

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Grand Canyon University,
Plaintiff,
v.
Miguel Cardona, et al.,
Defendants.

No. CV-21-00177-PHX-SRB
ORDER

The Court now considers the Motion for Summary Judgment (“Motion”) of Plaintiff Grand Canyon University (“GCU”) and the Cross-Motion for Summary Judgment (“Cross-Motion”) of Defendants Miguel Cardona (“the Secretary”) and the United States Department of Education (“DOE”) (collectively, “Defendants”). (Doc. 59, (“MSJ”); Doc. 74, Cross-MSJ (“X-MSJ”).) For the following reasons, the Court grants Defendants’ Cross-Motion and denies GCU’s Motion.

I. BACKGROUND

The Higher Education Act of 1965 (“HEA”) divides institutions of higher education into three categories: “public or other nonprofit institution[s]” as defined in § 1001 of the HEA; “proprietary institution[s]” defined in § 1002(b); and “postsecondary vocational institution[s]” defined in § 1002(c).¹ 20 U.S.C. §§ 1001(a)(4), 1002(b), 1002(c); *see Grand Canyon Univ. v. Cardona*, No. CV-21-00566-PHX-DLR, 2021 WL 5396090, at *1 (D.

¹ Congress reauthorized the HEA in 1992, at which point Congress adopted amendments to the HEA that “focused on proprietary schools.” (Doc. 84, MSJ Reply at 5.) GCU represents that the DOE “informed Congress, at that time, that it intended to treat proprietary and nonprofit institutions differently.” (*Id.*)

1 Ariz. Nov. 18, 2021). Through Title IV of the HEA, 20 U.S.C. § 1001 et seq., (“Title IV”),
 2 “Congress provides billions of dollars through loan and grant programs to help students
 3 pay tuition for their postsecondary education.” *Ass’n of Priv. Sector Colls. & Univs. v.*
 4 *Duncan*, 681 F.3d 427, 433 (D.C. Cir. 2012). This case arises from GCU’s attempt to
 5 convert to a nonprofit institution under Title IV and Defendants’ allegedly unlawful denial
 6 of this conversion. (*See generally* Doc. 75, X-MSJ Statement of Facts (“X-MSJ SOF”).)

7 GCU is a private, Christian university that has operated in Phoenix, Arizona since
 8 1951. (Doc. 60, Plaintiff’s Statement of Facts in Supp’t of MSJ (“MSJ SOF”) ¶ 1.) GCU
 9 functioned continuously as a nonprofit institution but began experiencing financial
 10 difficulties in the early 2000s. (*Id.* ¶¶ 2–3.) In 2004, GCU’s Board of Trustees (“Board”)
 11 sold GCU to the publicly traded company Grand Canyon Education (“GCE”), and GCU
 12 began participating in Title IV as a proprietary institution. (*See id.* ¶ 3; X-MSJ SOF ¶ 25.)
 13 In 2014, after GCU regained financial stability, the Board sought to convert GCU back to
 14 its nonprofit status. (MSJ SOF ¶¶ 4–5.)

15 The Board then began a protracted process to convert GCU to nonprofit status. A
 16 converting institution needs to meet three requirements to be recognized as a nonprofit
 17 under Title IV: (1) recognition as a 26 U.S.C. § 501(c)(3) tax-exempt organization; (2)
 18 recognition as a nonprofit from a state accreditor; and (3) recognition that it is operated by
 19 a nonprofit and none of its earnings benefit any private organization or individual. *See* 34
 20 C.F.R. § 600.2. To meet these criteria, the Board created Gazelle University, a new entity,
 21 which contracted to purchase “the real property comprising the GCU campus as well as
 22 tangible and intangible academic-related assets (including the GCU name)” from GCE for
 23 approximately \$853 million. (MSJ SOF ¶ 6; X-MSJ SOF ¶ 26; Doc. 1, Compl. ¶ 39.) GCE
 24 agreed to lend Gazelle the money necessary to purchase GCU. (*See* Doc. 59-2, 2019
 25 Decision at 2.) The Board and GCE also negotiated a Master Services Agreement (“MSA”)
 26 whereby GCE would provide “technological, marketing, promotional, financial aid, and
 27 other support services” to GCU once it had been sold to Gazelle. (*See* MSJ SOF ¶¶ 10–11,
 28 15; Doc. 59-6, MSA at 2; Doc. 59-37, Req. for Preacquisition Review at 1–2.) GCE would

1 perform these services in exchange for a fixed 60% share of GCU's adjusted gross revenue.
2 (X-MSJ SOF ¶ 27.) The MSA ran for an initial 15-year term and then provided for
3 automatic five-year renewals. (*Id.* ¶ 38.) GCU could not terminate the MSA for at least
4 seven years after its effective date, and if GCU chose to terminate the MSA after its initial
5 term, the MSA obligated GCU to pay GCE a "non-renewal fee" equal to 50 percent of the
6 previous year's services fee. (*See* AR-B-1295, AR-B-1322.)

