IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as Secretary of the Department of Education,

and

UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Civil Action No. 1:11-cv-01314 (RC)

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

TABLE OF AUTHORITIES
(Continued)

Page(s)

Statutes
(Continued)

Regulations

Other Authorities

Authorities upon which APSCU chiefly relies are marked with asterisks.

INTRODUCTION

In its June 30, 2012 decision, this Court vacated the Gainful Employment, 76 Fed. Reg. 34,386, 34,448-53 (June 13, 2011) (codified at 34 C.F.R. § 668.7), Program Approval, 75 Fed. Reg. 66,665, 66,676-77 (Oct. 29, 2010) (codified at 34 C.F.R. §§ 600.10 and 600.20), and Reporting regulations, 75 Fed. Reg. 66,832, 66,948-49 (Oct. 29, 2010) (codified at 34 C.F.R. § 668.6(a)), and upheld the Disclosure regulations, 75 Fed. Reg. at 66,949 (codified at 34 C.F.R. § 668.6(b)-(c)). The Department's motion to amend the judgment is an attempt to relitigate this case and to use the Court to impose an entirely new regulatory regime. The Department overlooks the fact that the Disclosure regulations were adopted seven months *before* the Gainful Employment regulations, and thus it is impossible that the Gainful Employment regulations are "necessary" to the Disclosure regulations. The Department also largely ignores the governing legal standard, which requires the Department to demonstrate that the Court's judgment was clearly erroneous. Instead, the Department focuses on the policy goals it believes could be pursued, if the Court unraveled its judgment and substituted a different one. The Department is free to seek its policy goals through a new rulemaking under the APA; but Federal Rule of Civil Procedure 59(e) is not a device to short-circuit APA rulemaking.

ARGUMENT

I. The Department's Motion Identifies No "Clear Error" In The Court's Original Judgment, And No Amendment Is Necessary To Prevent "Manifest Injustice."

Federal Rule of Civil Procedure 59(e) does not provide disappointed litigants an avenue to rehash the case. "[R]econsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995). Further, "because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied." *Id.* The

Department has not demonstrated that it satisfies that standard; and granting the Department's motion would demonstrate to *other* litigants that they also can successfully reopen any decision, merely by filing a motion to "amend" the judgment.

A motion under Rule 59(e) "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006) (internal quotation omitted). The Department's motion acknowledges this legal standard, but nowhere demonstrates that the Court committed a "clear error" or engendered a "manifest injustice." *See Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006) ("Unless the court has misapprehended some material fact or point of law, [a Rule 59(e)] motion is normally not a promising vehicle for revisiting a party's case and rearguing theories previously advanced and rejected."). However much the Department invokes the purported "benefits" of its public policy goals, *e.g.*, Mem. of Law in Supp. of Defs.' Mot. to Alter or Amend the J. ("Defs.' Mot.") at 1-2, 5-6, 10 & n.4, 11, 13-14, those policy arguments do not justify rewriting the judgment. Accordingly, the Department's motion must be denied as legally unsupported.

II. The Department's Motion Is An Improper Effort To Relitigate The Case.

Through its motion, the Department is attempting to relitigate the case and to reinstate regulations that were properly vacated.

The Court held that the Department failed to provide a reasonable explanation for its chosen repayment rate threshold, which the Department would have used to determine whether a program satisfied an intricate scheme of gainful employment eligibility standards, and concluded that the entire debt measure rule must be vacated because the repayment rate test cannot be severed from the other debt measures. Mem. Op. at 31-32. Addressing the Reporting and Disclosure regulations, the Court held that the Department had not shown that the database it

would maintain as a result of the Reporting regulations is necessary for the operation of any Title IV program. Accordingly, the Reporting regulations had to be vacated because they ran afoul of 20 U.S.C. § 1015c—the statutory prohibition on the development of a database of personally identifiable information on individuals receiving Title IV assistance. The Court upheld the Disclosure regulations, concluding that they could be severed from the reporting requirements.

