

1 Robyn Smith (SBN 165446); rsmith@lafla.org
2 Yolanda Arias (SBN 130025); yarias@lafla.org
3 Josephine Lee (SBN 308439); jslee@lafla.org
4 Andrew Kazakes (SBN 277912); akazakes@lafla.org
5 LEGAL AID FOUNDATION OF LOS ANGELES
6 5228 Whittier Boulevard
7 Los Angeles, CA 90022
8 Telephone: (213) 640-3908
9 Facsimile: (213) 640-3911

10 Joanna Darcus; jdarcus@nclc.org*
11 Charles Delbaum; cdelbaum@nclc.org*
12 NATIONAL CONSUMER LAW CENTER
13 7 Winthrop Square
14 Boston, MA 02110
15 Telephone: (617) 542-8010
16 Facsimile: (617) 542-8028

17 Attorneys for Plaintiffs Lizette Menendez,
18 Lydia Luna, and Leonard Valdez

19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**

21 LIZETTE MENENDEZ,) Case No.:
22 LYDIA LUNA, and LEONARD)
23 VALDEZ,) **COMPLAINT FOR REVIEW OF**
24 *Plaintiffs,*) **FINAL AGENCY ACTION AND**
25 v.) **FOR DECLARATORY AND**
26) **INJUNCTIVE RELIEF**
27 BETSY DEVOS, in her official)
28 capacity as Secretary of the U.S.)
Department of Education, and U.S.)
DEPARTMENT OF EDUCATION,)
Defendants.)

*Application for admission *pro hac vice* forthcoming.

INTRODUCTION

1
2 1. Pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§
3 701-706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, Plaintiffs
4 Lizette Menendez, Lydia Luna, and Leonard Valdez (“Plaintiffs”) bring this
5 lawsuit to challenge the unlawful denial of their applications for federal student
6 loan discharges by the U.S. Department of Education and Secretary Betsy DeVos
7 (“Defendants”).

8 2. Plaintiffs also challenge, pursuant to the APA, Defendants’ unlawful
9 delays of the effective date of an updated false certification discharge regulation
10 which was intended to clarify loan discharge eligibility for student loan borrowers,
11 including Plaintiffs, whose schools used fake high school diplomas to fraudulently
12 certify their federal financial aid eligibility.

13 3. Plaintiffs, all residents of Southern California, wanted to pursue
14 higher education to improve their job prospects and earning potential. Their career
15 options had previously been limited, in part, because they had not completed high
16 school.

17 4. In 2013, upon visiting the for-profit Marinello Schools of Beauty
18 (“Marinello”) to inquire about its programs, Marinello promised Plaintiffs they
19 could earn a high school diploma from Parkridge Private School (“Parkridge”) and
20 receive the career training necessary to work as cosmetologists.

21 5. After a test was administered by Marinello, each Plaintiff received a
22 high school diploma from Parkridge, then enrolled at a Marinello campus. After
23 Plaintiffs graduated, they discovered that the Marinello education was worthless
24 because it did not teach basic skills that they needed for employment as
25 cosmetologists. Nonetheless, Marinello took their money and left them with
26 unaffordable student loan debt.

27
28 6. Later, Plaintiffs learned that their high school diplomas were not

1 legitimate when, in February 2016, the U.S. Department of Education (the
2 “Department”) determined that Marinello had partnered with Parkridge in an
3 illegal scheme to heavily advertise high school diplomas that were in fact phony.

4 7. Marinello targeted students who lacked high school diplomas and
5 GEDs, pressured them into enrolling, then illegally certified their eligibility for
6 federal student loans. Marinello created this program to fraudulently game federal
7 law, under which students who lack high school diplomas or GEDs are ineligible
8 for federal financial aid.

9 8. Based on these facts, the Department determined that Marinello had
10 falsely certified the eligibility of students, like Plaintiffs, who had obtained
11 Parkridge diplomas, but lacked high school diplomas or GEDs. The Department
12 also barred five Marinello campuses from continued participation in federal
13 financial aid programs. Marinello subsequently closed all of its campuses.

14 9. Plaintiffs all applied for false certification discharge of their federal
15 student loans based on a broad provision of the Higher Education Act (the “HEA”)
16 which *requires* Defendants to discharge the loans of students whose schools falsely
17 certify their eligibility for federal financial aid. 20 U.S.C. § 1087(c). Defendants
18 ignored this provision and denied Plaintiffs’ applications, impermissibly relying on
19 a narrow, outdated regulation, 34 C.F.R. § 684.215(a)(1), that directly conflicts
20 with the broad statutory mandate of the HEA.
21

22 10. As of November 1, 2016, Defendants had finally updated the false
23 certification regulation after many years of schools’ increasing use of fake high
24 school diplomas. The updated regulation provided a clear pathway to relief for
25 students harmed by fraudulent diploma practices, including Plaintiffs. Plaintiffs
26 had planned on seeking the Department’s review of the initial denials of their
27 applications after this updated regulation’s effective date of July 1, 2017.

28 11. Unfortunately, the updated regulation has not taken effect.

1 Defendants delayed implementation twice, most recently until July 1, 2018.
2 Defendants did so in order to allow themselves sufficient time to reconsider and
3 amend or repeal the new regulations, including the updated false certification
4 discharge regulation.

5 12. Defendants enacted these delays without engaging in the public
6 rulemaking procedures required by the APA and the HEA. Defendants' failure to
7 engage in these procedures violated the APA, as Defendants did not provide facts
8 or a sufficient legal basis to justify their disregard of the public rulemaking
9 procedures.

10 13. Each Plaintiff is now unable to pay down his or her student loans. If
11 these delays are not invalidated by the court, Plaintiffs may never be eligible for a
12 discharge of their student loans. In addition, if Defendants enact a new regulation
13 clarifying Plaintiffs' eligibility for false certification discharges, the earliest the
14 new regulation could go into effect is July 1, 2019.

15 **JURISDICTION AND VENUE**

16 14. This court has subject matter jurisdiction over this matter pursuant to
17 the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-706, the
18 Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and 28 U.S.C. § 1331.

19 15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)
20 because a substantial part of the events giving rise to the claim occurred in this
21 district and all Plaintiffs reside in this district.

22 **PARTIES**

23 16. Plaintiff LIZETTE MENENDEZ (hereinafter "Ms. Menendez") resides,
24 and at all relevant times has resided, in Los Angeles County, California. She
25 attended a campus of Marinello Schools of Beauty located in Los Angeles County,
26 California.
27

28 17. Plaintiff LYDIA LUNA (hereinafter "Ms. Luna") resides, and at all

1 relevant times has resided, in San Bernardino County, California. She attended a
2 campus of Marinello Schools of Beauty located in Los Angeles County, California.

3 18. Plaintiff LEONARD VALDEZ (hereinafter, “Mr. Valdez”) resides, and
4 at all relevant times has resided, in Orange County, California. He attended a
5 campus of Marinello Schools of Beauty located in Orange County, California.
6 Collectively, all plaintiffs are referred to herein as “Plaintiffs.”

7 19. Defendant BETSY DEVOS is the Secretary (hereinafter, the
8 “Secretary”) of the United States Department of Education. Title IV of the Higher
9 Education Act of 1965 (“HEA”), 20 U.S.C. §§ 1070-1099d, charges the Secretary
10 with the responsibility of administering and overseeing the federal student loan
11 programs, including the Direct Loan program. She is named as a defendant in her
12 official capacity.