7 GCE and Gazelle believed that outsourcing services to GCE under the MSA would
8 not draw scrutiny under Title IV, as DOE regulation allows educational institutions to
9 contract out "the administration of any aspect of the institution's participation in any Title
10 IV, HEA program." (*See* MSJ at 22 (citing 34 C.F.R. § 668.25).) GCU represents, and
11 Defendants do not dispute, that many nonprofit institutions maintain service agreements
12 and revenue sharing agreements with for-profit companies. (MSJ at 21; *see* Doc. 75, X-
13 MSJ Resp. to MSJ SOF ("X-MSJ RSOF") ¶¶ 12, 15.) Gazelle and the Board consulted
14 other service agreements and revenue sharing contracts used by nonprofit institutions and
15 for-profit service providers in drafting the MSA. (*See* MSJ at 20–21; MSJ SOF ¶¶ 77–78.)
16 These service agreements included one in which Purdue University, a public institution
17 based in Indiana, created a new entity, Purdue University Global ("Purdue Global"), to buy
18 the "credential-issuing side" of Kaplan University ("Kaplan"), a for-profit institution
19 ("Purdue-Kaplan transaction"). (Compl. ¶¶ 200, 203.) From GCU's account, Purdue
20 Global and Kaplan executed a service agreement under which Kaplan continued to
21 administer, *inter alia*, Purdue Global's marketing, financial aid, technology support,
22 facilities management, and accounting. (*Id.* ¶ 204.) As compensation for these services,
23 Purdue Global contracted to pay Kaplan for the costs of the "support services" plus 12.5
24 percent of Purdue Global's "consolidated revenues." (*Id.* ¶ 205.) In contrast to GCU's 15-
25 year MSA term, Purdue Global and Kaplan contracted to a 30-year term with automatic
26 five-year renewals, and Purdue Global's termination fee is 125 percent of the revenue
27 earned over the year prior to termination. (*Id.* ¶¶ 207–09, 211.) Purdue Global participates
28

1 in Title IV as a public institution.² (Doc. 21, Ans. ¶ 315; X-MSJ SOF ¶ 36.)

2 The Board and GCE’s Board of Directors, which are “fully independent” from each
 3 other, agreed that Brian Mueller, CEO of GCE, would be President of GCU after its sale.
 4 (MSJ SOF ¶¶ 75–76.) But the Board instituted several checks for Gazelle and GCU to
 5 retain independence from GCE. (*Id.* ¶ 76.) Per GCU’s bylaws and the terms of the MSA,
 6 Mr. Mueller could not have any control over GCU’s relationship with GCE. (*Id.*) The MSA
 7 further obligates GCE to “comply with all policies and standards of GCU,” but imposes no
 8 reciprocal obligation on GCU. (MSJ at 25.) Under the MSA, GCU oversees the services
 9 executed by GCE and has the “unilateral ability to audit GCE at any time to ensure
 10 compliance with GCU’s requirements.” (*Id.* at 26 (citing AR-B-1292–94, 1324–38).) GCU
 11 also created an independent “MSA Committee” to “oversee” the relationship between
 12 service recipient and provider. (*Id.*)

13 **A. Initial Conversion Review**

14 On October 8, 2015, the Board applied to the Internal Revenue Service (“IRS”) for
 15 Gazelle to be recognized as a § 501(c)(3) tax-exempt institution. (MSJ SOF ¶ 16.) In its
 16 application, the Board explained that Gazelle was “organized to . . . acquire, and thereafter
 17 own and operate [GCU].” (*Id.* ¶ 17.) The Board also provided the IRS “a substantially
 18 completed copy” of the MSA and “detailed the material terms of the MSA.” (*Id.* ¶ 19.) The
 19 application to the IRS included the precise services GCE contracted to perform under the
 20 MSA, for which GCU would pay GCE fees “contemplated to be 55% of the University’s
 21 Adjusted Gross Revenue.” (*Id.* ¶¶ 20–21.) Additionally, the application disclosed that Mr.
 22 Mueller would serve as both President of the GCU and CEO of GCE following the sale.
 23 (*Id.* ¶ 22.) On November 20, 2015, the IRS approved the University’s § 501(c)(3) tax-
 24 exempt status, concluding that GCU’s gross income did not “inure to the benefit of a private
 25 shareholder or individual.” (*Id.* ¶ 23; Doc. 59-31, IRS Decision); *see* 26 U.S.C. § 501(c)(3).
 26 The IRS affirmed its 2015 decision on August 31, 2018, though Defendants assert that the
 27 2018 affirmation did not involve any substantive analysis of GCU’s circumstances at that