In its complicated motion, the Department criticizes the Court for three principal "misunderstandings" underlying these holdings: it faults the Court for "not acknowledg[ing]" that "the reporting requirements and debt measure formulas serve a valid and important information-sharing purpose"; for not "understanding" that "the reporting requirements and debt measure formulas are necessary to enable the Department to provide schools with information they must disclose under the disclosure requirements that the Court upheld"; and for "misunderstanding" that the reporting requirements do not require the Department to create a new database. Defs.' Mot. at 5. In essence, the Department's motion asserts, for the first time in this litigation, that the upheld Disclosure regulations rely on the vacated gainful employment metrics and Reporting regulations, and thus that several vacated provisions of those regulations should be revived; and that portions of the vacated regulations serve an independent information-sharing purpose that could support reviving the regulations in part. *See* Defs.' Mot. at 5-11. For the reasons discussed below, the Department's arguments are incorrect and, in any event, do not demonstrate any clear error.[1]

---

[1] The Department never specifies whether it is asking the Court to amend its judgment on the basis that it is "clearly erroneous" or on the basis that it results in "manifest injustice." Defs.' Mot. at 4, 5. Because the Department cannot seriously contend that a regulatory regime that does not use metrics heretofore unknown in the fifty-year history of the Higher Education Act is "manifestly unjust," this section focuses on the "clear error" prong of the standard.

APSCU reserves its position on other issues addressed by the Court's judgment.

A. The Department Has Waived The Arguments In Its Motion.

The portions of the Court's judgment at issue do not embody clear error because the Department never made the arguments it now accuses the Court of "misunderstanding." The Department could have tried to defend the validity of the Gainful Employment regulations' metrics and the Reporting regulations on the basis that they were necessary to the operation of the Disclosure regulations, or that the regulations served an independent information-sharing purpose, but it did not do so. That is fatal to the motion. *See Patton Boggs LLP v. Chevron Corp.*, 683 F.3d 397, 403 (D.C. Cir. 2012) ("Because Rule 59(e) is not a vehicle to present a new legal theory that was available prior to judgment, the district court did not abuse its discretion in denying the motion." (internal citation omitted)); *Marseilles Homeowners Condo. Ass'n v. Fidelity Nat'l Ins. Co.*, 542 F.3d 1053, 1058 (5th Cir. 2008) ("Rule 59(e) motions cannot be used to raise arguments that could, and should, have been made before the judgment issued." (internal quotation omitted)).

The Department's summary judgment briefs contradict the position it now advances. First, the Department's filings did not argue that the Gainful Employment regulations' metrics were valid because they serve an "information-sharing" purpose. Rather, the Department's filings focused on the metrics' validity as Title IV eligibility thresholds. *See, e.g.*, Defs.' Mem. of Law in Supp. of Their Cross-Mot. for Summ. J. ("Defs.' Mem.") at 8 ("The Gainful Employment regulations set minimum standards to measure whether particular programs are preparing students for gainful employment in a recognized occupation."); *id.* at 20 ("Thus, the Department crafted three tests to determine if a program should be eligible for federal loans . . . ."). Whatever the merits of a claim that the gainful employment metrics might serve an additional information-sharing function, it is new to this litigation and therefore improper at this late stage.

Second, the notion that the Gainful Employment regulations' metrics or the Reporting regulations are "necessary" to the full implementation of the Disclosure regulations is also missing from the Department's filings. The Department's defense of the Reporting regulations did not link them to the Disclosure regulations. Instead, the Department explained that the Reporting regulations were "necessary to calculate a program's debt measures," Defs.' Mem. at 47, and "to evaluate programs," Defs.' Reply in Supp. of Their Cross-Mot. for Summ. J. ("Defs.' Reply") at 25. That was also the Department's position during the rulemaking. 75 Fed. Reg. 34,806, 34,809 (June 18, 2010) (explaining that the Department intended to use reported data "*to assess the outcomes* of programs that lead to gainful employment in a recognized occupation" (emphasis added)).