13 20. Defendant U.S. DEPARTMENT OF EDUCATION (hereinafter, the
14 “Department”) is an agency of the United States within the meaning of the APA. It
15 is responsible for administering and adopting regulations that implement Title IV of
16 the HEA. Collectively, both defendants are referred to herein as “Defendants.”
17

18 **BACKGROUND**

19 21. In general, students must have a high school diploma or a General
20 Equivalency Diploma (GED) to be eligible for federal financial aid, including Direct
21 Loans, under Title IV of the HEA. 20 U.S.C. § 1091(d).

22 22. Schools are responsible for screening students to ensure that they meet
23 the financial aid eligibility requirements. Before a student can qualify for financial
24 aid, the school must certify the student’s eligibility to the Department.

25 23. In limited circumstances, students who do not have the requisite high
26 school diploma or GED can qualify for financial aid. Between January 1, 1986 and
27 July 1, 2012, the HEA allowed a student who did not have a high school diploma or
28 GED to receive financial aid if the student’s school determined that he or she

1 demonstrated an “ability to benefit” (“ATB”) from the program the student sought to
2 attend. *See* Pub. L. No. 99-498, sec. 407(a), § 484(d), 100 Stat. 1268, 1481 (1986)
3 (codified at 20 U.S.C. § 1091(d)) and Pub. L. No. 112-74, Div. F, Title III, sec.
4 309(c)(1), § 484(d), 125 Stat. 1100 (Dec. 23, 2011) (codified at 20 U.S.C. §
5 1091(d)).

6 24. A school could demonstrate that a student met the ATB eligibility
7 alternative in a number of ways that varied over the years. *See* 20 U.S.C. §§ 1091(d)
8 (1986) and 1091(d) (2010); 34 C.F.R. § 682.402(e)(13)(ii). These included (1)
9 administering an approved “ability-to-benefit” test that the student passed; or (2)
10 having the student satisfactorily complete six credits of coursework applicable
11 toward a credential. 34 C.F.R. § 682.402(e)(13)(ii).

12 25. Schools found ways to exploit students and this narrow eligibility
13 alternative. Between 1989 and 1991, the U.S. Senate Permanent Subcommittee on
14 Investigations of the Committee on Governmental Affairs conducted an
15 investigation that revealed a “national epidemic” of fraud by for-profit trade schools,
16 including a “widespread” practice of fraudulently certifying students’ eligibility for
17 federal financial aid. S. Rep. No. 102-58, 1st Sess. 37, 12 (1991).

18 26. In response to this fraud, Congress amended the HEA in 1992 to
19 provide that “the Secretary shall discharge [a] borrower’s liability on [his or her]
20 loan” when the borrower’s “eligibility to borrow . . . was falsely certified by an
21 eligible institution.” Higher Education Amendments of 1992, Pub. L. No. 102-325,
22 sec. 428, § 437(c), 106 Stat. 448, 551 (1992) (codified as amended at 20 U.S.C. §
23 1087(c)) (emph. added).

24 27. This mandate applies to Direct Loans. 20 U.S.C. § 1087e(a)(1).

25 28. Direct Loan regulations narrow false certification discharge eligibility
26 to borrowers whose schools did one of the following: (a) falsified a non-high school
27 graduate’s ability to benefit; (b) forged the borrower’s signature on loan documents;
28

1 (c) certified eligibility even though the borrower's physical or mental condition, age,
2 or criminal record disqualified the borrower from employment; or (d) certified
3 eligibility as a result of identity theft. 34 C.F.R. § 685.215(a)(1).

4 29. Federal regulations require a Direct Loan borrower seeking discharge
5 on the basis of false certification to submit a written request to the Department,
6 including a sworn factual statement. 34 C.F.R. § 685.215(c).

7 30. If the Department determines that a Direct Loan borrower satisfies the
8 requirements for a false certification discharge, it is required to (a) discharge the
9 borrower's obligation to pay existing or past loans falsely certified by the school, as
10 well as any accrued charges and collection costs; (b) refund payments made by the
11 borrower on the loans; and (c) report the discharge to all consumer reporting
12 agencies so as to delete all adverse credit history regarding the loans. 20 U.S.C. §
13 1087(c)(1); 34 C.F.R. § 685.215(b).

14 31. There is no time limit on a Direct Loan borrower's eligibility for
15 discharge. A borrower may submit an application at any time, including after a loan
16 has been paid off. 34 C.F.R. § 215(b)(1).

17 32. Congress removed the ATB alternative for financial aid eligibility from
18 the HEA in 2011, effective starting July 1, 2012. *See* Pub. L. No. 112-74, Div. F,
19 Title III, sec. 309(c)(1), § 484(d), 125 Stat. 1100 (Dec. 23, 2011) (codified at 20
20 U.S.C. § 1091(d)).

21 33. Thus, beginning on July 1, 2012, students who did not have a high
22 school diploma or GED could no longer qualify for federal financial aid through the
23 ATB alternative. 20 U.S.C. § 1091(d) (2012).

24 34. As of December 17, 2015, Congress reenacted the ATB alternative to
25 the high school diploma eligibility requirement, but only for students enrolled in an
26 "eligible career pathway" program. *See* Pub. L. No. 113-235, Div. G, Title III, sec.
27 309(a)(1), § 484(d), 128 Stat. 2504 (Dec. 16, 2014) (codified at 20 U.S.C. § 1091(d)
28

1 (2015)).

2 **FACTUAL ALLEGATIONS**

3 **Marinello Schools of Beauty’s Use of Fake High School Diplomas**

4 35. Marinello Schools of Beauty (“Marinello”) was a private, for-profit
5 cosmetology school that operated 56 schools throughout several states, including 39
6 locations in California.

7 36. On February 1, 2016, the Department denied applications from five
8 Marinello campuses in California that sought approval for continued participation in
9 the federal financial aid programs.

10 37. The Department did so based on findings that Marinello fabricated high
11 school diplomas so it could fraudulently receive Title IV funds on behalf of
12 ineligible students who lacked high school diplomas or GEDs. *See, e.g.*, Letter from
13 Susan D. Crim, Director, Administrative Actions and Appeals Service Group, U.S.
14 Dep’t of Educ., to Dr. Rashed Elyas, CEO, Marinello Schools of Beauty (Feb. 1,
15 2016).

16 38. According to the Department, Marinello partnered with Parkridge
17 Private School (“Parkridge”), located in Long Beach, California, in a “fraudulent
18 scheme” to “fill the void in student enrollment left when the ATB alternative [for
19 financial aid eligibility] was eliminated.” *Id.* at 3, 5.

20 39. Beginning at least on July 1, 2012, Marinello “heavily advertised” the
21 high school completion program offered by Parkridge to students who lacked a high
22 school diploma or GED. *Id.*

23 40. Marinello “pressured” and “pushed [these] students . . . to sign up for
24 the Parkridge program” and represented that a Parkridge diploma was a valid high
25 school diploma. *Id.*

26 41. After an extensive investigation, the Department determined that the
27 Parkridge program did not provide Marinello students with a valid high school
28

1 diploma. *Id.* at 6. The Department determined that Marinello’s scheme had “caused
2 undue harm to its students” who had “trusted” Marinello and ended up with
3 “worthless” high school diplomas. *Id.* at 6-7. Indeed, the Department
4 acknowledged that these students are unable to continue their postsecondary
5 education elsewhere because they still lack a legitimate high school diploma or
6 GED. *Id.* at 7.

7 42. The Department therefore concluded that Marinello had falsely certified
8 the federal financial aid eligibility of the students who had been provided with a
9 Parkridge diploma and who otherwise lacked a high school diploma or GED before
10 they enrolled. *Id.* at 5.