28 ² Because Purdue University is a public institution, its Title IV student loans are backed by
 the state of Indiana. (X-MSJ SOF ¶ 36 (citing AR-J-0006).)

1 time. (MSJ SOF ¶ 24; X-MSJ RSOF ¶ 89; *see* AR-F-0612.)

2 After receiving tax-exempt status, GCU's Board next sought approval for the sale
 3 from its accrediting agency, the Higher Learning Commission ("HLC"). (MSJ SOF ¶ 26.)
 4 The HLC initially denied the Board's request, as the HLC had not developed guidelines to
 5 review the kind of MSA at issue. (*Id.* ¶ 27.) In 2017, once the HLC had developed
 6 appropriate guidelines, the Board reapplied for accreditation and informed the HLC about
 7 GCU's conflict of interest policy, the checks on Mr. Mueller's power over GCU, and how
 8 the relationship between GCU and GCE had been structured to "ensure GCE had no ability
 9 to exercise authority over GCU and was subject to GCU's policies and control."³ (*Id.*
 10 ¶¶ 27–28.) After reviewing the application and visiting GCU's campus, HLC staff issued
 11 a report approving GCU's change in control. (*Id.* ¶¶ 29–30.) The HLC specifically found
 12 that Mr. Mueller was excluded from any input regarding the relationship between GCE and
 13 GCU, the MSA was not subject to conflicts of interest with GCE, and the sale would not
 14 impose an excessive financial burden on Gazelle. (*Id.* ¶¶ 30–33.) On March 5, 2018, the
 15 HLC voted to approve GCU's change of control.⁴ (*Id.* ¶ 34.)

16 **B. Preacquisition Review & Sale of GCU**

17 After obtaining § 501(c)(3) tax-exempt status and while the Board's application to
 18 the HLC was still pending, the Board set out to secure Title IV nonprofit status for GCU.
 19 (*Id.* ¶ 35.) When an institution that has been participating in Title IV programs undergoes
 20 "a change in ownership that results in a change in control," it automatically ceases to
 21 qualify as an eligible institution and must reapply to the Secretary to participate in Title IV
 22 programs. *See* 34 C.F.R. § 668.14(g)(1). Once an institution lodges an application for
 23 change in ownership, the institution can participate in Title IV programs on a provisional
 24 basis while its application is being evaluated. § 600.20(g)(1). If the institution applies to
 25 participate in Title IV as a nonprofit institution, "it must demonstrate that its new ownership

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 27 ³ At the time of the IRS and HLC review, Mr. Mueller also sat on Gazelle's Board. (MSJ
 at 26.) However, before the sale of GCU was complete, Mr. Mueller resigned from the
 Board. (*See id.*; AR-J-0076.)

28 ⁴ In April 2018, state regulator Arizona Board of Private Postsecondary Education also
 approved the sale. (MSJ SOF ¶ 52.)

1 structure satisfies the definition of a ‘nonprofit institution’ under the HEA and its
 2 implementing regulations.” (X-MSJ SOF ¶ 17; X-MSJ at 5–6 (citing § 600.20(b)(2)(i)));
 3 § 600.20(b) (“[A]n . . . institution that participates in the Title IV, HEA programs must
 4 apply to the Secretary for a determination that the institution continues to meet the [three
 5 applicable] requirements . . . if the institution chooses to . . . reestablish eligibility and
 6 certification as a private nonprofit.”). Defendants interpret these regulations to mean that
 7 the Secretary has “broad authority” to regulate programs administered by the DOE, which
 8 includes Title IV. (*See* X-MSJ SOF ¶ 4 (citing 20 U.S.C. § 1221e-3)); 34 C.F.R.
 9 § 600.20(b)(2)(B). The DOE asserts that it has more aggressively scrutinized such
 10 applications to convert to nonprofit status since 2016, and the DOE rejected an application
 11 for nonprofit conversion before GCU’s sale.⁵ (X-MSJ SOF ¶¶ 19–20; Doc. 85, GCU Resp.
 12 to X-MSJ SOF ¶ 20.)