And its defense of the Disclosure regulations did not link them to either the Gainful Employment regulations or the Reporting regulations. *See* Defs.' Mem. at 46-48; Defs.' Reply Mem. at 24-25. Rather, the Department argued that the regulations were independently authorized and their validity was not contingent on the lawfulness of the Gainful Employment regulations. Defs.' Mem. at 46 n.17. The Department also asserted that the Disclosure regulations "require schools to provide certain information to prospective students," and in its list of what those required disclosures included, the Department did not reference the Gainful Employment metrics. Defs.' Mem. at 46. It is therefore not surprising—and certainly not clear error—that the Court did not conclude that the Disclosure regulations were dependent on the Gainful Employment or Reporting regulations and instead held the Disclosure regulations were severable from the Reporting regulations. Mem. Op. at 34-36. Any "misunderstanding" is

solely attributable to the Department's chosen defense of its own regulations and is therefore an improper subject for a Rule 59 motion.[2]

B. The Disclosure Regulations Do Not Depend On The Gainful Employment Regulations' Metrics.

Even if the Department had not waived its arguments, the motion should be denied because the Court's judgment is not clearly erroneous. The Department's argument that the Gainful Employment regulations' debt measure formulas are necessary to the full operation of the Disclosure regulations rests on a false premise. Specifically, the Department argues that unless the judgment is amended to reinstate the Gainful Employment regulations' formulas, "students, schools, and the Department" will be deprived of "the full benefit" of the Disclosure regulations. Defs.' Mot. at 1-2. The operation of the Disclosure regulations, however, is not dependent on the validity of any portion of the Gainful Employment regulations.

Notably, the Disclosure regulations were adopted in final form *more than seven months before* the gainful employment regulations, and they became fully effective a year *before* the gainful employment regulations would have become effective had this Court not vacated them. To believe that the Disclosure regulations are somehow dependent upon the Gainful Employment regulations' formulas, the Court would have to believe that the Department

---

[2] Indeed, the alleged "misunderstandings" are a far cry from the error identified in the sole authority relied on by the Department to demonstrate that it has met the "clear error" standard, *Atlantic States Legal Foundation v. Karg Bros., Inc.*, 841 F. Supp. 51, 55 (N.D.N.Y. 1993), cited at page 5 of the Department's motion. In that case, the court fundamentally misconstrued the governing law at the heart of its decision—as opposed to failing to surmise the existence of some undisclosed regulatory agenda that was never argued by the Department.

Moreover, the Department had ample opportunity in its 75 pages of summary judgment briefing to make whatever arguments it chose and to clarify its position regarding the scope and function of its regulatory regime. This undeniable fact also militates against the Department's "misunderstanding" theme.

published final regulations that were in fact not final but rather were contingent upon not-yet-adopted regulations.

Not surprisingly, there is no evidence in the record to support that conclusion. Indeed, the evidence supports the opposite conclusion. Unlike the Program Approval regulations, which were published alongside the Disclosure regulations, the Disclosure regulations do not anticipate the Gainful Employment regulations at all. Further, the Disclosure regulations, contrary to the Department's repeated claims, make no reference to either repayment rates or debt-to-income ratios. Defs.' Mot. at 2, 8, 9. Indeed, given their adoption months *before* those artificially constructed metrics were adopted, it would be remarkable if they did.

In an effort at a *post hoc* incorporation of the Gainful Employment metrics into the pre-existing Disclosure regulations, the Department—for the first time—argues that its self-generated "draft template" imposes additional disclosure obligations on schools beyond those set forth in the regulatory text. Defs.' Mot. at 7-8. The Department asserts that because this "draft template" includes "a place for programs to disclose their repayment rate" and their debt-to-income ratio, the Disclosure regulations require disclosure of this information. But the Department's "draft template," which was not included as part of the disclosure requirements during the rulemaking, is obviously distinct from the actual Disclosure regulations. The "draft template" cannot support the Department's Rule 59(e) motion.

C. The Disclosure Regulations Do Not Depend On The Reporting Regulations.

The Department's argument that the Disclosure regulations "cannot be implemented without the reporting requirements," Defs.' Mot. at 9, also fails. As explained above, the Department waived this argument. But even if the argument was not waived, the Department has not demonstrated that the Reporting regulations are necessary to implement the Disclosure

regulations; and 20 U.S.C. § 1015c would still bar the Department from collecting the information it seeks.[3]

1. The Department Has Failed To Show That The Reporting Regulations Are Necessary To Implement The Disclosure Regulations.

