UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

360 DEGREE EDUCATION, LLC, d/b/a Cortiva Institute; and THE COALITION FOR CAREER SCHOOLS,

Plaintiffs,

v.

DEPARTMENT OF EDUCATION; and SECRETARY MIGUEL A. CARDONA, in his official capacity as Secretary of the Department of Education,

Defendants.

Case No. 4:24-cv-00508-P

Response Brief Opposing Defendants' Motion for Clarification of Preliminary Injunction

INTRODUCTION

The Court's narrow preliminary injunction, prohibiting enforcement and implementation of just the Bare Minimum Rule—not the entire Final Rule—is legally sound and necessary "to ensure uniformity and consistency in enforcement." *Texas v. United States*, 40 F.4th 205, 229 n.18 (5th Cir. 2022). The Court has clearly established authority to stay the Bare Minimum Rule, not just for the parties, *see Career Colleges & Sch. of Texas v. U.S. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024) ("*CCST*"), and *like CCST*, "the Department's arguments that general equitable and constitutional principles require the panel to limit any relief to the named parties do not hold water." *Id*.

The Department makes clear that, if the Court further narrows the preliminary injunction to apply only to Cortiva and members of The Coalition for Career Schools, the United States will open a new front of unnecessary litigation over the scope of relief afforded to the Coalition. *See*

Motion at 7 n.3 (suggesting the Federal Government will improperly seek to limit preliminary relief only to those members who joined the Coalition before this action was filed).

The Department has already acknowledged that schools may not be able to comply with the Bare Minimum Rule until at least January 1, 2025, and that it will need to exercise *ad hoc* discretion for at least the next six months.[1] That alone counsels against the Department's request to narrow the injunction. Surprisingly, the Department now announces—through its motion—new guidance on enforcement and implementation which it had not previously disclosed to regulated parties. That new guidance just confirms that a further narrowed injunction would be "unwieldy." *See Braidwood Mgmt., Inc. v. Becerra*, No. 23-10326, _ F.4th _, 2024 WL 3079340, at *16 (5th Cir. June 21, 2024) (recognizing injunctive relief can be universal when party-specific relief would be "unwieldy").

The Court should deny the Department's motion, filed on the eve of July 1, 2024, causing unnecessary confusion for career schools throughout the United States.[2]

LEGAL STANDARD

Though some courts have said motions to clarify can be considered under a district court's inherent authority, *see, e.g.*, *APL Logistics Americas, Ltd. v. TTE Tech., Inc.*, No. 3:10-CV-02234-P, 2013 WL 12124588, at *2 (N.D. Tex. Mar. 5, 2013), courts should apply Federal Rule of Civil Procedure 59(e) when a party actually seeks reconsideration rather than clarification, *see, e.g.*, *Wi-*

[1] U.S. Dep't of Educ., Federal Student Aid, GEN-24-03, Updates on New Regulatory Provisions Related to Certification Procedures and Ability-to-Benefit (Apr. 9, 2024), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2024-04-09/updates-new-regulatory-provisions-related-certification-procedures-and-ability-benefit ("The Department understands that there may be circumstances outside of an institution's control that prevent compliance with these new requirements by July 1, 2024. However, the Department believes that most of those concerns and challenges will have been resolved or sufficiently mitigated by January 1, 2024.").

[2] Contrary to the Department's assertions, the Plaintiffs clearly requested a judgment "holding unlawful, setting aside, and enjoining the enforcement of the regulatory changes in 34 C.F.R. § 668.14(b)(26)(ii)(A) in the Final Rule in its entirety, or, in the alternative, holding unlawful, setting aside, and enjoining the enforcement of the Final Rule as applied to Cortiva and members of the Coalition." ECF No. 1 (Compl.) Prayer for Relief (b).

Lan, Inc. v. Acer, Inc., No. 2:07-CV-473-TJW-CE, 2010 WL 5559546, at *2 (E.D. Tex. Dec. 30, 2010) ("Though Plaintiff has styled its motion as a 'motion for clarification,' the Court concludes that the motion is actually a motion for reconsideration."). The Court can grant a motion for reconsideration under Rule 59(e) only when there is: (1) "an intervening change in controlling law"; (2) new evidence previously unavailable; or (3) "the need to correct a clear error of law or prevent manifest injustice." *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002).