13 The DOE reviews an application for Title IV participation after an institution has
 14 already undergone a change in control, but an institution anticipating a change in control
 15 may also request a “preacquisition review” from the DOE. (MSJ SOF ¶ 37.) This
 16 discretionary review allows an institution to receive feedback on how its prospective
 17 change in ownership will affect its Title IV participation. (*Id.* ¶¶ 37, 40.) On January 18,
 18 2018, GCU submitted a request for preacquisition review, hoping “for guidance as to any
 19 regulatory limitations that the Department might impose on GCU following the closing of
 20 the Transaction.” (*Id.* ¶ 43.) GCU contends that this request included “substantially the
 21 same information provided to the IRS and HLC, including the proposed MSA, asset
 22 purchase agreement, credit agreement, and proposed corporate structure.” (*Id.* ¶ 45.) GCU
 23 filed its request for preacquisition review almost six months before the sale was due to
 24 close.⁶ (*Id.* ¶¶ 47–48.) While GCU relied on prior successful nonprofit conversions to craft

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 26 ⁵ The Board acknowledged this recent denial, stating to the DOE that “[GCU]
 understand[s] the [DOE] makes an independent decision regarding an institution’s status
 as a nonprofit institution for Title IV purposes.” (X-MSJ SOF ¶¶ 21–23.)

27 ⁶ GCU suggests that this closing date was set after its March 2018 HLC approval, as the
 28 “HLC typically requires transactions to close within 30 days of its grant of approval, but
 [the] HLC agreed to extend the time for closing until the end of June 2018.” (MSJ SOF
 ¶ 53.)

1 the material terms of the sale, GCU still hoped for the DOE’s particularized input and
 2 provided the DOE with any updated information necessary for its review. (*Id.* ¶¶ 48–51,
 3 54, 77–78.) The DOE had no published guidance regarding how a for-profit university
 4 could successfully convert to a nonprofit institution under Title IV. (*Id.* ¶ 80.) By late June
 5 2018, GCU had not received any feedback from the DOE about how it would receive the
 6 sale, but Gazelle and GCE still decided to close the sale on July 1, 2018. (*See id.* ¶ 54.)
 7 Gazelle paid a purchase price of approximately \$870 million by senior secured note to
 8 GCE.⁷ (*Id.* ¶¶ 54, 58.)

9 GCU timely sent the DOE the “principal transaction documents” so that the DOE
 10 could conduct its mandatory review of GCU’s change in control. (*See id.* ¶¶ 60–61; X-MSJ
 11 SOF ¶ 31.) These documents were (1) an Asset Purchase Agreement, identifying the
 12 particular assets GCU purchased from GCE; (2) the Credit Agreement outlining the terms
 13 of the senior secured note; and (3) the MSA detailing the specific services GCE would
 14 perform for GCU after the sale, subject to an initial 15-year term and automatic five-year
 15 renewals. (MSJ SOF ¶ 58.) In addition to the principal transaction documents, GCU also
 16 shared valuation reports of GCU’s assets completed by financial experts at Deloitte and
 17 Barclays. (*See id.* ¶ 70.)

18 The DOE reviewed GCU’s application for nonprofit conversion under its regulatory
 19 definition of a nonprofit institution. Specifically, the DOE evaluated whether, after the sale,
 20 GCU was:

- 21 (i) owned and operated by a nonprofit corporation, with no shareholder
 or individual benefitting from the net earnings of the corporation;
- 22 (ii) legally authorized to operate as a nonprofit organization in the state
 in which it is physically located; and
- 23 (iii) determined by the [IRS] to be an organization to which contributions
 are tax-deductible in accordance with section 501(c)(3) of the Internal
 24 Revenue Code.

25 34 C.F.R. § 600.2. The DOE’s regulation is derived from the HEA definition of a nonprofit,
 26 which is an institution “owned and operated by one or more nonprofit corporations or

27 ⁷ After Gazelle purchased GCU from GCE, Gazelle changed its name to Grand Canyon
 28 University. (Doc. 59-3, 2021 Decision at 1 n.1; AR-B-1421.) This Order refers to Gazelle
 and GCU as one and the same post-sale, as the entities are now indistinguishable for present
 purposes.