The Department has not carried its burden because the Disclosure regulations stand on their own. The Department does not contend the Reporting regulations are necessary for the vast majority of the disclosures required by the Disclosure regulations. *See* Defs.' Mot. at 7 n.3. Instead, the Department invokes the disclosure requirement set forth in subsection (b)(1)(v) to support its argument that the Court's decision was clear error. That provision requires the disclosure of the "median loan debt" of certain students "as provided by the Secretary," as well as "any other information the Secretary provided to the institution about the program." But the Department has not shown that even without the Reporting regulations, it does not already have access or the ability to get access to the information required to provide schools with median Title IV loan debt information. Further, the Department's assertion that the Reporting regulations are necessary to ensure that median loan debt information is calculated "in a uniform and consistent way," Defs.' Mot. at 9, is a makeweight argument that could be readily addressed by the Department adopting instructions for performing the calculations. If the Department now wants to impose on schools new disclosure obligations not found in the Disclosure regulations it must pursue another rulemaking.

---

[3] If the Department's argument were valid, that would support the conclusion that the Disclosure regulations are intertwined with the unlawful Reporting regulations and must be vacated along with the Reporting regulations. It would also require the Court to address explicitly APSCU's argument that the Department cannot rely on its general authority under 20 U.S.C. § 1221e-3 and 20 U.S.C. § 3474 to defend its ability to promulgate the Reporting and Disclosure regulations, because the Department failed to invoke those provisions as the source of its authority in either the notice of proposed rulemaking or the final regulations. *See Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 (D.C. Cir. 1978); *see also* Reply in Supp. of Pl's. Mot. for Summ. J. ("APSCU Reply Mem.") at 44.

In any event, the Department has failed to demonstrate why it would be necessary for the implementation of the Disclosure regulations to revive all of the requirements of the Reporting regulations. As shown above, the Disclosure regulations do not require schools to disclose the contrived gainful employment metrics. And the Department has not explained why the need to calculate median loan debt statistics requires schools to report "[i]nformation needed to identify the student and the institution the student attended," 34 C.F.R. § 668.6(a)(1)(i)(A) (vacated), or "identifying information for . . . students" to calculate median loan debts, *id.* § 668.6(a)(1)(ii) (vacated). To be sure, such information may be necessary to calculate the Gainful Employment regulations' separate and different metrics, but it is seemingly unnecessary to determine programs' median loan debt. The Department's quest for personally identifiable information that is irrelevant to the Disclosure regulations reveals that the purpose of the motion is an illegitimate one: to resurrect the vacated Gainful Employment regulations' metrics.

2. The Reporting Regulations Still Violate The Statutory Database Prohibition.

Regardless of the Department's other arguments, 20 U.S.C. § 1015c still prohibits the Reporting regulations. The Department's arguments in support of its new disclosure regime fall even shorter than the ones it actually made in its summary judgment briefing to explain how the Reporting regulations do not violate 20 U.S.C. § 1015c. Section 1015c generally prohibits the Department from "develop[ing], implement[ing], or maint[aining] . . . a Federal database of personally identifiable information," unless that system "is necessary for the operation of programs" authorized by Title IV. A new disclosure-based regime will not actually affect Title IV eligibility for any schools, so it is implausible for the Department to argue that it is "necessary" for the operation of a Title IV program to collect the information at issue. Accepting the Department's new arguments as to why the Reporting regulations should be

upheld would also impermissibly expand the exception set forth in 20 U.S.C. § 1015c so far that its protections would be rendered meaningless. If the Department can invoke the exception to the database prohibition by creating a disclosure regulation that requires the collection of personally identifiable information, there is no limit to what systems are "necessary" to the "operation" of a Title IV program. That cannot be what Congress intended. In short, the Court held that the Reporting regulations are invalid because they are not "necessary" for the operation of any Title IV program; and the Department has not carried its burden of showing that holding is clearly erroneous. *See* Mem. Op. at 33-34; 20 U.S.C. § 1015c(b)(1).

In any event, even if the Reporting regulations were necessary for the operation of a Title IV program, they would still run afoul of the requirement that the database be one that was in use by the Secretary as of "the day before August 14, 2008," 20 U.S.C. § 1015c(b)(2). In resolving the cross-motions for summary judgment, the Court acknowledged this issue but did not decide whether the Reporting regulations created an unauthorized new database because it disposed of the issue on other grounds, by holding that the regulations were not necessary to the operation of any Title IV program. Mem. Op. at 33 & n.8; *see also* Mem. of Law in Supp. of Pl's. Mot. for Summ. J. ("APSCU Mem.") at 39-40; APSCU Reply Mem. at 44-45.

