to parts of the record that may not be publicly available, such as out-of-time comments or *ex parte* communications, particularly for negotiated rulemakings such as this one.

For this reason, when a petition for review is filed in a court of appeals, the agency is required to file the administrative record within 40 days of being served with the petition. Fed. R. App. P. 17(a); *see also* 5th Cir. R. 17. The agency may also file a certified list that describes the documents in the record, or the parties may stipulate that the record need not be filed. Fed. R. App. P. 17(b). But in either case, the agency must retain the record and send portions to the court as the court or a party requests. *Id.* R. 17(b)(3). After this filing, the petitioner has 40 days to file its brief on the merits. Fed. R. App. P. 31(a). This timeline reflects the importance of the administrative record to the parties' ability to prepare their arguments fully. The petitioner also needs sufficient time to review the record and seek necessary corrections or supplementation. *See id.* R. 16(b); 16AA Charles Alan Wright et al., *Federal Practice & Procedure* § 3962.1 (5th ed. Apr. 2023 update) (describing the courts' power to order correction or supplementation).

While the Federal Rules of Appellate Procedure do not apply to this Court, the rationale behind Rule 17(a) applies with equal force here. The Department did not reasonably need more

than 40 days to produce the administrative record after receiving CCST's complaint. Indeed, the Department represented that it could produce the record by April 17, 2023—over three months ago. *See* ECF No. 42 ¶ 2. Even using the Department's asserted May 15 service date, *see* Mot. for Extension ¶ 5, ECF No. 78, the record would have been due by June 26 in a court of appeals. There is no reason the Department should be held to a much more lenient standard here.

In all likelihood, this case will be resolved on summary judgment, which “serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.” *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020). At this stage, while summary judgment could proceed without a filed record, the absence of one hinders the parties' ability to brief the issues fully.

In its recent motion, the Department supports its refusal to produce the record by citing *G.Y.J.P. ex rel. M.R.P.S. v. Wolf*, No. 1:20-cv-1511-TNM, 2020 WL 4192490, at *2 (D.D.C. July 21, 2020). *See* Mot. for Extension ¶ 11, ECF No. 78. But that case bears little resemblance to the situation here. In *G.Y.J.P.*, the plaintiff sought expedited summary judgment and production of the record more than a month before the Federal Rules of Civil Procedure required the government to file an answer. 2020 WL 4192490, at *2. By contrast, CCST reasonably asks that the record be produced by July 28, 2023, the Department's extended deadline to respond to the complaint.

There is no justifiable reason for further delay. On July 28, the Department will have had 148 days to produce the record. By any reasonable standard, 148 days is more than enough time.

Accordingly, CCST respectfully requests that the Court order the Department to produce the administrative record by July 28, 2023.

Dated: July 21, 2023

Respectfully submitted,

/s/ Allyson B. Baker

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record via the Court's CM/ECF system on July 21, 2023.

/s/ Allyson B. Baker

Allyson B. Baker