1 associations, no part of the net earnings of which inures, or may lawfully inure, to the
 2 benefit of any private shareholder or individual.” (*See* X-MSJ SOF ¶ 7 (citing 20 U.S.C. §
 3 1003(13)).) When evaluating GCU’s application, the DOE considered the principal
 4 transaction documents; a chart of other service agreements which GCU provided to the
 5 DOE; valuation reports which GCU offered to support the conversion; and “relevant
 6 authority interpreting a similar standard from the Internal Revenue Code.” (*Id.* ¶¶ 34–36.)
 7 During the review period, the DOE requested that GCU “identify any service providers . .
 8 . that are affiliates, owners, or former owners of the institution (including related persons
 9 and entities), and indicate whether any of the servicing agreements were entered into in
 10 conjunction with a change in ownership transaction [resulting in nonprofit conversion].”
 11 (*Id.* ¶ 35 (citing AR-J-0156–57).) GCU did not identify any such service agreements for
 12 the DOE, instead contending that “GCU believes that comparisons to the Kaplan
 13 transaction or any other example are not relevant . . . [r]ather, it believes that the
 14 Transaction stands on its own.” (*Id.* (citing AR-J-0086).) Though the HEA and § 600.2
 15 guide the DOE’s nonprofit analysis, Defendants emphasize that the contours of change-in-
 16 control review may vary depending on the nature of the transaction at issue, leading to a
 17 “case-by-case” determination. (X-MSJ RSOF ¶ 138.)

18 **C. 2019 DOE Decision**

19 On November 6, 2019, the DOE issued a decision refusing to recognize GCU as a
 20 nonprofit institution under Title IV (“2019 Decision”). (MSJ SOF ¶ 83.) The DOE found
 21 that GCU met the second and third prongs of § 600.2 but concluded that GCU did not meet
 22 the first prong (“Subsection i”) of the nonprofit definition. (*Id.* ¶ 85; 2019 Decision at 10.)
 23 In short, the DOE found some part of GCU’s net earnings benefit a private party—GCE—
 24 in violation of Subsection i. (2019 Decision at 10–17.) Three factors determined the
 25 outcome of the DOE’s analysis: (1) the terms of the MSA made GCU operate for the benefit
 26 of GCE; (2) Mr. Mueller’s dual roles as President of GCU and CEO of GCE indicate that
 27 he may not have “undivided loyalty” to GCU; (3) and GCU was not actually operating the
 28 university, given the number of institution-specific functions performed by GCE under the

1 MSA. (MSJ SOF ¶¶ 92–94.) In the 2019 Decision, the DOE also forbade GCU from
 2 holding itself out to the public as a nonprofit under Title IV.⁸ (*See* MSJ at 30.)
 3 Notwithstanding the 2019 Decision, GCU could still participate in Title IV programs as a
 4 proprietary institution, as the DOE otherwise approved its change in control.⁹ (X-MSJ
 5 RSOF ¶ 8.)

6 The DOE also explained how it considered the two valuation reports submitted with
 7 GCU’s application and why it discredited certain conclusions therein. (X-MSJ SOF ¶ 39.)
 8 Skeptical of the accuracy of the reports, the DOE noted that “opinions in key areas appear
 9 to have been based on information supplied by GCE management” and reasoned that
 10 Deloitte’s report was “incomplete,” rooted in “fundamentally flawed assumptions,” and
 11 based on an outdated draft of the MSA. (*Id.* (citing 2019 Decision at 9); 2019 Decision at
 12 7–8.) And from the DOE’s observation, the Barclay’s Report revealed that the cost to
 13 operate GCU would increase by \$697 million purely as a result of the commitments in the
 14 MSA. (2019 Decision at 4–6.) “The increase is not because GCE will be providing new or
 15 additional services,” the DOE wrote, “but solely because the MSA requires [GCU] to pay
 16 GCE the Services Fee.” (*Id.* at 5.) The DOE also noted that GCE pocketed 60% of GCU’s
 17 revenue despite performing only 28% of the services necessary for GCU to operate. Per
 18 the DOE’s calculations, “[w]hen payments on the Senior Secured Note are included in the
 19 analysis, GCE will be receiving approximately 95% of Gazelle’s revenue.” (Doc. 91, X-
 20 MSJ Reply at 7 (citing 2019 Decision at 14); 2019 Decision at 6 n.11.)