The Department's arguments that the Reporting regulations satisfy 20 U.S.C. § 1015c(b)(2) fail for two reasons. The Department accuses the Court of having "misunderstood the content of the [National Student Loan Data System ("NSLDS")] and the limited nature of the modifications to that database that are necessary to implement" the Reporting regulations. Defs.' Mot. at 11. But again, the blame for any misunderstanding rests entirely with the Department's failure to make the argument. During the summary judgment briefing, the Department simply told the Court that the information "will be incorporated into an existing database used by the

Department to monitor Title IV programs—the National Student Loan Data System." Defs.' Mem. at 47. And the Department sat silent in its reply after APSCU explained that the Department's position—that 20 U.S.C. § 1015c(b)(2) allows the Department to collect any personally identifiable information whatsoever, so long as it eventually incorporates that data into an existing system—would render that limitation meaningless. *Compare* APSCU Reply Mem. at 45, *with the later-filed* Defs.' Reply Mem. at 24-25. The Court appeared to agree with APSCU, Mem. Op. at 33 n.8, and the Department cannot claim that it was clear error for the Court to fail to endorse arguments the Department did not make.[4]

Even if the Department had not waived this argument, it would still fail. Congress has not authorized the Department infinitely to expand the NSLDS to gather personally identifiable student information about any matter the Department desires. To be sure, Congress has authorized the Department's use of the NSLDS to collect information about Title IV loans and has not complained when the Department expanded the NSLDS to track new information relevant to Title IV loans, *see* 20 U.S.C. § 1092b(a)-(b). But the Department has not identified any evidence that Congress has authorized it to expand the NSLDS to collect information about *non-federal private and institutional loans*, or to track private income information of former students after graduation. Congress's awareness of the NSLDS when it adopted 20 U.S.C. § 1015c does not amount to tacit approval of the Department's efforts to expand the database to collect new types of information. Indeed, the adoption of 20 U.S.C. § 1015c at a time when the

[4] The Department's motion represents its third meritless effort to justify the regulations under 20 U.S.C. § 1015c. In the rulemaking, the Department argued that the regulations were permissible because the information already may be "maintained by institutions in their student financial aid and academic records, and is subject to compliance and program reviews." 75 Fed. Reg. at 66,842. APSCU explained that the fact that *schools* may have already collected the personal information that the *Department* now wishes to compile does not make that information "necessary" or part of an existing system in use by the Secretary in 2008. *See* APSCU Mem. at 40. The Department did not respond to this argument.

NSLDS was limited to information related to federal lending is strong evidence that the Reporting regulations' attempt to expand that database to collect information unrelated to federal lending is unlawful. The Department's new argument does nothing to allay the Court's concern that the Reporting regulations would eviscerate the prohibition in 20 U.S.C. § 1015c.[5]

D. Disclosure Is Not An Independent Purpose Of The Gainful Employment Regulations.

Faced with the reality that its adopted regulatory regime is unlawful, the Department now asserts that disclosure requirements in the Gainful Employment regulations serve a purpose independent of the regulations' eligibility thresholds, and thus the judgment must be amended to preserve portions of the regulations. This is also a new argument: the Department has not argued that the Gainful Employment regulations should be construed primarily as a disclosure regime that is separate and severable from the eligibility thresholds. The fact that the briefing in this litigation and the Court's opinion do not address whether such a disclosure regime is proper or lawful demonstrates how far the Department has strayed from the rulemaking at issue. Moreover, even if the regulations also created a disclosure regime, the disclosure requirements would be clearly ancillary to the regulations' eligibility standards and hence unseverable—that is, they must fall with the underlying eligibility standards.

