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 11-1314 (RC)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO ALTER OR AMEND THE JUDGMENT

INTRODUCTION

A Court may alter or amend a judgment under Federal Rule of Civil Procedure 59(e) to correct a clear error. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). As plaintiff acknowledges, *see* Memo. of Law in Opp'n to Defs.' Mot. to Alter or Amend the Judgment ("Pl.'s Opp'n") at 2, 6 n.2, Aug. 15, 2012, ECF No. 28, clear error includes situations where the Court "has misapprehended some material fact or point of law," *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006), or where the Court's decision is based on a "misunderstanding of a relevant regulatory scheme," *Flynn v. Dick Corp.*, 565 F. Supp. 2d 141, 145 (D.D.C. 2008) (quoting *Atlantic States Legal Found. v. Karg Bros., Inc.*, 841 F. Supp. 51, 55 (N.D.N.Y. 1993)). That is what has occurred here.

In ruling on the parties' cross-motions for summary judgment, the Court considered and rejected numerous challenges that plaintiff raised against the Department's authority to establish regulations for programs required to prepare students for gainful employment. The Court

recognized the Department's authority to regulate in this area, and rejected specific challenges to portions of the regulations that established repayment rate and debt-to-income measures for gainful employment programs. In that analysis, the Court invalidated the pass/fail threshold for the repayment rate, but left in place the requirements for gainful employment programs to make certain disclosures to students and prospective students on the schools' Web sites. The Court then set aside the reporting requirements because the eligibility thresholds had been invalidated, but did not take into account that the disclosure requirements the Court upheld require schools to disclose a program's median loan debt and to provide repayment rate and debt-to-income ratios as additional information in the disclosure template that the Department developed. The Court's omission is understandable: although plaintiff challenged almost every other aspect of the gainful employment, reporting and disclosure, and program approval regulations, it did not challenge this aspect of the disclosure requirements. As a result, the Court upheld the disclosure requirements without considering that they could not be fully implemented without the reporting requirements and the formulas and procedures for calculating a program's repayment rate and debt-to-income ratios, which the Court vacated.

Through its motion to alter or amend the judgment, the Department does not seek to "impose an entirely new regulatory regime," Pl.'s Opp'n at 1; instead, it merely seeks to allow students and prospective students to receive the full benefit of the Court's decision upholding the disclosure requirements. Absent the requested relief, the effect of the Court's misunderstanding would be to nullify important portions of the disclosure requirements that plaintiff never

challenged and that this Court has recognized ensure that "prospective students [are] better informed about the programs they are considering."[1] Slip. Op. at 36, June 30, 2012, ECF No. 25.

For the reasons set forth herein and in the Department's opening brief, this Court should grant the Department's Motion to Alter or Amend the Judgment.

ARGUMENT

I. THE DEPARTMENT HAS NOT WAIVED THE ARGUMENTS MADE IN ITS OPENING BRIEF.

Plaintiff asserts that the Department has waived the arguments made in its opening brief because, in summary judgment briefing, the Department did not seek to defend the reporting requirements or the formulas and procedures used to calculate a program's repayment rate and debt-to-income ratios on the basis that they were necessary to the operation of the disclosure requirements. Pl.'s Opp'n at 4-5. Plaintiff, however, did not challenge the portion of the disclosure requirements on which the Department's Rule 59(e) motion is based, i.e., 34 C.F.R. § 668.6(b)(1)(v). Plaintiff challenged only the Department's authority to promulgate the disclosure requirements generally and the specific requirement that schools disclose the "on-time graduation rate for students completing the program," 34 C.F.R. § 668.6(b)(1)(ii). *See* Memo. of Law in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mot. for Summ. J.") at 38-42, Nov. 15, 2011, ECF No. 15. Plaintiff did not claim that the requirements to disclose "median loan debt" and "other information the Secretary provided to the institution about that program," 34 C.F.R. § 668.6(b)(1)(v), were unlawful. The Department is not obligated to defend regulations, or portions of regulations, that plaintiff did not make.