The scope of injunctions "must be justified based on the circumstances." *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021). Though nationwide injunctions are not required, *see id.*, "[i]t is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction," *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *as revised* (Nov. 25, 2015), especially when "[t]here is a need for consistent application of the law," *Mock v. Garland*, 75 F.4th 563, 588 (5th Cir. 2023); *see also id.* ("[I]n certain circumstances, nationwide relief is appropriate and may be necessary for the benefit of all parties.").

ARGUMENT

I. The Order Already Clearly Enjoins the Department from Enforcing the Bare Minimum Rule, Consistent with Fifth Circuit Precedent

The Court held that "enforcement and implementation of the Bare Minimum Rule, as described herein and contained in the Department of Education's October 31, 2023 Final Regulations, is hereby **ENJOINED** pending resolution of this lawsuit." Order at 15. That order is not "party restricted." *CCST*, 98 F.4th at 255. As the Fifth Circuit recently made clear in another case involving a challenge to a Department of Education regulation, "[n]othing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA needs to be limited to [an associational plaintiff] or its members." *Id*. The *CCST* Court directed the district court to grant that non-party-restricted relief through "a preliminary injunction," not a

§ 705 stay. *Id*. This Court crafted a preliminary injunction that is entirely consistent with *CCST*, while the Department now asks the Court to narrow its injunction to be *inconsistent* with *CCST*.

As *CCST* and the authorities that the Court of Appeals cited there make clear, granting preliminary relief in an APA case that is not party restricted is not the same thing as granting a "nationwide injunction." *See id.* at 255. "'Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA . . . go[es] further by empowering the judiciary to act directly against the challenged agency action.'" *Id.* (quoting Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012–13 (2018)). In other words, in an APA case like this one, the Court is not so much providing preliminary relief in favor of one party and against another as it is temporarily "set[ting] aside" the Bare Minimum Rule itself, *see* 5 U.S.C. § 706(2), which inures to the benefit of whoever may be subject to it, *see CCST*, 98 F.4th at 255.

The Department therefore errs in stating that it "do[es] not understand the preliminary injunction to apply nationwide" nor does it "understand [the Order] to bar the Department from enforcing the 100% limit with respect to schools that are not parties to this case." Motion at 2. Consistent with *CCST* and the plain terms of the order, that is precisely what the Department is enjoined from doing. The Order is clear that it prevents the Department from enforcing the Bare Minimum Rule during the pendency of this litigation, which is sensible given the Court's determination that the Bare Minimum Rule is arbitrary and capricious, *see* Order at 6–7, and that the Department failed to provide notice to the public about how the Bare Minimum Rule would drastically change the current operation of proprietary schools, *see id.* at 8 ("[T]he Court certainly understands why the Schools saw the Bare Minimum Rule as a bait-and-switch when compared with the scantily articulated NPRM.").

The only limitation the Court put on the preliminary injunction was to make clear that it applies only to the Bare Minimum Rule, not the other parts of the October 31, 2023 Final Regulations. *See id.* at 14–15. Specifically, the Court said that it would provide "the most limited possible scope that will afford complete relief" by limiting the injunction "to the [Bare Minimum Rule], which is only one among numerous provisions set forth in the October 31, 2023 Final Regulations" because "[a]nything broader would be unnecessary to provide complete relief and would needlessly hinder the Department's programming." *Id.* (citations and internal quotation marks omitted). That Order was specific—the Department is enjoined from enforcing the Bare Minimum Rule—and it complies with Federal Rule of Civil Procedure 65 because it states both (1) the reasons for issuing the injunction—the Department's arbitrary and capricious actions and its failure to issue a rule that was a logical outgrowth of the NPRM, *see* Order at 6–8; and (2) the terms of the injunction and the acts restrained—the Bare Minimum Rule cannot be enforced but the other parts of the October 31, 2023 Final Regulations can, *see id.* at 14–15.