As an initial matter, the Department does not cite to any provision of the Gainful Employment regulations that independently requires disclosure of the contrived gainful employment metrics. Indeed, the provisions of the Gainful Employment regulations that the

[5] The Department's attempt to fall back on its argument that the Reporting regulations do not violate 20 U.S.C. § 1015c because that section was intended to prevent "track[ing] individual students over time," *see* Defs.' Mot. at 13 n.5 (alteration in original) (internal quotation omitted), fails for the reasons APSCU set forth in its reply in support of its summary judgment motion. *See* APSCU Reply Mem. at 44 n.23.

Department moves the Court to restore do not require the disclosures the Department envisions. *See* 34 C.F.R. § 668.7(a)(2), (b)-(f) (vacated).[6]

Further, even if in its summary judgment briefing the Department had defended the Gainful Employment regulations on the ground that any disclosure requirements were severable, adopting a gainful employment regime of disclosure alone would have violated both the Higher Education Act ("HEA") and the APA. As authority for the gainful employment regulations, the Department cited only two sections of the HEA: 20 U.S.C. §§ 1001(b), 1002(b) and (c). 76 Fed. Reg. at 34,453. At most, those provisions authorize the Department to define what it means to "prepare students for gainful employment in a recognized occupation" in a way that is consistent with congressional intent. A pure disclosure regime does not perform that function, as even the Department previously admitted. *See* 76 Fed. Reg. at 34,497 ("[D]isclosures alone cannot serve as a standard for determining whether a program complies with the gainful employment requirement in the statute."); 75 Fed. Reg. 43,616, 43,692 (July 26, 2010) (similar). And because the Department chose to base the regulations entirely on those sections, the APA requires that the Court deny the Department's motion even if other provisions in the HEA would have authorized the Department to adopt a stand-alone disclosure regime. *See Nat'l Tour*

[6] Another provision, not cited by the Department, seemingly may require such disclosures. *See* 34 C.F.R. § 668.7(g)(6)(i) (vacated). But apparently the Department does not view this section as relevant to establishing a disclosure requirement and does not ask the Court to revive that section. Moreover, by failing to cite this section as a foundation for the creation of a disclosure regime, the Department has waived any argument that the section could serve this purpose. *See AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000) ("Although AMSC alluded to the factual basis for this claim in the statement of facts in its opening brief, it did not actually make the argument until its reply brief. The argument is therefore waived."). In any event, it is implausible for the Department to argue that the Court's failure to consider this section represents clear error when the Department itself has failed to cite the section in its motion.

Brokers Ass'n, 591 F.2d at 900 (agency must correctly identify and reference the legal authority under which a rule is proposed).

In any event, any disclosure provisions in the Gainful Employment regulations would not be severable from the eligibility provisions because the record demonstrates that the Department would not have adopted a stand-alone gainful employment disclosure regime had it understood that the eligibility regime it actually adopted was unlawful. As the Court explained, "[w]hether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent." Mem. Op. at 32 (quoting *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997)). Moreover, that "the component parts of a regulation are 'intertwined . . . gives rise to a substantial doubt that a partial affirmance would comport with the [agency's] intent.'" Mem. Op. at 32 (alterations in original) (quoting *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994)).

In an attempt to cobble together a regulatory regime it did not envision until now, the Department asserts that the Gainful Employment regulations were adopted so that "students can make an informed decision about whether to enroll in a particular program." Defs.' Mot. at 6. But a review of the full adopting release shows that the Gainful Employment regulations represented a sweeping, punitive regulatory regime intended to "help to protect students by *removing eligibility* from the worst performing programs," 76 Fed. Reg. at 34,387 (emphasis added), and to use disclosure as an additional means of routing students away from "poor[] performing" programs, as adjudged by the Department, *id.* at 34,435. In fact, the Department's own words establish that it understood disclosure was not sufficient for its regulatory purposes. In the adopting release, the Department asserted that "disclosures alone" cannot serve as a standard for evaluating whether a program prepares students for gainful employment. *See id.* at

34,497. According to the Department, "increasing the level of disclosure is critical," but "*information alone is unlikely fully to promote the goals of the HEA and to ensure that programs provide training that leads to gainful employment in a recognized occupation*." *Id.* at 34,388 (emphases added). In light of the Department's rejection of a pure disclosure-based regime, the Court did not clearly err by vacating the regulations as a whole. *See R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362 (1935) ("[W]e cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole.").