[1] Even if the Court determines that the Department has not satisfied the clear error standard, the Court nevertheless retains discretion to grant the Department's Rule 59(e) motion. *See Firestone*, 76 F.3d at 1208.

Plaintiff also maintains that the Department did not mention the information-sharing purpose of the regulations in its summary judgment briefs. Pl.'s Opp'n at 4. As an initial matter, this is not true. *See* Defs.' Memo. of Law in Supp. of Their Cross-Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J. ("Defs.' Cross-Mot. for Summ. J.") at 8, Dec. 13, 2011, ECF No. 16 ("Institutions are required . . . to disclose how their programs are performing under the debt measures."); *id*. at 46 ("[The regulations] require schools to provide certain information to prospective students to enable them to make an informed choice about whether to attend a particular program."); *id.* (asserting that the Department's broad rulemaking authority empowers it to "require schools to report information to . . . prospective students on the outcomes achieved by students who attend a program that receives Title IV funding"). Indeed, the Court acknowledged this information-sharing purpose of the regulations in its decision. Slip Op. at 36 (referring to "the Department's desire to see prospective students better informed about the programs they are considering").

The fact that this information-sharing purpose was not the primary focus of the Department's summary judgment briefs is not surprising; nor is it dispositive with regard to the Department's Rule 59(e) motion, as plaintiff contends. Plaintiff's claims focused almost exclusively on the Department's intent to use the debt measures to determine a program's eligibility and the consequences the regulations attached to a program's failure to meet the Department's debt measure thresholds. *See, e.g.*, Pl.'s Mot. for Summ. J. at 1-38. Because plaintiff did not object to the regulations' information-sharing purpose (beyond questioning the Department's authority to promulgate the disclosure requirements, which the Department addressed), the Department had no reason to focus its summary judgment briefing on that purpose. Nor should the Department have been expected to anticipate that the Court might

disrupt the regulations' information-sharing purpose if and when it vacated the regulations for containing an arbitrary debt measure threshold. As the Court itself found, "there is no reason to think that the Department's desire to see prospective students better informed about the programs they are considering was in any way dependent upon its intention to conduct its own assessments of those programs." Slip Op. at 36.

II. THE REPORTING REQUIREMENTS AND DEBT MEASURE FORMULAS ARE NECESSARY FOR THE FULL IMPLEMENTATION OF THE DISCLOSURE REQUIREMENTS.

In its opening brief, the Department demonstrated that the debt measure formulas and procedures are necessary to implement 34 C.F.R. § 668.6(b)(1)(v), which requires schools to disclose "any other information the Secretary provided to the institution about that program," including a program's repayment rate and debt-to-income ratios. *See* Memo. of Law in Supp. of Defs.' Mot. to Alter or Amend the Judgment ("Defs.' Mot.") at 7-10, July 30, 2012, ECF No. 27-1. Absent the debt measure formulas and procedures, the Department cannot calculate a program's repayment rate or debt-to-income ratios (based on the information schools provide pursuant to the reporting requirements) and schools cannot then provide that information to prospective students. *Id*. Plaintiff contends this connection between the debt measure formulas and procedures and the disclosure requirements was not apparent during the rulemaking and, moreover, cannot exist because the disclosure requirements were finalized more than seven months before the gainful employment regulations. Pl.'s Opp'n at 6-7.

Plaintiff's position is completely at odds with its prior position in this litigation, where plaintiff asserted that the "Disclosure regulations . . . are designed to facilitate implementation of the [] Gainful Employment regulations," Pl.'s Mot. for Summ. J. at 39, and "[t]he . . . Disclosure regulations form part of a sweeping regulatory regime *given full force and effect through the*

recently issued Gainful Employment regulations," Compl. and Prayer for Declaratory and Injunctive Relief ("Compl.") ¶ 1, July 20, 2011, ECF No. 1 (emphasis added); *see also* Pl.'s Mot. for Summ. J. at 39 ("Disclosure regulations . . . are intended to be complementary to the 'performance standards' promulgated in the Gainful Employment regulations."). Indeed, plaintiff does not dispute that the reporting and disclosure regulations and the gainful employment regulations came out of the same negotiated rulemaking process. *See* Compl. ¶¶ 36-44. Plaintiff understood – and in fact advocated before this Court – that the reporting and disclosure regulations and the gainful employment regulations were two parts of the same regulatory package. Plaintiff cannot hide from that knowledge now.