11 43. While the Department denied applications for recertification of federal
12 financial aid eligibility for five of Marinello’s campuses, its findings regarding the
13 invalidity of Parkridge high school diplomas at each campus should apply to all
14 Marinello students whose eligibility was certified based on those diplomas. There is
15 no factual basis upon which to conclude that the Parkridge program provided valid
16 high school diplomas to Marinello students from other campuses.

17 44. The school closed all 56 of its campuses on or about February 5, 2016.

18 45. Several months later, in August 2016, Marinello settled a False Claims
19 Act lawsuit brought by six former employees of Marinello for \$11 million in
20 damages and attorneys’ fees. The suit was based on similar allegations that
21 Marinello engaged in a broad scheme to procure fake high school diplomas from
22 Parkridge to defraud the federal government of financial aid funds.

23 **Facts About Named Plaintiffs**

24 ***Plaintiff Lizette Menendez***

25 46. Lizette Menendez is currently 37 years old and is a lifetime resident of
26 Los Angeles County.
27

28 47. In February 2013, Ms. Menendez visited the Marinello campus in

1 Bell, California. There, she met with a Marinello employee, Christina, who guided
2 her through the campus.

3 48. Christina informed Ms. Menendez that she would need a high school
4 diploma or its equivalent in order to enroll at Marinello.

5 49. Ms. Menendez told her that she had not graduated from high school or
6 earned a GED.

7 50. Ms. Menendez had dropped out of Bell High School after completing
8 10th grade. She stopped attending school after she became pregnant with her first
9 child.

10 51. Christina assured Ms. Menendez that she could still enroll because
11 Marinello had a program, known as the Parkridge program, which would help Ms.
12 Menendez obtain a high school diploma.

13 52. Ms. Menendez paid \$150 in cash to Marinello and paid \$150 to
14 Parkridge to participate in the Parkridge program.

15 53. Ms. Menendez took the Parkridge test about one week later. A few
16 days after taking the Parkridge test, she received her Parkridge high school
17 diploma in person at Marinello.

18 54. Ms. Menendez trusted Marinello's representations that her Parkridge
19 diploma was legitimate and that Marinello had administered the Parkridge program
20 and test correctly. She was proud of her achievement and shared her diploma with
21 her family.

22 55. Soon after, in February 2013, Ms. Menendez enrolled in the
23 cosmetology program at Marinello's Bell campus.

24 56. Marinello falsely certified Ms. Menendez's federal financial aid
25 eligibility based on the Parkridge program diploma. Three Direct Loans totaling
26 \$9,931.00 were subsequently disbursed to Marinello on Ms. Menendez's behalf.
27

28 57. During her program, a Marinello instructor demonstrated how to cut

1 hair on a female mannequin one time. Marinello did not provide Ms. Menendez
2 and her class any other instruction on how to cut hair. Instead, it advised them to
3 practice cutting hair on their own without any further instruction or guidance.

4 58. Marinello also failed to provide hair-related instruction in other areas
5 commonly required of cosmetologists. For example, Marinello never taught Ms.
6 Menendez how to mix coloring for hair or the complete process for how to perm
7 hair.

8 59. During the manicure portion of the cosmetology program, Marinello
9 asked Ms. Menendez to instruct the class because she had some prior experience in
10 nails. Ms. Menendez was shocked that, as a student, she was asked to instruct the
11 other students in her class.

12 60. Ms. Menendez completed her program on or around July 12, 2014.

13 61. Ms. Menendez has never worked as a cosmetologist and is currently
14 unemployed.

15 62. The Department continues to collect on Ms. Menendez's Direct
16 Loans.

17 ***Plaintiff Lydia Luna***

18 63. Lydia Luna is currently 55 years old and is a lifetime resident of
19 Southern California.

20 64. By 2013, Ms. Luna had worked as a manicurist for over 16 years. She
21 had to stop working as a manicurist because she got sick from the chemicals in the
22 nail salon.

23 65. In November 2013, hoping to go back to school to learn additional
24 cosmetology skills that would qualify her to work in hair salons, Ms. Luna visited
25 the Marinello campus in City of Industry, California. She met with a Marinello
26 employee named Lisa.

27 66. During Ms. Luna's campus visit, Lisa asked whether Ms. Luna had a
28

1 high school diploma or GED.

2 67. Ms. Luna gave Lisa a copy of her high school transcript from Lowell
3 High School, which showed that Lydia had dropped out of high school after
4 completing the 10th grade.

5 68. Lisa assured Ms. Luna that she could still enroll in Marinello and earn
6 a high school diploma through the Parkridge program.

7 69. Ms. Luna paid \$250 to Marinello for the Parkridge program.

8 70. Marinello gave Ms. Luna three Parkridge workbooks and gave her a
9 week to complete them on her own. Shortly thereafter, Marinello provided her
10 with a high school diploma.

11 71. Ms. Luna believed Marinello's assurances that the Parkridge high
12 school diploma was valid.

13 72. On or around November 27, 2013, Ms. Luna enrolled in the
14 cosmetology program at Marinello's City of Industry campus.

15 73. Marinello falsely certified Ms. Luna's federal financial aid eligibility
16 based on the Parkridge program diploma. Four Direct Loans totaling \$15,802.00
17 were subsequently disbursed to Marinello on Ms. Luna's behalf.

18 74. Marinello informed her class that it lacked enough teachers to instruct
19 the freshman class. As a result, Marinello instructed them to join the senior class,
20 which had already progressed to cutting clients' hair in Marinello's clinical space.

21 75. Ms. Luna and her freshman class were then told to remain in a corner
22 of the room and do the best that they could to watch the seniors cutting hair and
23 learn on their own.

24 76. In addition, Ms. Luna had informed the school that she is left-handed
25 and therefore needed to learn how to use left-handed hair-cutting instruments.

26 77. Although Marinello had agreed to provide students with their own
27 hair-cutting instruments, Marinello did not provide Ms. Luna with left-handed
28

1 instruments until seven months into her ten-month program. Since none of the
2 instructors at Marinello knew how to use left-handed scissors, Marinello told Ms.
3 Luna that she had to learn how to cut with them on her own.

4 78. On or around September 27, 2014, Ms. Luna completed the
5 cosmetology program at Marinello.

6 79. Ms. Luna lost her first job at a hair salon because she had not been
7 properly trained at Marinello.

8 80. Ms. Luna returned to working as a manicurist, the same job she had
9 prior to attending Marinello, because she lacks the skills necessary to work in a
10 hair salon.

11 81. The Department continues to collect on Ms. Luna's Direct Loans.

12 ***Leonard Valdez***

13 82. Leonard Valdez is currently 47 years old. He is a lifetime resident of
14 Orange County, California.

15 83. In 2013, Mr. Valdez was working in the backroom at Target. He had
16 worked up to this position, but knew that he could not progress to a higher level
17 due to his limited education.

18 84. Mr. Valdez had dropped out of Polaris High School in Anaheim,
19 California, without earning his diploma in order to work and support his mother
20 after his parents divorced.

21 85. Mr. Valdez wanted a career change and decided to pursue barbering.

22 86. In January 2014, he visited a Marinello campus in Anaheim,
23 California. He met with a Marinello employee named Priscilla.

24 87. Mr. Valdez informed Priscilla that he had not completed high school
25 and had not earned a GED.

26 88. Priscilla assured Mr. Valdez that Marinello could help him earn his
27 high school diploma through the Parkridge program. She emphasized that he
28

1 would be obtaining a valid high school diploma.

2 89. Mr. Valdez paid \$300 for the Parkridge program.

3 90. Marinello gave Mr. Valdez a Parkridge workbook.