21 In the remainder of the 2019 Decision, the DOE distinguished its review under
 22

23 ⁸ Between completing the sale and receiving the 2019 Decision, Mr. Mueller made public
 24 representations about GCU’s Title IV status. For example, on December 20, 2018, Mr.
 25 Mueller stated in an interview: “[T]he University being not-for-profit is a tremendous
 26 advantage. That stigma is now gone. We can recruit in high schools that would not let us
 27 in the past . . . We’re just 90 days into this, but we’re experiencing, we believe, a tailwind
 already just because of how many students didn’t pick up the phone [before] because we
 were for-profit.” (X-MSJ SOF ¶ 32.) On February 20, 2019, Mr. Mueller shared in an
 earnings call that “new student online growth [following GCU’s conversion] was more
 than we expected and I think it’s evidence that being out there now a million times a day
 saying we’re non-profit has had an impact.” (*Id.* ¶ 33.)

28 ⁹ Proprietary institutions may still participate in some programs under Title IV, but they
 are not eligible for certain programs authorized by the HEA. (X-MSJ SOF ¶ 6; X-MSJ at
 3.)

1 § 600.2 from the IRS’s decision to grant GCU § 501(c)(3) status. First, the DOE asserted
 2 that material terms of the transaction had changed in the time between the 2015 IRS
 3 approval and the 2018 sale of GCU. (X-MSJ SOF ¶ 44.) The DOE disputed that it reviewed
 4 the same information in the 2019 Decision that the IRS reviewed when it granted GCU
 5 § 501(c)(3) tax-exempt status. (X-MSJ RSOF ¶¶ 23, 45, 90.) Second, the DOE reasoned
 6 that its review was more thorough, in that “[u]nlike the IRS’s initial grant of tax-exempt
 7 status, the Department’s determination of nonprofit status considers the structure and
 8 planned operations of the institution when its owner(s) apply for that change of status.” (X-
 9 MSJ SOF ¶ 45 (quoting AR-J-0077 n.3).) The DOE also raised that the IRS issued its
 10 § 501(c)(3) approval only 22 business days after Gazelle applied, whereas the DOE took
 11 more than a year to process GCU’s application under Title IV. (X-MSJ at 19–20 (citing
 12 2019 Decision at 15).) Relatedly, the IRS completes its analysis “based solely upon the
 13 facts, attestations, and representations” made by the entity seeking § 501(c)(3) status,
 14 whereas the DOE may conduct a “more in-depth” review. (*Id.* at 20.)

15 **D. 2021 DOE Decision**

16 GCU met with DOE officials on December 16, 2019 to discuss the nonprofit denial.
 17 (MSJ SOF ¶ 99.) At this meeting, the DOE affirmed that the issues raised in the 2019
 18 Decision were the dispositive factors in the DOE’s nonprofit denial. (*Id.* ¶ 100; *see* AR-B-
 19 2325.) In response to this meeting, GCU amended the MSA in an attempt to make the terms
 20 more favorable to GCU. (MSJ SOF ¶¶ 101–02, 104–06.) Specifically, the amended MSA
 21 (“AMSA”) capped the fee for GCE’s services at whichever was lower: 59% of GCU’s total
 22 revenue or 66.8% of only GCU’s tuition and fees. (*Id.* ¶ 104.) The AMSA also provided
 23 GCU more flexibility to terminate its relationship with GCE. (*Id.* ¶ 105.) Additionally,
 24 GCU took over certain responsibilities previously delegated to GCE, namely coordinating
 25 Curriculum Services and Faculty Operations. (2021 Decision at 17 n.23.) On January 8,
 26 2020, GCU sent the AMSA to the DOE for consideration but explained that adoption of
 27 the AMSA was contingent on an updated transfer pricing study from Deloitte and the
 28 DOE’s approval of GCU’s nonprofit status. (MSJ SOF ¶ 107.) Later that month, the DOE

1 asked GCU to provide the updated transfer pricing study and requested GCU retain an
 2 independent expert to review the transfer pricing study to “ensure the [A]MSA was fair to
 3 GCU.” (*Id.* ¶ 108.)

4 GCU set to work facilitating the DOE’s review of the AMSA. GCU retained
 5 Deloitte to perform a transfer pricing study of the AMSA and retained BKD, LLP (“BKD”) to review Deloitte’s new study for fairness. (*Id.* ¶ 109.) BKD also performed valuations of
 6 GCU’s investments as of July 1, 2018 and January 7, 2020. (*Id.* ¶ 110.) After reviewing
 7 Deloitte’s transfer pricing study, BKD concluded that Gazelle paid below fair market value
 8 to purchase GCU from GCE. (*Id.* ¶¶ 114, 117.)