Furthermore, plaintiff's contention that "the Disclosure regulations do not anticipate the Gainful Employment regulations at all," Pl.'s Opp'n at 7, is belied by the rulemaking record. In the June 18, 2010 Notice of Proposed Rulemaking ("NPRM"), the reporting and disclosure regulations are listed under the heading "Gainful Employment," 75 Fed. Reg. 34,806, 34,809, and in the October 29, 2010 Final Rule they are described as "Gainful Employment Reporting and Disclosure Requirements," 75 Fed. Reg. 66,832, 66,835. The Department made clear in the October 29, 2010 Final Rule that it intended to develop a template for the required disclosures, *id*. at 66,836, and the Department explicitly referenced that template when it finalized the gainful employment regulations:

> Since publishing the final regulations, the Department has published in the Federal Register on April 13, 2011, a draft disclosure template for public comment (76 FR 20635). The Department intends to finalize this disclosure template by the fall of 2011 so that it is available for use by institutions by July 1, 2012. The disclosure template will automate the process by which institutions can prepare the required disclosures and will include links to provide the appropriate Web sites of other institutions offering the same program that participate in the title IV, HEA student aid programs, thus allowing students to compare similar programs. With this template, and consistent with section 4 of Executive Order 13563, the Department is thus attempting to foster informed

> decisions and to improve the operation of the market through "disclosure requirements as well as provision of information to the public in a form that is clear and intelligible."

76 Fed. Reg. 34,386, 34,387 (June 13, 2011). The template, which has now received final approval, includes a place for programs to disclose their repayment rate and debt-to-income ratios. *See* http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201201-1845-006&icID=200909 (select: Att Gainful Employment Output Document 30 day comment period 1 12 2012.pptx, p. 2) (last visited Sept. 6, 2012); *see also* AR426 (draft template). Thus, the rulemaking record makes clear that the disclosure requirements did provide for data to be incorporated from the gainful employment regulations, and that the debt measure formulas and procedures are necessary for the full implementation of the disclosure requirements.[2]

The Department also demonstrated in its opening brief that schools do not possess all of the information necessary to calculate a program's median loan debt, repayment rate, and debt-to-income ratios, which must be disclosed by schools to prospective students pursuant to 34 C.F.R. § 668.6(b)(1)(v). Defs.' Mot. at 8-10. Rather, schools must first report certain data to the Department pursuant to the reporting requirements. *Id*. Then, the Department will use that data to calculate a program's median loan debt, repayment rate, and debt-to-income ratios and provide that information to schools so that schools can disclose the information to students. *Id*.

[2] The Department's assertion in summary judgment briefing that the disclosure requirements are independently authorized by the Department's broad rulemaking authority under 20 U.S.C. §§ 1221e-3 and 3474 is not at odds with its assertion here that the reporting requirements and debt measure formulas and procedures are necessary to fully implement the disclosure requirements. *See* Pl.'s Opp'n at 5. As noted above, plaintiff's lawsuit focused on the lawfulness of the debt measure thresholds and the Department's intent to use those thresholds to determine program eligibility. The lawfulness of the disclosure requirements is not contingent on the aspects of the gainful employment regulations that plaintiff challenged. But, § 668.6(b)(1)(v), and specifically the requirement that schools disclose a program's repayment rate and debt-to-income ratios (which plaintiff did not challenge), is contingent upon the validity of the debt measure formulas and procedures. And, as Defendants previously argued, those formulas and procedures are independently authorized by the Department's broad rulemaking authority. *See* Defs.' Cross-Mot. for Summ. J. at 10.