Similarly, the adopting release identified two primary regulatory goals: (i) providing schools with the "opportunity to improve the performance of their gainful employment programs *before those programs lose eligibility* for Federal student aid funds," and (ii) to "identify accurately *the worst* performing gainful employment programs," under the now-invalidated metrics. 76 Fed. Reg. at 34,386 (emphasis added). Disclosure alone satisfies neither of those goals, and thus the Court's severability holding was not clear error. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 736 (D.C. Cir. 2001) (en banc) (rejecting severability argument when remaining regulations "would not have accomplished [the agency's] two [stated regulatory] goals").

Disclosure alone does not even serve the Department's newly stated motivation for the regulations. The Department claims that "the reporting and disclosure requirements for all gainful employment programs, not just the failing programs, establish the framework for students, prospective students, and the schools offering the programs to make meaningful comparisons about similar programs offered by different schools." Defs.' Mot. at 6. But simply disclosing the contrived and heretofore unknown debt metrics does not provide any meaningful information to prospective students about whether a program prepares students for gainful

employment. Indeed, the Court vacated the regulations because the Department itself could not articulate a reasoned explanation for why any particular loan repayment rate provides any useful information about whether a program of study prepares students for gainful employment in a recognized occupation. Mem. Op. at 31. If the Department is unable to understand and explain the relationship between its artificial debt measures and "gainful employment," prospective students—without any meaningful guideposts—are likely to be even more lost.

In fact, the Department has already acknowledged that the metrics, unmoored from any thresholds, do not provide substantial information to prospective students. In the Gainful Employment regulations, the Department recognized that to be intelligible, the warnings related to debt measures that were required for "failing" programs must be "explain[ed]" to students and students must be informed as to "the amount by which the program did not meet the minimum standards." 34 C.F.R. § 668.7(j)(1)(i) (vacated).

Finally, had the Department actually believed that disclosure of the gainful employment metrics served a function truly independent from the regulations' eligibility-determining function, the Department would have likely amended the Disclosure regulations instead of burying an independent disclosure regime in the Gainful Employment regulations. Once again, the Department did not choose that path; and the resulting rulemaking, focused on eligibility standards, cannot be belatedly transformed into something else.[7]

[7] The Department concedes that it may not use "the debt measure formulas or procedures to assess whether a program satisfies the vacated debt measure thresholds or to determine a program's eligibility on that basis." Defs.' Mot. at 10-11; *id.* at 13. But the Department has yet to indicate that it agrees with the Court that its chosen eligibility thresholds result in an unlawful regulatory regime. Consequently, any ruling that permits the Department to calculate and track the Gainful Employment regulations' metrics creates the risk that the Department will focus its investigative and enforcement resources on programs that fail to satisfy the Department's thresholds. And so long as the Department's regime has its implicit approval, students and the public are likely to assess programs unfairly and unreliably.

In sum, the Department has not identified any clear error in the Court's decision that the arbitrary loan repayment threshold was not severable from the remaining Gainful Employment regulations. Thus, this Court should not "amend" the judgment to craft a new disclosure regime for the Department.[8]

III. The Department's Motion Represents An Impermissible Attempt To Circumvent The APA.

The Department's motion to amend the judgment represents an improper attempt to circumvent the requirements of the APA and to impose a new regulatory regime without notice and comment rulemaking. The Department's motion is replete with arguments as to why a new disclosure-based gainful employment regime would be a worthwhile policy. *See* Defs.' Mot. at 1-2, 5-6, 10 & n.4, 11, 13-14. But a Rule 59(e) motion is not the forum for making policy decisions. And the Department's attempt to impose a completely new regulatory regime through a Rule 59(e) motion—instead of through notice and comment rulemaking—represents an independent violation of the APA. *Cf. AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 85 (D.D.C. 2007) (explaining that when a court vacates a rule it reinstates the prior regulatory regime, and if the agency wants to reissue the rule "it must follow the APA's rulemaking procedures"). If the Department would like to adopt a pure disclosure regime, it has the ability to promulgate

[8] Should the Court accept the Department's argument, it will have to decide whether the Department adopted the Gainful Employment regulations in violation of the APA's notice requirements because it failed to release the data that provided the foundation for its regulations. *See* APSCU Mem. at 33. The Court would also need to decide whether it is arbitrary and capricious for the Department to require schools to disclose statistics derived from income data they are never allowed to see or challenge. *Cf. U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 534-35 (D.C. Cir. 1978) (holding that an agency "must either disclose the contents of what it relied upon or, in the case of publicly available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review"). This APA issue was not squarely before the Court in the summary judgment briefing because it stems from the creation of an independent disclosure-based regime never envisioned by the Department or APSCU.

appropriate regulations, consistent with the HEA and after following the procedures set forth in the APA. The Department errs in asking the Court to be its accomplice in these efforts.