4 91. After a week, Marinello had Mr. Valdez take the Parkridge high
5 school diploma test.

6 92. Marinello eventually gave him a Parkridge diploma.

7 93. On or around January 6, 2014, Mr. Valdez enrolled in the barbering
8 program at Marinello's Anaheim campus.

9 94. Marinello falsely certified Mr. Valdez's federal financial aid
10 eligibility based on the Parkridge program diploma. Four Direct Loans totaling
11 \$16,474.00 were subsequently disbursed to Marinello on Mr. Valdez's behalf.

12 95. During his program, Mr. Valdez did not feel properly trained because
13 there were not enough instructors to teach the class.

14 96. When he first started his program, there were two instructors: one to
15 teach the workbook and prepare students for the state board exam and the other to
16 teach practice skills of cosmetology.

17 97. Soon after he started, Mr. Valdez's class only had one instructor.
18 Since the instructor was also busy assisting paying clients who came to Marinello
19 for haircuts, the instructor had limited time to instruct students on how to perform
20 basic skills like cutting.

21 98. Most of the time, the instructor would do the cuts himself and would
22 not take the time to teach students haircutting skills.

23 99. Mr. Valdez graduated from Marinello's barbering program on or
24 around March 17, 2015.

25 100. After graduating, Mr. Valdez found a job at a barber shop, but he was
26 quickly fired due to his lack of training.

27 101. Mr. Valdez had to learn barbering skills from barbers on the job
28

1 because he was not properly trained at Marinello.

2 102. The Department continues to collect on Mr. Valdez's Direct Loans.

3 **Department's Denial of Plaintiffs' False Certification Discharge Applications**

4 103. Based on these facts and the Department's findings that Marinello
5 used the fraudulent Parkridge program to falsely certify the financial aid eligibility
6 of students who lacked a high school diploma or GED, Plaintiffs are eligible for
7 false certification discharge under the statutory mandate of the HEA, 20 U.S.C. §
8 1087(c).

9 104. Plaintiffs therefore jointly submitted false certification discharge
10 applications on December 22, 2016.

11 105. The applications were submitted with over 140 pages of supporting
12 evidence, including Plaintiffs' sworn declarations and the Department's February
13 2016 letter determining that Marinello falsely certified borrowers based on
14 Parkridge high school diplomas. The Department denied all three Plaintiffs'
15 discharge applications in January 2017.

16 106. In the denial letters, the Department stated Plaintiffs were not eligible
17 for false certification loan discharges because they were not enrolled at a
18 postsecondary school prior to July 1, 2012, the effective date of Congress's repeal
19 of the ability-to-benefit eligibility alternative for non-high school graduates.
20

21 107. On information and belief, in denying Plaintiffs' discharge
22 applications, the Department improperly disregarded the statutory false
23 certification discharge mandate of the HEA, 20 U.S.C. § 1087(c). Instead, the
24 Department relied on the out-of-date false certification regulation, 34 C.F.R. §
25 685.215(a)(1), which conflicts with the statute's broad mandate by narrowing false
26 certification discharge eligibility for students who lack a high school diploma or
27 GED. The current regulation, unlike the statute, states that these students are
28 eligible for a false certification discharge *only* when a school failed to properly

1 administer an ATB test. Thus, because Congress repealed the ATB eligibility
2 alternative for non-high school graduates as of July 1, 2012, students who enroll
3 after that date cannot qualify for a false certification discharge under the current
4 regulation even when a school falsely certifies that they have a high school
5 diploma.

6 **Delay and Reconsideration of Updated False Certification Discharge Regulation**

7 108. After an extensive rulemaking process, on November 1, 2016, the
8 Department published an updated Direct Loan false certification discharge
9 regulation designed to “address the problem of schools encouraging non-high school
10 graduates to obtain false high school diplomas.” 81 Fed. Reg. 75,926, 76,082 (Nov.
11 1, 2016); 81 Fed. Reg. 39,330, 39,377 (June 16, 2016). The updated regulation is
12 hereinafter referred to as the “Updated False Certification Discharge Rule.”

13 109. The rulemaking process lasted over one year. During that time, the
14 Department held two public hearings and considered over 10,000 comments
15 regarding possible topics for the rulemaking (80 Fed. Reg. 63,478, 63,479 (Oct. 20,
16 2015)). It then convened a negotiated rulemaking committee comprised of sixteen
17 negotiators representing a wide range of stakeholders who met for three multi-day
18 rulemaking sessions in 2016 (81 Fed. Reg. 39,330, 39,333-34). Following the
19 rulemaking sessions, the Department proposed regulations (81 Fed. Reg. 39,330 and
20 considered comments submitted by over 50,000 parties (81 Fed. Reg. 75,926,
21 75,928).

22 110. The November 1, 2016 notice publishing the final Updated False
23 Certification Discharge Rule included extensive new regulations regarding other
24 matters, including the use of arbitration provisions in enrollment agreements and
25 procedures that would allow borrowers to seek cancellation of their federal loans
26 based on unlawful conduct by their schools (collectively, the “2016 Final
27 Regulations”).
28

1 111. Under the Updated False Certification Discharge Rule, Direct Loan
2 borrowers who were not high school graduates and did not meet an alternative
3 eligibility provision when they enrolled would be eligible for a false certification
4 discharge if (a) the borrower reported not having a high school diploma to the school
5 and (b) the school certified his or her eligibility based on a “high school diploma
6 falsified by the school or a third party to which the school referred the borrower.”
7 81 Fed. Reg. 75,926, 76,082 (amending 34 C.F.R. § 685.215(a)(1)).

8 112. This updated regulation clarifies the categories of borrowers that are
9 eligible for false certification discharges, including borrowers like plaintiffs.
10 Plaintiffs would have qualified for discharges under this updated regulation because
11 (a) Plaintiffs did not have high school diplomas and did not meet an alternative to
12 the high school graduation eligibility requirement; (b) Plaintiffs reported not having
13 high school diplomas to Marinello; and (c) Marinello certified Plaintiffs’ financial
14 aid eligibility based on high school diplomas falsified by Marinello and a third party
15 (Parkridge) to which Marinello had referred them.
16

17 113. This Updated False Certification Discharge Rule was to take effect on
18 July 1, 2017.

19 114. The updated regulation would have applied to all Direct Loans,
20 including those made prior to July 1, 2017.

21 115. The existing regulation does not prohibit borrowers from resubmitting
22 or seeking Department review of previously denied false certification discharge
23 applications.

24 116. Plaintiffs had therefore planned on resubmitting their false
25 certification discharge applications or seeking review of the Department’s denial
26 after July 1, 2017.

27 ///

28 ///

1 ***First Delay Rule***

2 117. Plaintiffs never reapplied for a discharge. Doing so would have been
3 futile because the Department effectively repealed the Updated False Certification
4 Discharge Rule by delaying its effective date to at least July 1, 2018.

5 118. On June 16, 2017, the Department published a final rule delaying “until
6 further notice” the 2016 Final Regulations, including the Updated False Certification
7 Discharge Rule. 82 Fed. Reg. 27,621, 27,622 (June 16, 2017) (hereinafter, the “First
8 Delay Rule”).

9 119. The Department did not convene a negotiated rulemaking committee or
10 provide an opportunity for public notice and comment, as required by the APA, 5
11 U.S.C. § 533, and the HEA, 20 U.S.C. § 1098a, before publishing the First Delay
12 Rule with an immediate effective date.