Plaintiff does not dispute that the reporting requirements are necessary for schools to be able to disclose a program's repayment rate and debt-to-income ratios, Pl.'s Opp'n at 9, but plaintiff argues the same is not true of median loan debt, *id*. at 8. Plaintiff surmises – without any support whatsoever – that the Department may "already have access or the ability to get access" to the information needed to calculate median loan debt. *Id*. Alternatively, plaintiff suggests that the Department could provide schools with instructions for calculating median loan debt so that this disclosure requirement would be calculated in a uniform manner. *Id*. Plaintiff in essence suggests that the Department do exactly what plaintiff has unjustifiably accused the Department of attempting to do through its Rule 59(e) motion, i.e., invent a different regulatory regime rather than seeking approval now to use the one it carefully created.

The reporting and disclosure regulations establish a system whereby a school reports, *inter alia*, information collected from various sources on the loan debt of students completing a program; then the Department combines that information with information from other schools in the case of students who attended multiple schools; and, finally, the Department provides a consistently-calculated and uniform median loan debt figure to schools so that schools can disclose that figure to prospective students to use in comparing programs. *See* 75 Fed. Reg. at 66,840-42. Thus, reporting is necessary for disclosures that can only be calculated by the Department. Plaintiff did not challenge this scheme in its motion for summary judgment. *See* Pl.'s Mot. for Summ. J. at 38-42. Having waived any such challenge, plaintiff cannot now claim that the Department could have set up a different scheme and because, under this hypothetical scheme, the reporting requirements would not be necessary to the disclosures requirements, the

reporting requirements the Department actually adopted are not necessary to the disclosure requirements the Department actually adopted.[3]

III. THE REGULATIONS SERVE AN IMPORTANT INFORMATION-SHARING PURPOSE.

Plaintiff contends that the gainful employment regulations do not serve an information-sharing purpose because no provision of the gainful employment regulations requires disclosure of a program's repayment rate and debt-to-income ratios.[4] Pl.'s Opp'n at 12-13. But plaintiff completely misses the point. The information-sharing purpose is implemented primarily through the *disclosure* requirements, which, as explained above and in the Department's opening brief, require each school to disclose a program's median loan debt, repayment rate, and debt-to-income ratios. Plaintiff cites no authority that would require the Department to insert the disclosure requirements – which are already contained in the reporting and disclosure regulations

[3] In June 2012, before the Court issued its Memorandum Opinion, the Department released Informational Rates for gainful employment programs. *See* 76 Fed. Reg. 34,390; Federal Student Aid gainful employment information rates Web page, http://studentaid.ed.gov/node/275. The Informational Rates were provided to schools and posted on the Department's Web site, and carried no sanctions against the programs or schools. The rates provided schools with preliminary informational rates of their gainful employment programs a year before the official rates would have been released, while giving the Department time to continue to put systems in place to make sure data would be accurately reported. One of the twelve informational rates presented was "Median Title IV Loans." Subsequently, the Department determined that the posted "Median Title IV Loans" rate reflected student debt information from the most recent loan award year, but did not include debt information from previous years. The Department removed that rate from the Informational Rates on its Web site to avoid any confusion, and plans to update the Informational Rates to include a new label for the original column and a new column for the multi-year Median Title IV Loan debt. This issue did not impact the other Information Rates, which were calculated using the multi-year median loan amounts.

[4] Plaintiff suggests that 34 C.F.R. § 668.7(g)(6)(i) may require the disclosures, Pl.'s Opp'n at 13 n.6, but it does not. That provision refers only to failing programs that seek to satisfy the vacated debt measure thresholds by using alternative earnings data. 34 C.F.R. § 668.7(g). If a failing program chose this path, § 668.7(g)(6)(i) required it to disclose its repayment rate and debt-to-income ratios (as calculated using alternative earnings data) to its students in accordance with § 668.6(b)(1)(v). Because this provision relates only to programs that fail to satisfy the vacated debt measure thresholds, and is therefore inextricably linked to the eligibility provisions, the Department did not, and does not, seek an amendment of the Judgment that would uphold this provision. The Department notes, however, that this provision's requirement that a school disclose its alternative earnings repayment rate and debt-to-income ratios "[i]n accordance with § 668.6(b)(1)(v)," *id.* § 668.7(g)(6)(i), provides further support for the Department's position that § 668.6(b)(1)(v) requires all programs to disclose their repayment rate and debt-to-income ratios, even absent the existence of the vacated debt measure thresholds.