The extent the Department has drifted from its initial regulations is proof enough that the Department is asking this Court to construct an entirely new regulatory regime. The Department set forth in its Notice of Proposed Rulemaking regarding the Gainful Employment regulations a set of tests the Department would use to "assess whether a program provides training that leads to gainful employment." 75 Fed. Reg. at 43,618. Now the Department is advocating an amendment to the judgment that would institute a regime where it is not assessing anything—indeed, the Department admits it may not use the debt measures "to assess whether a program" satisfies the Department's tests. Defs.' Mot. at 10-11. This disclosure regime stands in stark contrast to the regime announced in the proposed regulations, the one on which the public commented, the one actually adopted by the Department, the one that gave rise to this suit, and the one fully briefed before the Court.

Indeed, if the Department were to have adopted in the first instance the purely disclosure-based regime it is asking this Court to create, the Department would have violated the procedural requirements of the APA. An agency's final regulations must be a "logical outgrowth" of the proposed rule to ensure that the comment process has value and that parties have the opportunity to make suggestions and voice their objections. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Final gainful employment regulations based solely on disclosure would have been "surprisingly distant" from the proposed regulations, which extensively dealt with the punitive aspects of the regulatory regime, and thus the final regulations would not have been a "logical outgrowth" of the proposed rule as required by the APA. *See id.* at 1259-60.

CONCLUSION

The Department has not carried its burden to demonstrate a clear error in the Court's judgment. The Department's motion is predicated on waived arguments, and the Department has not established that disclosure of the Gainful Employment regulations' metrics was an independent goal of either the Disclosure regulations or the Gainful Employment regulations. The Department also has failed to demonstrate that the Reporting regulations are lawful under 20 U.S.C. § 1015c. The Court should deny the Department's motion to alter or amend the judgment.

Dated: August 15, 2012

Respectfully submitted,

/s/ Douglas R. Cox

TIMOTHY J. HATCH, SBN 374694
THatch@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

DOUGLAS R. COX, SBN 459668
DCox@gibsondunn.com
NIKESH JINDAL, SBN 492008
NJindal@gibsondunn.com
DEREK S. LYONS, SBN 995720
DLyons@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, District of Columbia 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Attorneys for Plaintiff Association of Private Sector Colleges and Universities

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2012, a true and correct copy of the attached **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT**, and the accompanying **PROPOSED ORDER**, were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

/s/ Derek S. Lyons

DEREK S. LYONS, SBN 995720
DLyons@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, District of Columbia 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES,

Plaintiff,

v.

ARNE DUNCAN, in his official capacity as Secretary of the Department of Education,

and

UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Civil Action No. 1:11-cv-01314 (RC)

[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT

WHEREFORE, having considered Defendants' Motion to Alter or Amend the Judgment, Plaintiff's Opposition, the arguments of counsel, and the evidence in this matter, it is hereby

ORDERED that Defendants' Motion to Alter or Amend the Judgment is **DENIED**.

SO ORDERED.

DATE: _____

_____
Rudolph Contreras
United States District Judge

LOCAL RULE 7(k) LIST OF PERSONS TO BE SERVED WITH PROPOSED ORDER

Pursuant to LCvR 7(k), APSCU states that the following persons are entitled to be notified of entry of the foregoing Proposed Order:

Douglas R. Cox
Nikesh Jindal
Derek S. Lyons
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, District of Columbia 20036

Timothy J. Hatch
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197

Attorneys for Plaintiff

Marcia Berman
Michelle Bennett
Gregory P. Dworkowitz
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW, Room 7132
Washington, District of Columbia 20530

Attorneys for Defendants