In reality, the Department is asking the Court to *reconsider* the Order rather than to clarify, but that is improper. *See, e.g.*, *Wi-Lan, Inc.*, 2010 WL 5559546, at *2 ("Though Plaintiff has styled its motion as a 'motion for clarification,' the Court concludes that the motion is actually a motion for reconsideration."). And the Department has failed to meet the demanding standards for a Rule 59(e) motion for reconsideration because (1) there has been no intervening change of law; (2) there is no newly discovered evidence, and (3) the Order correctly applied the law. *See In re Benjamin Moore*, 318 F.3d at 629.

II. Even If the Court Were to Reconsider the Order, Non-Party-Restricted Relief Is Still Warranted

As explained above, the Fifth Circuit's decision in *CCST* makes clear that non-party-restricted relief is appropriate at this preliminary stage. Thus, even if the Court were to reconsider the Order, it should simply reaffirm that the Department is enjoined from implementing and enforcing the Bare Minimum Rule *at all*. The Court can do that based on the rationale set forth in *CCST*—that it is issuing preliminary relief to set aside the Bare Minimum Rule itself pending the litigation—or it could do it under the rubric of a so-called nationwide injunction, which Fifth Circuit precedent also makes clear is within the Court's authority. *See, e.g.*, *Texas*, 809 F.3d at 188 (making clear that federal courts have "power . . . , in appropriate circumstances, to issue a nationwide injunction").

First, enjoining the Department from enforcing the Rule nationwide is appropriate because the Court has held that Plaintiffs are likely to succeed on their claims that the Department acted arbitrarily and capriciously when implementing the Bare Minimum Rule and that the Department failed to give the public fair notice that it would remove accreditors entirely from the process of setting the governing standards for schools' programs. *See* Order at 6–9. This Court further noted that "the Schools are correct that the Department 'never relied on § 1099c-1(e)'s clock-hour authority to justify the Bare Minimum Rule.'" Order at 8. Based on those holdings, the Rule likely will be vacated. If the Department chooses to go forward with making similar changes to the 150% Rule, it will need to (1) provide a reasoned basis for this sea-change to the 30-year old 150% Rule; (2) provide fair notice of the alleged authority the Department relies upon for this sea-change; and (3) allow for comments regarding the Department's ill-advised removal of accreditors from setting program length requirements. Thus, selective implementation of this Rule could have serious long-term effects, as schools that are not parties to this lawsuit will have to change their programs to comply with the Bare Minimum Rule when there is a high likelihood that they will later have to

change those programs back to be in the same place in which they currently stand. There is no reason to require proprietary schools to flip-flop between two different regimes while this lawsuit is pending.

Second, a nationwide injunction complies with the cases relied upon by the Department and other Fifth Circuit precedent. *CCST* establishes the appropriateness of non-party-restricted relief in circumstances like these, but other precedents considering the appropriateness of a "nationwide injunction" point in the same direction.

Texas v. United States, 809 F.3d 134 (5th Cir. 2015), makes clear that a nationwide or "universal" injunction is appropriate where there is a strong interest in "uniform" enforcement of the law and "a geographically-limited injunction would be ineffective." *Id.* at 187–88. Similarly, in *Feds for Medical Freedom v. Biden*, 63 F.4th 366 (5th Cir. 2023), the Court of Appeals held that a universal injunction was warranted where the Federal Government on the merits had asserted an interest in consistent enforcement of its policy. The Court also emphasized that members of the plaintiff association were "spread across every State in the Nation," and the district court "fear[ed] that limiting the relief to only those before it would prove unwieldy and would only cause more confusion." *Id.* at 388. While the Supreme Court later vacated that decision based on mootness, *see Biden v. Feds for Med. Freedom*, 144 S. Ct. 480 (2023) (citing *United States v. Munsingwear*, 340 U.S. 26 (1950)), the Fifth Circuit has continued to cite it for the proposition that universal relief is appropriate where uniformity is important, *see Braidwood*, 2024 WL 3079340, at *16 n.122.