– into the gainful employment regulations as well. That does not mean, however, that the debt measure formulas and procedures found in the gainful employment regulations and the reporting requirements are not necessary to fully implement the disclosure requirements. *See supra* pp. 5-9.[5]

Plaintiff also asserts that the disclosure requirements are not authorized by 20 U.S.C. §§ 1001(b) or 1002(b), (c) – the authority cited in the gainful employment NPRM. Pl.'s Opp'n at 13. But this Court has already determined that the disclosure requirements "fall comfortably within [the Department's] regulatory power." Slip Op. at 34 (citing 20 U.S.C. §§ 1221e-3, 3474). Moreover, to the extent the debt measure formulas and procedures and the reporting requirements are necessary to implement the disclosure requirements, they are also authorized by the Department's broad authority "to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department," 20 U.S.C. § 1221e-3, and "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the

[5] Contrary to plaintiff's assertion, *see* Pl.'s Opp'n at 17-18, the Department's Motion to Alter or Amend the Judgment does not seek to circumvent the requirements of the Administrative Procedure Act ("APA"). The Department merely seeks to have students and prospective students receive the full benefit of the disclosure requirements that this Court upheld. Plaintiff, and other interested parties, had ample opportunity to comment on those disclosure requirements. *See, e.g.*, 75 Fed. Reg. at 34,873 (proposed rule); 75 Fed. Reg. at 66,948-49 (Final Rule). In the October 29, 2010 Final Rule, the Department made clear that it would develop a template for the required disclosures and would seek public comment on that template. *Id*. at 66,836. The Department conducted focus groups with students and institutional representatives to obtain input on the disclosure template. AR434-459. The Department then published a draft template in the Federal Register on April 13, 2011, *see* 76 Fed. Reg. 20,635; *see also* AR 426, and received comments from the public on the draft template, including comments from one of plaintiff's member schools, *see* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201010-1845-008 (comments from DeVry Inc.) (last visited Sept. 6, 2012). The Department submitted a revised template to the Office of Management and Budget ("OMB") on February 15, 2012, and the public was again given the opportunity to comment on the revised template prior to OMB approval. *See* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201201-1845-006 (click on "Att_Comment table 1 12 2012.doc" at bottom of page for summary of comments) (last visited Sept. 6, 2012). Thus, there is no basis to conclude that the Department has not complied with the APA's notice and comment requirements or that the disclosures required by the final reporting and disclosure regulations are not a logical outgrowth of the proposed disclosure requirements.

functions of the [Department]," *id*. § 3474. Thus, the question of whether the disclosure requirements, the debt measure formulas and procedures, and the reporting requirements are also authorized by 20 U.S.C. §§ 1001(b) or 1002(b), (c), is irrelevant.[6]

Plaintiff maintains that the debt measure formulas and procedures and the reporting requirements are not severable from the disclosure requirements because the Department would not have adopted them to further the Department's information-sharing purpose absent the Department's ability to use them to determine program eligibility. Pl.'s Opp'n at 14. But plaintiff's assertion is negated by the structure of the regulations; *all* gainful employment programs are required to comply with the disclosure requirements even though only a small number of those programs would have lost eligibility under the debt measure thresholds that were vacated. Indeed, this Court recognized that "there is no reason to think that the Department's desire to see prospective students better informed about the programs they are considering was in any way dependent upon its intention to conduct its own assessments of those programs." Slip Op. at 36. Although it is true, as plaintiff notes, that the Department would prefer a scheme involving both disclosure and eligibility criteria to "*fully* . . . promote the goals of the HEA," Pl.'s Opp'n at 15 (quoting 76 Fed. Reg. at 34,388) (emphasis added), there is no reason to think that the Department would have completely foregone the former if it had known the latter would be vacated. *See Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (severing portion of regulations based on court's determination that the agency would have adopted the portion sought to be severed even without the vacated portion). Indeed,