13 120. Instead, in the First Delay Rule notice, the Department claimed that it
14 had the authority to dispense with these rulemaking requirements by invoking 5
15 U.S.C. § 705. 82 Fed. Reg. 27,621, 27,622. Section 705 provides that “[w]hen an
16 agency finds that justice so requires, it may postpone the effective date of action
17 taken by it, pending judicial review.”

18 121. The Department “concluded that justice require[d] it to postpone” most
19 provisions of the 2016 Final Regulations until resolution of a lawsuit filed by the
20 California Association of Private Postsecondary Schools (“CAPPS”) on May 24,
21 2017. 82 Fed. Reg. 27,621, 27,622.

22 122. The Department reached this conclusion by finding that the CAPPS
23 lawsuit “raised serious questions concerning the validity of *certain* provisions of the
24 final regulations.” 82 Fed. Reg. 27,621 (emph. added).

25 123. However, while the CAPPS lawsuit challenged the validity of the 2016
26 Final Regulations, neither CAPPS’s complaint nor its subsequent motion seeking a
27 preliminary injunction refer to the Updated False Certification Discharge Rule.
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1 124. CAPPS’s complaint specifically challenged only four aspects of the
2 2016 Final Regulations: (a) provisions regarding the use of forced arbitration clauses
3 and class action waivers in school enrollment contracts; (b) standards and procedures
4 for the evaluation of “borrower defenses” to repayment of Title IV loans (not
5 including false certification discharges which involve separate procedures); (c) new
6 financial responsibility requirements for schools and related student disclosures; and
7 (d) new disclosure requirements for schools whose former students do not meet
8 specific requirements about paying down their federal loans after leaving school.

9 125. Of these four aspects of the 2016 Final Regulations, CAPPS’s
10 subsequent motion for preliminary injunction only sought an order enjoining the
11 Department from implementing the regulations regarding arbitration clauses and
12 class action waivers.

13 126. The Department also found that CAPPS had “identified substantial
14 injuries that could result if the final regulations go into effect before those questions
15 [regarding the validity of certain provisions] are resolved.” 82 Fed. Reg. 27,621.
16

17 127. The only potential injuries cited by the Department were (1) the cost to
18 schools of modifying enrollment agreements to comply with the new arbitration
19 clause and class action waiver provisions and (2) the new financial responsibility
20 requirements that could trigger a school’s obligation to provide a letter of credit or
21 other financial protection. *Id.* Again, neither the Department nor the CAPPS lawsuit
22 identified any injuries that could result from the implementation of the Updated
23 False Certification Discharge Rule.

24 128. The Department found that the United States would suffer no
25 significant harm from delaying the 2016 Final Regulations and would avoid
26 significant costs to schools, the government, and the taxpayer. *Id.* However, the
27 only costs identified by the Department were (1) the costs identified in the Net
28 Budget Impacts Section of the Regulatory Impact Analysis of the 2016 Final

1 Regulations; (2) the costs of the new borrower defense procedures, and (3) the costs
2 of the new three-year automatic closed school discharges. *Id.*

3 129. Notably, the Net Budget Impacts Section of the Regulatory Impact
4 Analysis for the 2016 Final Regulations states, “[w]e do not expect an increase in
5 false certification discharge claims to result in a significant budget impact from” the
6 Updated False Certification Discharge Rule. 81 Fed. Reg. 75,927, 76,060.

7 130. The Department did not provide any other explanation or justification
8 for delaying the Updated False Certification Discharge Rule in the First Delay Rule
9 notice.

10 131. The Department did not address the benefits of the Updated False
11 Certification Discharge Rule, including the financial benefits to harmed student loan
12 borrowers and the benefits to the government and prospective student loan
13 borrowers from discouraging the type of false certification fraud engaged in by
14 Marinello.

15 132. In addition, the Department did not address or provide a reasoned
16 explanation for disregarding prior factual findings underlying the Updated False
17 Certification Discharge Rule.

18 ***Reconsideration of 2016 Final Regulations***

19 20 133. In the June 16, 2017 First Delay Rule notice, the Department also
21 announced its plans to conduct a new rulemaking process to “review and revise” the
22 2016 Final Regulations. The announced process included a plan to convene a new
23 negotiated rulemaking committee. 82 Fed. Reg. 27,621, 27,622.

24 134. On the same day, the Department published a separate notice regarding
25 its intent to undertake a “regulatory reset” beginning through negotiated rulemaking
26 committee meetings starting in November or December 2017. Press Release, Dep’t
27 of Educ., *Secretary DeVos Announces Regulatory Reset to Protect Students,*
28 *Taxpayers Higher Ed Institutions* (June 14, 2017); 82 Fed. Reg. 27,640 (June 16,

1 2017).

2 135. On June 22, 2017, the Department published a notice seeking public
3 input on which of its regulations it should consider repealing, modifying or
4 replacing. 82 Fed. Reg. 28,431 (June 22, 2017).

5 136. On August 30, 2017, the Department published a notice soliciting
6 nominations for seats on two negotiated rulemaking committees, including one that
7 would consider a number of topics including false certification discharges. 82 Fed.
8 Reg. 41,194 (Aug. 30, 2017).

9 137. The Department convened the first meeting of the committee
10 considering false certification discharge regulations on November 13, 2017.

11 ***Interim Final Rule***

12 138. On October 24, 2017, the Department published an interim final rule
13 (“Interim Final Rule” or “IFR”), effective immediately, delaying implementation of
14 the 2016 Final Regulations, including the Updated False Certification Discharge
15 Rule, until July 1, 2018. 82 Fed. Reg. 49,114 (Oct. 24, 2017).

16 139. The Department did not engage in negotiated rulemaking or provide
17 any opportunity for public comment, as required by the HEA, 20 U.S.C. § 1098a,
18 and the APA, 5 U.S.C. § 533, before publishing the IFR.

19 140. Instead, the Department found it had good cause to bypass these
20 rulemaking requirements under the 5 U.S.C. § 553(b) (APA) and 20 U.S.C. §
21 1098a(b)(2) (HEA). These sections state that the Department may bypass
22 rulemaking procedures only when there is good cause to do so because such
23 procedures are “impracticable, unnecessary, or contrary to the public interest.”
24

25 141. The Department found that compliance with public rulemaking
26 procedures was impracticable and unnecessary based on the HEA “master calendar”
27 requirement. 82 Fed. Reg. 49,114, 49,117.

28 142. Under the master calendar requirement, “any regulatory changes . . .

1 affecting the programs” under Title IV “that have not been published in final form
2 by November 1 prior to the start of the award year” beginning on July 1 “shall not
3 become effective until the beginning of the second award year after such November
4 1 date.” 20 U.S.C. § 1089(c).

5 143. The Department reasoned that because the First Delay Rule delayed the
6 effective date of the 2016 Final Regulations past July 1, 2017, under the master
7 calendar requirement the earliest new effective date for these regulations is July 1,
8 2018, in the event that the CAPPS litigation is resolved prior to that date. 82 Fed.
9 Reg. 49,114, 49,116.

10 144. However, the IFR is not necessary to enact an effective date for the
11 2016 Final Regulations. If the Department had not enacted the IFR, the effective
12 date of July 1, 2017 for the 2016 Final Regulations, including the Updated False
13 Certification Discharge Rule, would be restored in the event that the CAPPS
14 litigation (which was the basis for the First Delay Rule) was resolved and any of the
15 2016 Final Regulations withstood challenge. In this case, the original effective date
16 would comply with the HEA’s master calendar requirement.
17

18 145. In the notice, the Department also concluded that the IFR would avoid
19 costs of compliance for schools and the costs to the government and taxpayers
20 resulting from the implementation of the new borrower defense and closed school
21 discharge regulations. *Id.*

22 146. The Department’s cost analysis omitted any mention of the Updated
23 False Certification Discharge Rule. Nor did it provide any other justification or
24 explanation for the delay of the Updated False Certification Discharge Rule.