Universal relief against the Bare Minimum Rule is warranted under these precedents. The Coalition for Career Schools comprises schools around the country. Just taking Plaintiff Cortiva and Coalition member Bellus Academy (both of which submitted declarations in support of the

motion for preliminary relief), they operate schools not only in Texas but also in California, Florida, and Kansas. And there is a strong interest for uniformity in application of the pre-existing 150% Rule pending litigation across schools and even among different schools in the same state.

Third, the circumstances justify a narrow injunction of the Bare Minimum Rule that is not party-limited because schools currently still do not know *whether* or *how* the Department will enforce the Bare Minimum Rule. The Department continues to act arbitrarily and capriciously by not clarifying when the Bare Minimum Rule will actually be enforced while trying to keep that door open throughout this litigation. Previously, because proprietary schools faced serious compliance issues outside their control, including with their accreditors, the Department stated that it would "consider exercising [its] discretion" before taking any action regarding the Bare Minimum Rule before January 1, 2025.[3] Now, the Department appears to still be changing the manner in which it will enforce the Bare Minimum Rule, saying "during the first six months the revised provision is in effect, the Department will also seriously consider a school's defense to any enforcement action." Motion at 7. In other words, instead of proactively choosing not to enforce the Rule, the Department now says—three days before the Bare Minimum Rule goes into effect—that the onus is on schools to demonstrate that some circumstance prevented compliance with the Rule.

The Department also states—for the first time—exactly when it will enforce the Rule against different entities. Specifically, the Department says it "will not be involved in monitoring a school's compliance with the 100% limit until one of three circumstances takes place: (1) the school reports a new program length to the Department through Partner Connect; (2) the

[3] U.S. Dep't of Educ., Federal Student Aid, GEN-24-03, Updates on New Regulatory Provisions Related to Certification Procedures and Ability-to-Benefit (Apr. 9, 2024), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2024-04-09/updates-new-regulatory-provisions-related-certification-procedures-and-ability-benefit.

Department conducts a program review pursuant to 20 U.S.C. 1099c-1; or (3) the Department reviews a school's application for initial or renewed certification pursuant to 34 C.F.R. § 668.13." Motion at 6. None of these circumstances are included in the April 9, April 15, or May 16 guidance documents regarding the Bare Minimum Rule or even in the preamble to the final rule, promulgating the Bare Minimum Rule.

The Department then lays out the methods in which it will deem schools in or out of compliance in each of these circumstances, by differentiating between schools in this litigation after obtaining their names from Plaintiffs' counsel and then by implementing the Bare Minimum Rule against schools at different times and by different methods. *See* Motion at 6–8. For example, the Department says, "where application of the 100% limit would cause a program to drop below the 600-hour minimum for Pell Grant participation, the school is required to report the shortened program length to the Department as a new program through Partner Connect" and "[w]here application of the 100% limit would cause a program to drop below the 300-hour minimum for Title IV loan participation, the school is required to report that the program is no longer eligible to participate in Title IV student aid programs." *Id.* at 6–7. Surprisingly, the only citation to the basis for these bright-line rules is to a *declaration in this litigation*. The Department does not point to any of its three public-facing guidance documents as a source for these requirements, nor does it appear the Department has ensured that all proprietary schools subject to the Bare Minimum Rule could know how or when the Department will enforce this Rule outside of paying close attention to this lawsuit.

This continued lack of clarity makes a narrow preliminary injunction that is not limited to the parties necessary. The Department still has not set a clear timeline about when the Bare

Minimum Rule will actually be enforced, and it appears to be at least a matter of months before the Department would fully implement the Rule.

Fourth, enjoining the Department from enforcing the Bare Minimum Rule does not implicate the Court's concern with limiting the relief to that which is necessary to redress Plaintiff's injury. *See* Order at 14–15. The Court was clear that it limited the injunction to the Bare Minimum Rule so that the Court did not enjoin any other part of the October 31, 2023 Final Regulations in order to not "needlessly hinder the Department's programming." *Id.* at 15. Any issue the Department has related to implementing a part of a Rule is of its own doing, as it is the one that chose to issue one two-hundred-and-twelve-page NPRM covering six major topics that resulted in two final rule packages instead of separating those six areas into different rulemakings. *See* ECF No. 1 ¶ 63.