9
 10 On January 12, 2021, the DOE once again denied GCU’s application for nonprofit
 11 status, this time reviewing the AMSA and updated studies (“2021 Decision”). (X-MSJ SOF
 12 ¶ 49.) Though the DOE acknowledged the AMSA had altered certain problematic terms in
 13 the original MSA, it found the AMSA kept in place “the basic structure whereby a
 14 substantial portion of GCU’s revenues benefits GCE.”¹⁰ (*Id.* ¶ 50 (citing 2021 Decision at
 15 17).) The 2021 Decision explained that while the DOE considered Deloitte and BKD’s
 16 valuations of GCU’s assets, these valuations were not truly independent. (*See id.* ¶¶ 51–
 17 52; X-MSJ RSOF ¶¶ 13–14, 70.) The DOE also outlined how Deloitte and BKD found the
 18 AMSA was not comparable to any other service agreement in operation yet failed to
 19 consider the appropriate factors about this unique revenue-share agreement.¹¹ (2021
 20 Decision at 10–12.) Further, the Barclays report commissioned by GCE indicated that “the
 21 costs to operate GCU following the change in ownership (with GCE providing services)
 22 would increase from \$810 million to \$1.496 billion for fiscal year 2019, solely as a result

23
 24 ¹⁰ The DOE also considered the HLC’s accreditation of GCU as a nonprofit institution, but
 found the HLC’s review “neither binding nor persuasive.” (X-MSJ SOF ¶ 46 (citing 2021
 Decision at 17).)

25 ¹¹ The DOE took issue with the use of the transfer pricing method in the analyses provided
 26 by GCU. (X-MSJ SOF ¶ 52.) According to the DOE, transfer pricing analysis “allow[s] for
 27 the establishment for the goods and services exchanged between a subsidiary, an affiliate,
 or commonly controlled companies that are part of the same larger enterprise [which] can
 28 lead to tax savings for corporations.” (*Id.* (citing 2021 Decision at 7).) The DOE
 consequently did not condone transfer pricing analysis to evaluate “whether the service
 agreement is consistent with the behavior of what should be two financially independent
 entities.” (*Id.*)

1 of fees paid to GCE,” which suggested the sale was not in the university’s financial interest.
 2 (X-MSJ RSOF ¶ 118 (citing AR-C-0041); 2021 Decision at 4 (noting that the AMSA did
 3 not substantially change the MSA revenue split).) The DOE explained that the AMSA
 4 ensured a “continuing revenue stream to [GCU’s] former owner GCE, the primary purpose
 5 of which is to drive shareholder value for GCE.” (X-MSJ SOF ¶ 51 (quoting 2021 Decision
 6 at 6).) The 2021 Decision recognized that GCU had taken more responsibility from GCE
 7 over the operations of the university, but the Decision also raised that GCE would receive
 8 almost the same revenue share under the AMSA as under the MSA, notwithstanding its
 9 reduced duties under the AMSA. (2021 Decision at 17 n.23.) The 2021 Decision also
 10 “reiterated [the DOE’s] concerns about Mr. Mueller’s dual roles as President of GCU and
 11 CEO of GCE,” which had not changed under the AMSA. (*See* X-MSJ SOF ¶ 54.) The DOE
 12 clarified to Mr. Mueller that it “is not directing GCU to remove you as President of the
 13 University, [but] your multiple roles continue to be of concern to the Department. Of
 14 course, nothing would prevent you from severing ties with GCE if you (and the GCU
 15 Board) thought it was more important for you to stay with GCU instead of serving in two
 16 potentially conflicting positions.” (2021 Decision at 18.)

17 **E. Procedural History**

18 On February 2, 2021, GCU filed its Complaint in this Court, alleging that the 2019
 19 and 2021 Decisions (collectively, “the Decisions”) violated the Administrative Procedure
 20 Act (“APA”) and the First Amendment of the United States Constitution. (Compl.)
 21 Regarding Defendants’ alleged APA violation, GCU argued that the Decisions are contrary
 22 to law because, *inter alia*, GCU should have been determined to be a nonprofit institution
 23 under both the HEA and § 600.2. (Compl. ¶¶ 338, 340, 346.) GCU also argued that the
 24 Decisions are arbitrary and capricious on several grounds. (*Id.* ¶ 339.) Separate from its
 25 APA claims, GCU alleged that the DOE’s requirement that GCU refrain from calling itself
 26 a nonprofit under Title IV violates the First Amendment. (*Id.* ¶¶ 347–55.)