[6] This Court has already implicitly rejected plaintiff's contention that the disclosure requirements violate the APA because the Department did not cite 20 U.S.C. §§ 1221e-3 and 3474 in the NPRM. Plaintiff raised this argument in summary judgment briefing, *see* Memo. of Law in Opp'n to Defs.' Cross-Mot. for Summ. J. and Reply Memo. of Law in Supp. of Pl.'s Mot. for Summ. J. at 44, Jan. 12, 2012, ECF No. 18, and this Court nevertheless upheld the disclosure requirements, Slip Op. at 34. And, for good reason: As the Department explained in its summary judgment brief, any procedural error in this regard was harmless. *See* Defs.' Reply in Supp. of Their Cross-Mot. for Summ. J. at 24, Feb. 2, 2012, ECF No. 20.

the Department made an explicit decision to separate the disclosure requirements from the warnings that would be required if a program failed the Department's debt measure thresholds. *See* 76 Fed. Reg. at 34,431. The Department noted that the disclosures serve an independent purpose to provide students with "basic, comparable information across all gainful employment programs," *id*., regardless of how a program performs on the Department's thresholds. *See also* 75 Fed. Reg. at 66,833 (explaining that the purpose of the reporting and disclosure regulations is to "[e]stablish[] requirements for institutions to disclose on their Web site and in promotional materials to prospective students, the on-time completion rate, placement rate, median loan debt, program cost, and other information for programs that prepare students for gainful employment in recognized occupations"). The Department's information-sharing purpose, therefore, is not dependent on its desire to evaluate program eligibility. *See Davis County Solid Waste Mgmt.*, 108 F.3d at 1459 (observing that, in assessing severability, courts should consider whether the provision sought to be severed can operate independently of the vacated provision).

Moreover, plaintiff's assertion that, without the Department's debt measure thresholds, information on a program's repayment rate and debt-to-income ratios will not be meaningful to students, Pl.'s Opp'n at 15-16, is nonsense. The percentage of a program's graduates that are currently repaying their loans and the percentage of monthly earnings that graduates are using to make payments on their student loans is valuable information that many – if not all – prospective students considering whether to enroll in a program would like to have. And the disclosure requirements, which require schools to disclose information in the "form issued by the Secretary," 34 C.F.R. § 668.6(b)(2)(iv), serve to ensure that this information will be "intelligible," Pl.'s Opp'n at 16, to students, especially students using the disclosures to assist them in choosing between similar programs offered at different institutions. The approved form

poses the question, "Will I be able to pay back my student loans?" and provides the following answers: "Former students are successfully repaying XX% of the total amount of student loans they took out for attending the program," and "Typical graduates of the program use XX% of their monthly earnings to make student loan payments." *See* http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201201-1845-006&icID=200909 (select: Att Gainful Employment Output Document 30 day comment period 1 12 2012.pptx, p. 2) (last visited Sept. 6, 2012). Prospective students considering whether to enroll in a program offered by one or more schools will be able to understand and benefit from having this information presented in a standardized form.[7]

IV. THE REPORTING REQUIREMENTS DO NOT VIOLATE 20 U.S.C. § 1015C.

The Department demonstrated in its opening brief that the reporting requirements fit squarely within the exception to 20 U.S.C. § 1015c because the information collected is necessary to the operation of Title IV programs and would be maintained in the existing National Student Loan Data System ("NSLDS") database, with only slight modifications. Defs.' Mot. at 11-13. In its opposition, plaintiff argues that, if the collected information is used solely for purposes of making required disclosures, it "will not actually affect Title IV eligibility for any schools" and thus is not necessary for the operation of a Title IV program. Pl.'s Opp'n at 9. This argument, however, re-writes the exception. Section 1015c(b)(1) does not require that a database be necessary for determining a school's *eligibility* for a Title IV program; it only requires that the database be "necessary for the operation of programs authorized by [Title IV]."