Finally, the Department's proposal is unworkable. *Cf. Braidwood Mgmt.*, 2024 WL 3079340, at *16 (recognizing nationwide injunctions may be appropriate if the circumstances otherwise would be "unwieldy"). The Coalition for Career Schools currently contains over 200 members, a number that continues to grow. If the Department is allowed to proceed against "non-parties," it has also signaled that it will attempt to enforce the Bare Minimum Rule against Coalition members who joined the Coalition after the filing of the complaint in this case.[4] Aside from being meritless, that dispute introduces a completely unnecessary prospect of side litigation that will draw on this Court's limited resources and delay the ultimately resolution of the matter which is not in the interest of *any* party.[5] That prospect also makes the Department's narrowing

[4] For example, the Department apparently takes the position that only schools that were members of the Coalition "as of the filing of this case" will be entitled to relief, though it provides no support for that proposition. Motion at 7 n.3. Plaintiffs disagree and, if required to do so, will contend that every member is entitled to relief.

[5] Plaintiff The Coalition for Career Schools has standing under well-established principles to seek non-party-restricted preliminary relief that does not require it to disclose all of its member schools to the United States. Associations have a clearly established First Amendment right against compelled disclosure of membership lists. *See Americans for*

request unworkable—further favoring preliminarily relief that enjoins implementation or enforcement of the Bare Minimum Rule nationwide during the pendency of this litigation.[6]

III. Alternatively, the Court Should Stay the Bare Minimum Rule Under Section 705.

Non-party-restricted preliminary injunctive relief is justified under the circumstance, but the Court could choose, in the alternative, to issue a partial stay of the Final Rule, limited to the Bare Minimum Rule, under 5 U.S.C. § 705. *CCST* makes clear that both § 705 and § 706 authorize preliminary relief that is not party restricted, whether framed as a stay or as a preliminary injunction. *See* 98 F.4th at 255–56. And the Court of Appeals also made clear, at the Federal Government's request, that a § 705 stay need not apply to portions of a rule that "[we]re unchallenged or for which [the plaintiff] has not shown a likelihood of success on the merits." *Id.* at 256. The Court can similarly grant relief that is limited to the Bare Minimum Rule but not party restricted here through a § 705 stay.

Or, if the Court prefers to make clear it is severing the Bare Minimum Rule from the remainder of the rule and staying that provision only, it can do that as well. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) (allowing severance and invalidation of a subsection of a rule); *see also Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (vacating only challenged portions of a rule).

Prosperity Found. v. Bonta, 594 U.S. 595, 606 (2021) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." (alteration in original) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958))). Moreover, the Department has already shown through its treatment of Cortiva that it will subject schools participating in this lawsuit to additional scrutiny, not just for purposes of the Bare Minimum Rule, but across the board.

[6] The Department also continues to make veiled threats against Cortiva and the members of the Coalition for Career Schools, stating that they "may continue to disburse student aid according to their currently-approved program length, ***subject to all other applicable Title IV requirements***." Motion at 7. If the Department were to conduct program reviews or any other retaliatory action against Plaintiffs or their member schools for bringing this federal lawsuit, that retaliation would violate the First Amendment. *See generally NRA v. Vullo*, 144 S. Ct. 1316 (2024) (holding that NRA stated viable First Amendment claim based on allegations that the New York State Department of Financial Services retaliated against the NRA by contacting third-party insurance companies and pressuring them to go after the organization).

* * *

The Court should deny the Motion because the Order is clear that the Department cannot enforce the Bare Minimum Rule throughout this lawsuit. To remove the shadow of doubt that the Department's Motion has cast upon this Court's Order, the Court should deny the Department's Motion and restate that its Order applies nationwide during the pendency of this lawsuit or alternatively that this Court is implementing a stay of the Bare Minimum Rule only under 5 U.S.C. § 705.

Dated: July 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been served upon all counsel of record, via email, on July 1, 2024, as follows:

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