25 147. The IFR notice did not include any analysis of the actual or potential
26 harm or negative impact the delay would cause for borrowers like the Plaintiffs, or
27 the benefits of the Updated False Certification Discharge Rule.

28 148. In contrast to the Department’s assurance that its delay of the new

1 borrower defense regulation will not negatively impact borrowers because it is
2 processing those claims, the Department is *denying* false certification discharge
3 applications from borrowers, including Plaintiffs, who enrolled after July 1, 2012
4 and whose schools falsely certified their financial aid eligibility based on fraudulent
5 high school diplomas provided by the school.

6 149. On October 24, 2017, the Department separately proposed a further
7 delay of implementation of the 2016 Final Regulations until July 1, 2019. 82 Fed.
8 Reg. 49,155 (Oct. 24, 2017).

9 150. In publishing the First Delay Rule and the Interim Final Rule without
10 following the required HEA and APA rulemaking procedures, Defendants have
11 deprived Plaintiffs of a benefit to which they are entitled under both the HEA and
12 the 2016 Final Regulations.

13 151. Moreover, in the context of both the Department's proposed further
14 delay of those regulations until July 1, 2019, and the current negotiated rulemaking
15 proceeding re-evaluating the 2016 Final Regulations, the Department could
16 promulgate a regulation that does less to clarify Plaintiffs' eligibility for false
17 certification discharges. Worse yet, a new regulation could go so far as to preclude
18 them from qualifying for false certification discharges.

19 20 152. Thus, the First Delay Rule and the Interim Final Rule affect the rights
21 and obligations of and have a direct impact on Plaintiffs. The First Delay Rule and
22 IFR have caused substantial injury to the Plaintiffs. As long as Plaintiffs are
23 precluded from obtaining false certification discharges, they must repay their loans,
24 respond to the Department's debt collection efforts, and face the consequences of
25 default if they do not. In addition, to the extent they wish to attend a legitimate
26 postsecondary school, until the Marinello Direct Loans are cancelled or paid down,
27 they will count towards the maximum amounts Plaintiffs are allowed to borrow
28 under the Direct Loan program. This will limit their ability to pay for a legitimate

1 undergraduate higher education. Moreover, the Direct Loans will continue to appear
2 on their credit reports and impact their ability to obtain other forms of credit.

3 **FIRST CAUSE OF ACTION**

4 **(Denial of Discharge Applications - Pursuant to the**
5 **Administrative Procedure Act, 5 U.S.C. §§ 701-706)**

6 153. Plaintiffs repeat and reallege each of the foregoing paragraphs as if
7 fully set forth herein.

8 154. Plaintiffs’ applications for false certification discharge, along with the
9 evidence submitted with those applications, satisfied the eligibility standards set
10 forth in 20 U.S.C. § 1087(c) for discharge of the Direct Loans they obtained to
11 attend Marinello.

12 155. The denials of Plaintiffs’ individual applications for false certification
13 student loan discharge constitute final agency actions, as defined by 5 U.S.C. § 704,
14 and are therefore reviewable under the APA.

15 156. Defendants’ denials of Plaintiffs’ false certification discharge
16 applications were arbitrary, capricious, an abuse of discretion, contrary to law, and
17 otherwise not in accordance with the HEA, 20 U.S.C. § 1087(c), in violation of the
18 APA, 5 U.S.C. § 706(2)(A).

19 157. Plaintiffs ask this court to declare that Defendants’ denials of their
20 applications for false certification discharge were unlawful, arbitrary, capricious, an
21 abuse of discretion, contrary to law, and otherwise not in accordance with the HEA,
22 20 U.S.C. § 1087(c), in violation of the APA, 5 U.S.C. § 706(2)(A).

23 158. Pursuant to the APA, 5 U.S.C. §§ 702 and 706(1) and (2)(A), Plaintiffs
24 further ask this court to reverse Defendants’ denials of their applications for false
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1 certification discharge and compel Defendants to grant Plaintiffs' applications and

- 2 a. Cease collection efforts on Plaintiffs' Direct Loans;
- 3 b. Discharge the liability on Plaintiffs' Direct Loans; and
- 4 c. Grant Plaintiffs all relief authorized by 20 U.S.C. § 1087(c)(1)
- 5 and 34 C.F.R. § 685.215.

6 **SECOND CAUSE OF ACTION**

7 **(Pursuant to the Declaratory Judgment Act, 28 U.S. C. §§ 2201-2202)**

8 159. Plaintiffs repeat and reallege each of the foregoing paragraphs as if

9 fully set forth herein.

10 160. For the reasons set forth in the First Cause of Action, Plaintiffs seek a

11 declaratory judgment, pursuant to 28 U.S.C. §§ 2201-2202, that under the HEA, 20

12 U.S.C. § 1087(c), the Department is obligated to discharge the Direct Loan(s) of a

13 borrower and provide the relief authorized by 20 U.S.C. § 1087(c) and 34 C.F.R. §

14 685.215 whenever the borrower submits an application attesting to the following:

- 15 a. The borrower (or the student on whose behalf a parent borrowed)
- 16 did not have a high school diploma or its equivalent and did not meet
- 17 alternative financial aid eligibility requirements provided in the HEA; and
- 18 b. The postsecondary institution certified the eligibility of the
- 19 borrower (or the student on whose behalf the parent borrowed) to receive
- 20 Direct Loans based on a high school graduation status falsified by the school
- 21 or a high school diploma falsified by the school or a third party to which the
- 22 school referred the borrower.

23 **THIRD CAUSE OF ACTION**

24 **(First Delay Rule – Violation of APA, 5 U.S.C. § 706(2)(D) –**

25 **Failure to Observe Procedure Required by Law)**

26 161. Plaintiffs repeat and reallege each of the foregoing paragraphs as if

27

28

1 fully set forth herein.

2 162. Defendants are subject to the rulemaking procedures of the APA and
3 the HEA.

4 163. The First Delay Rule is a final agency action, as defined by the APA, 5
5 U.S.C. § 704.

6 164. The First Delay Rule is a final agency action because:

7 a. it delays the Updated False Certification Discharge Rule, which
8 was published after an extensive notice-and-comment and rulemaking
9 process;

10 b. it marks the consummation of Defendants' decision-making
11 process to enact an indefinite delay in order to reconsider, amend, or repeal
12 the Updated False Certification Discharge Rule; and

13 c. directly and negatively modifies Plaintiffs' legal rights and
14 obligations with respect to the Direct Loans they obtained to attend Marinello.

15 165. The First Delay Rule is therefore subject to judicial review under the
16 APA.

17 166. The First Delay Rule is a substantive rescission of the effective date of
18 the Updated False Certification Discharge Rule, as demonstrated by the facts alleged
19 in this Complaint, including in paragraphs 108 through 137 and paragraphs 161
20 through 163.

21 167. Because the First Delay Rule is a substantive final rule, Defendants
22 were required to comply with the rulemaking procedures of the APA, 5 U.S.C. §
23 553, and the HEA, 20 U.S.C. § 1098a.

24 168. Defendants did not publish a notice of proposed rulemaking in the
25 Federal Register or provide interested persons with an opportunity to comment
26 before the effective date of the First Delay Rule, in violation of 5 U.S.C. §§ 553(b),
27 (c) and (d).
28

1 169. Defendants did not seek or obtain public involvement in the
2 development of the First Delay Rule, submit the First Delay Rule to a negotiated
3 rulemaking process, or publish a notice of proposed rulemaking in the Federal
4 Register and provide interested persons with an opportunity to comment before the
5 effective date of the final First Delay Rule, in violation of 20 U.S.C. §§ 1098a(a) and
6 (b).