[7] Plaintiff's suggestion that the Department will "focus its investigative and enforcement resources on programs that fail to satisfy the Department's thresholds," Pl.'s Opp'n at 16 n.7, despite the fact that those thresholds have been vacated, is pure speculation. It assumes the government will act in bad faith, when in fact, the law requires just the opposite. *See Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002). Moreover, contrary to plaintiff's suggestion, *see* Pl.'s Opp'n at 16 n.7, the Department need not waive its right to appeal the Court's decision on the debt measure thresholds before it can seek amendment of the Judgment with respect to other portions of the Court's decision.

There is much more to Title IV than determining schools' eligibility. As relevant here, students seeking loans under the Title IV program (as well as the government and taxpayers) need information about the schools and/or programs that students attend with those federal dollars. Indeed, this Court has already determined that the disclosures required by 34 C.F.R. § 668.6(b) are a valid exercise of the Department's authority to "prescribe . . . regulations" that are "*necessary* or appropriate to administer and manage" the Title IV program. Slip Op. at 34 (quoting 20 U.S.C. § 3474) (emphasis added). Plaintiff's assertion to the contrary relies on a cramped conception of the Title IV program and is not supported by the language of § 1015c's exception.[8]

Plaintiff does not dispute that the modifications to the NSLDS that are necessary to implement the reporting and disclosure regulations are minor – 23 data fields added to a database containing a total of 979 fields. And plaintiff acknowledges that "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." Pl.'s Opp'n at 11. Plaintiff nevertheless maintains that the Department has gone too far in using the NSLDS to collect information about non-federal private and institutional loans and the income of students after graduation. *Id*. According to plaintiff, any additions to the database must be "limited to information related to federal lending." *Id*. at 12. But this argument is not supported by the language of the statute authorizing the NSLDS.

[8] Nor is plaintiff's position supported by the legislative history of § 1015c(b). The NSLDS – which Congress clearly intended to fit within § 1015c(b)'s exception, *see* Defs.' Mot. at 11-12 – was established to serve numerous purposes, not solely to evaluate schools' eligibility for Title IV programs. *See* 20 U.S.C. § 1092b (directing the Department to create the NSLDS to, among other things, collect information on Title IV borrowers and grant recipients, verify the eligibility of loan applicants, and use its data for research and policy analysis).

Congress set out a *non-exhaustive* list, 20 U.S.C. § 1092b(a), of the types of information the NSLDS should contain, including "information concerning *other student financial assistance* received by the borrower," *id*. § 1092b(b)(3) (emphasis added). Moreover, Congress explicitly directed the Department to "integrate the [NSLDS] with . . . any other databases containing information on participation in programs under this subchapter and part C of subchapter I of chapter 34 of Title 42." *Id*. § 1092b(h). In light of the broad scope of the data Congress envisioned the Department collecting in the NSLDS and Congress's failure to indicate that the Department's past alterations to the database were improper, Defs.' Mot. at 12, the minor alterations required here do not exceed the scope of the exception in § 1015c(b).[9]

CONCLUSION

For these reasons and those set forth in the Department's opening brief, the Department respectfully requests that the Court alter or amend its June 30, 2012 Judgment. The Department requests that the Judgment be amended to uphold the reporting requirements in 34 C.F.R. § 668.6(a) and the formulas and procedures used to calculate a program's repayment rate and debt-to-income ratios in 34 C.F.R. § 668.7(a)(2), (b) – (f), to the extent that these regulations interact with the disclosure requirements to enable schools to make the disclosures mandated by 34 C.F.R. § 668.6(b)-(c).

[9] Contrary to plaintiff's assertion, *see* Pl.'s Opp'n at 10-11, the Department has not waived any argument that the reporting requirements fall within the exception to § 1015c. In its briefing on summary judgment, the Department argued – as it does here – that the reporting requirements fit within that exception because the information collected "will be incorporated into an existing database . . . – the [NSLDS]." Defs.' Cross-Mot. for Summ. J. at 47. This is more than sufficient to preserve the argument.

Dated: September 6, 2012

Respectfully Submitted,

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