7 170. Under 5 U.S.C. § 705, to justify their failure to comply with the
8 required rulemaking processes with respect to the Updated False Certification
9 Discharge Rule, Defendants must show each of the following, specifically, as
10 applied to the Updated False Certification Discharge Rule: (a) CAPPS is likely to
11 prevail on the merits of its complaint; (b) the absence of the delay will cause
12 irreparable harm; (c) the public will not be harmed by the delay; and (d) the public
13 interest requires the delay.
14

15 171. Defendants' notice of the First Delay Rule failed to acknowledge or
16 comply with this four-part test applicable to Section 705 stays.

17 172. Defendants' notice of the First Delay Rule did not provide any
18 justification for the delay of the Updated False Certification Discharge Rule.

19 173. Moreover, Defendants did not and could not have cited facts
20 demonstrating that the First Delay Rule met the four-part test because:

21 a. CAPPS did not state any facts that would serve as a basis for
22 challenging the Updated False Certification Discharge Rule in its complaint or
23 its motion for preliminary injunction.

24 b. Defendants therefore did not have any basis in fact or law on
25 which to conclude that CAPPS is likely to prevail on a challenge to the
26 Updated False Certification Discharge Rule.

27 c. CAPPS did not allege in its complaint or its motion for
28 preliminary injunction that its members would be harmed if the Updated False

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Certification Discharge Rule went into effect.

d. Defendants provided no analysis or facts to demonstrate that the public will not be harmed by the delay of the Updated False Certification Discharge Rule.

e. Defendants failed to acknowledge or evaluate significant injuries that Plaintiffs and other students are likely to suffer from the indefinite delay and possible rescission of the Updated False Certification Discharge Rule.

f. Defendants provided no analysis or facts to demonstrate that the public interest requires the delay of the Updated False Certification Discharge Rule.

g. On the contrary, to the extent the public interest is equivalent to the Department's or a taxpayer's interest in avoiding costs, the Net Budget Impacts Section of the Regulatory Impact Analysis for the 2016 Final Regulations states, "[w]e do not expect an increase in false certification discharge claims to result in a significant budget impact from" the Updated False Certification Discharge Rule. 81 Fed. Reg. 75,926, 76,060.

h. Defendants did not provide any facts to discredit this earlier conclusion.

174. Defendants failed to articulate any rational connection between the First Delay Rule, with respect to the Updated False Certification Discharge Rule, and the CAPPS lawsuit.

175. In addition, the HEA does not contain any provision that permits the Department to bypass the HEA public rulemaking procedures based on 5 U.S.C. § 705.

176. Based on the facts alleged in this Complaint, including in paragraphs 108 through 137 and paragraphs 161 through 175 herein, Defendants' failure to observe the rulemaking procedures of the HEA and APA in enacting the First Delay

1 Rule is a violation of the APA, § 706(2)(D).

2 177. Plaintiffs have been adversely affected and aggrieved by the First Delay
3 Rule for which there is no other adequate remedy in law and therefore seek review
4 of the First Delay Rule under 5 U.S.C. § 702.

5 178. Plaintiffs therefore request that the First Delay Rule be held unlawful,
6 vacated and set aside with respect to the Updated False Certification Discharge Rule.

7 **FOURTH CAUSE OF ACTION**

8 **(First Delay Rule – Violation of APA, 5 U.S.C. §§ 706(2)(A) –**
9 **Arbitrary, Capricious and Otherwise Contrary to Law)**

10 179. Plaintiffs repeat and reallege each of the foregoing paragraphs
11 as if fully set forth herein.

12 180. Prior to enactment of the First Delay Rule, Defendants failed to:

13 a. Address prior factual findings underlying the November
14 1, 2016 publication of the Updated False Certification Discharge
15 Rule;

16 b. Articulate any connection between its findings in the
17 First Delay Rule notice and the delay of the Updated False
18 Certification Discharge Rule;

19 c. Consider the benefits of the Updated False Certification
20 Discharge Rule.

21 181. Based on the facts alleged in this Complaint, including paragraphs 108
22 through 137 and paragraphs 161 through 180, Defendants' justification for enacting
23 the First Delay Rule without complying with the required APA and HEA public
24 rulemaking procedures is arbitrary, capricious, and contrary to law in violation of 5
25 U.S.C. § 706(2)(A).

26 182. Plaintiffs request that the First Delay Rule be held unlawful,
27 vacated and set aside with respect to the Updated False Certification Discharge Rule.
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FIFTH CAUSE OF ACTION

**(First Delay Rule – Violation of APA, 5 U.S.C. §§ 706(2)(C) –
Agency Action in Excess of Statutory Authority)**

183. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

184. Defendants’ findings under 5 U.S.C. § 705 that justice required it to enact the First Delay Rule with respect to the Updated False Certification Discharge Rule were in excess of statutory authority, in violation of 5 U.S.C. § 706(2)(C).

185. The HEA does not contain any provision that permits Defendants to bypass the HEA public rulemaking procedures based on 5 U.S.C. § 705.

186. The HEA permits Defendants to bypass the HEA public rulemaking procedures only when they determine there is good cause to do so under 5 U.S.C. § 553(b) of the APA.

187. In the First Delay Rule notice, Defendants made no findings under 5 U.S.C. § 553(b).

188. Defendants’ publication of the First Delay Rule with respect to the Updated False Certification Discharge Rule without complying with the rulemaking procedures required by APA, 5 U.S.C. § 553, and the HEA, 20 U.S.C. § 1098a, was therefore in excess of Defendants’ statutory authority in violation of 5 U.S.C. § 706(2)(C).

189. Plaintiffs request that the First Delay Rule be held unlawful, vacated and set aside with respect to the Updated False Certification Discharge Rule.

SIXTH CAUSE OF ACTION

**(Interim Final Rule – Violation of the APA – 5 U.S.C. § 706(2)(D) –
Failure to Observe Procedure Required by Law)**

190. Plaintiffs repeat and reallege each of the foregoing paragraphs as if fully set forth herein.

1 191. The Interim Final Rule is a final agency action, as defined by the APA,
2 5 U.S.C. § 704.

3 192. The IFR is a final agency action because:

4 a. it delays the Updated False Certification Discharge Rule, which
5 was published after an extensive notice-and-comment and rulemaking
6 process;

7 b. it marks the consummation of Defendants' decision-making
8 process to enact a delay and reconsider, amend, or repeal the 2016 Final
9 Regulations, including the Updated False Certification Discharge Rule, and
10 prevent them from going into effect before July 1, 2018, even if any of the
11 2016 Final Regulations are upheld and the CAPPS litigation is resolved prior
12 to that date; and

13 c. it directly and negatively modifies Plaintiffs' legal rights and
14 obligations with respect to the Direct Loans they obtained to attend Marinello.

15 193. The IFR is therefore subject to judicial review under the APA.

16 194. The IFR is a substantive rescission of the effective date because it
17 prevents the reinstatement of the original July 1, 2017 effective date of the 2016
18 Final Regulations, including the Updated False Certification Discharge Rule, even if
19 any of the 2016 Final Regulations are upheld and the CAPPS litigation resolved
20 prior to July 1, 2018.

21 195. Because the IFR is a substantive rule, Defendants were required to
22 comply with the rulemaking procedures of the APA, 5 U.S.C. § 553, and the HEA,
23 20 U.S.C. § 1098a.

24 196. Defendants did not publish a notice of proposed rulemaking in the
25 Federal Register or provide interested persons with an opportunity to comment
26 before the effective date of the IFR, in violation of the APA, 5 U.S.C. §§ 553(b), (c)
27
28

1 and (d).

2 197. Defendants also did not obtain public involvement in the development
3 of the IFR, submit the IFR to a negotiated rulemaking process, or publish a notice of
4 proposed rulemaking in the Federal Register and provide interested persons with an
5 opportunity to comment before the effective date of the final IFR, in violation of the
6 HEA, 20 U.S.C. §§ 1098a(a) and (b).

7 198. Defendants invoked good cause under 5 U.S.C. § 553(b) and 20 U.S.C.
8 § 1098a(b)(2) as grounds to enact the IFR without complying with the rulemaking
9 procedures required by the APA and the HEA.

10 199. Defendants determined that they had good cause to dispense with the
11 APA and HEA rulemaking procedures and that these procedures were impracticable
12 and unnecessary due to the HEA master calendar requirements.

13 200. Defendants' findings, however, are based on an incorrect analysis of the
14 law:

15 a. If any of the 2016 Final Regulations withstood challenge in the
16 CAPPS litigation, including the Updated False Certification Discharge Rule,
17 the HEA's master calendar requirement would allow them to be effective as of
18 July 1, 2017, since they were published on November 1, 2016.

19 b. Thus, if any of the 2016 Final Regulations withstood challenge in
20 any pending litigation at any time, it would be unnecessary for the Department
21 to publish a new effective date.

22 201. Moreover, none of the costs or harms cited in the IFR notice had any
23 relation to the Updated False Certification Discharge Rule. Instead, they only
24 related to the regulations regarding closed school discharges, borrower defenses to
25 repayment, arbitration clauses, class action waivers, and financial responsibility.

26 202. Defendants did not articulate any other facts supporting its
27 determination that the compliance with the public rulemaking procedures was
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1 impracticable or unnecessary.

2 203. Defendants did not and could not show that compliance with the
3 rulemaking requirements in enacting the IFR would have been contrary to public
4 interest. Defendants ignored significant injuries that Plaintiffs and other students
5 are likely to suffer from the delay and possible rescission of the Updated False
6 Certification Discharge Rule.

7 204. Defendant lacked good cause to enact the IFR with respect to the
8 Updated False Certification Discharge Rule without complying with the
9 procedures required by the APA, 5 U.S.C. § 553, and the HEA, 20 U.S.C. §
10 1098a.

11 205. Defendants' failure to observe the rulemaking procedures of the APA
12 and HEA in enacting the IFR is a violation of the APA, 5 U.S.C. § 706(2)(D).

13 206. Plaintiffs have been adversely affected and aggrieved by the
14 enactment of the IFR, for which there is no other adequate remedy in court, and
15 may therefore seek review of the IFR under 5 U.S.C. § 702.
16

17 207. Plaintiffs request that the IFR be held unlawful, vacated, and set aside
18 with respect to the Updated False Certification Discharge Rule.

19 **SEVENTH CAUSE OF ACTION**

20 **(Interim Final Rule – Violation of APA, 5 U.S.C. §§ 706(2)(A) –**
21 **Arbitrary, Capricious and Otherwise Contrary to Law)**

22 208. Plaintiffs repeat and reallege each of the foregoing paragraphs as if
23 fully set forth herein.

24 209. The Department failed to do the following in the IFR notice:

25 a. Address prior factual findings underlying the November 1,
26 2016 publication of the Updated False Certification Discharge Rule;

27 b. Articulate any connection between its findings regarding costs
28 in the IFR notice and the delay of the Updated False Certification Discharge

1 Rule; and

2 c. Consider the benefits of the Updated False Certification
3 Discharge Rule.

4 210. Based on the facts alleged in this Complaint, including paragraphs
5 108 through 152 and paragraphs 191 through 209, Defendants' findings in the IFR
6 notice that it had good cause under 5 U.S.C. § 553(b) and 20 U.S.C. § 1098a(b)(2)
7 to dispense with the public rulemaking procedures with respect to the Updated
8 False Certification Discharge Rule was arbitrary, capricious, and contrary to law in
9 violation of 5 U.S.C. §§ 706(2)(A).

10 211. Plaintiffs request that the IFR be held unlawful, vacated, and set aside
11 with respect to the Updated False Certification Discharge Rule.

12 **EIGHTH CAUSE OF ACTION**

13 **(Interim Final Rule – Violation of APA, 5 U.S.C. §§ 706(2)(C) –**
14 **Agency Action in Excess of Statutory Authority)**

15 212. Plaintiffs repeat and reallege each of the foregoing paragraphs as if
16 fully set forth herein.

17 213. Defendants' determination that they had good cause to dispense with
18 the rulemaking procedures of the HEA and APA in enacting the IFR with respect
19 to the Updated False Certification Discharge Rule was in excess of Defendants'
20 statutory authority in violation of 5 U.S.C. § 706(2)(C).

21 214. Defendants' publication of the IFR with respect to the Updated False
22 Certification Discharge Rule without complying with the rulemaking procedures
23 required by APA, 5 U.S.C. § 553, and the HEA, 20 U.S.C. § 1098a, was in excess
24 of Defendants' statutory authority in violation of 5 U.S.C. § 706(2)(C).

25 215. Plaintiffs request that the IFR be held unlawful, vacated, and set aside
26 with respect to the Updated False Certification Discharge Rule.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment and order for relief as follows:

1. Declaring that Defendants’ denials of Plaintiffs’ false certification discharge applications were arbitrary, capricious, an abuse of discretion, contrary to law, and otherwise not in accordance with the HEA, 20 U.S.C. § 1087(c), in violation of 5 U.S.C. § 706(2);

2. Reversing the Department’s final decisions denying Plaintiffs’ false certification discharge applications pursuant to 5 U.S.C. § 706(2);

3. Compelling the Secretary, pursuant to 5 U.S.C. § 706(1), to:

- a. Cease collection efforts on Plaintiffs’ Direct Loans;
- b. Discharge the liability on Plaintiffs’ Direct Loans; and
- c. Grant Plaintiffs all relief authorized by 20 U.S.C. § 1087(c)(1)

and 34 C.F.R. § 685.215;

4. Declaring that under the HEA, 20 U.S.C. § 1087(c), the Department is obligated to discharge the Direct Loan(s) of a borrower and provide the relief authorized by 20 U.S.C. § 1087(c) and 34 C.F.R. § 685.215 whenever the borrower submits an application attesting to the following:

a. The borrower (or the student on whose behalf a parent borrowed) did not have a high school diploma or its equivalent and did not meet alternative financial aid eligibility requirements provided in the HEA; and

b. The postsecondary institution certified the eligibility of the borrower (or the student on whose behalf the parent borrowed) to receive Direct Loans based on a high school graduation status falsified by the school or a high school diploma falsified by the school or a third party to which the school referred the borrower;

1 5. Declaring unlawful, vacating, and setting aside the First Delay Rule
2 notice and First Delay Rule with respect to the Updated False Certification
3 Discharge Regulation;

4 6. Declaring unlawful, vacating, and setting aside the Interim Final Rule
5 notice and Interim Final Rule with respect to the Updated False Certification
6 Discharge Regulation;

7 7. Ordering Defendants to implement the Updated False Certification
8 Discharge Regulation immediately;

9 8. Ordering Defendants to pay the costs of this action, together with
10 reasonable attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. §
11 2412(d)(1)(A), as determined by the Court; and
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