27 After litigating to establish the proper contents of the administrative record in this
 28 case, GCU filed its Motion on May 16, 2022. (MSJ; Doc. 55, 03/03/2022 Order (granting

1 in part GCU's Motion to Complete the Administrative Record).) On June 30, 2022,
 2 Defendants filed their Cross-Motion and Response to GCU's Motion, to which GCU filed
 3 its Response to the Cross-Motion and Reply to the DOE's Response on August 1, 2022.
 4 (X-MSJ; MSJ Reply.) On August 25, 2022, Defendants filed their Reply to GCU's
 5 Response. (X-MSJ Reply.) The Court held oral argument on the Motion and Cross-Motion
 6 on September 8, 2022. (Doc. 92, Min. Entry.)

7 **II. LEGAL STANDARD**

8 "[T]he standard set forth in Rule 56(c) does not apply [in reviewing cross-motions
 9 for summary judgment under the APA] because of the limited role of a court in reviewing
 10 the administrative record." *Gill v. Dep't of Justice*, 246 F. Supp. 3d 1264, 1268 (N.D. Cal.
 11 2017) (quoting *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006)). "Under
 12 the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is
 13 supported by the administrative record, whereas 'the function of the district court is to
 14 determine whether or not as a matter of law the evidence in the administrative record
 15 permitted the agency to make the decision it did.'" *Sierra Club*, 459 F. Supp. 2d at 90
 16 (quoting *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985)). "In other words,
 17 'the district court acts like an appellate court, and the entire case is a question of law.'" *Gill*,
 18 246 F. Supp. 3d at 1268 (quoting *Nat'l Law Ctr. on Homelessness v. U.S. Dep't of*
 19 *Veterans Affs.*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012)).

20 **III. ANALYSIS**

21 GCU argues that the Decisions are a product of Defendants' overreach and error,
 22 violating the APA in several respects. (MSJ at 10–30.) GCU also argues that Defendants
 23 have placed an unjustified prior restraint on GCU's ability to represent itself as a nonprofit
 24 entity, violating the First Amendment. (*Id.* at 30–31.) The Court addresses each argument
 25 in turn.

26 **A. APA Claims**

27 GCU argues that Defendants violated the APA in multiple ways. First, GCU
 28 contends that Defendants acted contrary to law because (1) the Secretary does not have the

1 authority to determine nonprofit status under Title IV and (2) the Decisions constitute an
 2 amendment of previous DOE regulation without the requisite notice-and-comment
 3 rulemaking.¹² (*See* MSJ 10–16, 18.) Second, GCU asserts that even if Defendants have
 4 authority to determine nonprofit status under Title IV, the Decisions are arbitrary and
 5 capricious because (1) the DOE did not adequately explain its “reinterpretation” of § 600.2
 6 and erred in determining that GCU’s profits inure to GCE; (2) the DOE failed to consider
 7 factors relevant to the Decisions, namely GCU’s § 501(c)(3) status and the HLC’s grant of
 8 accreditation; (3) the DOE applied IRS tax law, which is outside the scope of the DOE’s
 9 expertise and warrants no administrative deference; and (4) the DOE applied inconsistent,
 10 undefined standards to evaluate GCU’s application for Title IV nonprofit status, damaging
 11 GCU’s reliance interest in a uniformly-administered review process. (*Id.* at 18–27.)

12 **1. Contrary to Law**

13 **a. The DOE’s Statutory and Regulatory Authority**

14 GCU argues that the “text, history, and structure” of the HEA and § 600.2 all
 15 indicate that nonprofit status under Title IV is a function of state approval and IRS
 16 § 501(c)(3) tax-exempt status. (MSJ Reply at 2.) GCU posits that the Secretary accordingly
 17 did not have independent authority to determine whether GCU is a nonprofit under Title
 18 IV. (MSJ at 10, 18.) Alternatively, GCU argues that if § 600.2 is ambiguous, the DOE’s
 19 interpretation of the statute is unreasonable and unworthy of deference. (*See* MSJ Reply at
 20 2.) For the following reasons, GCU does not persuade the Court.

22 **i. Clear Interpretation**

23 To interpret the meaning of a regulation, “a court must carefully consider the text,
 24 structure, history, and purpose of a regulation [before resorting to agency deference]. . . .
 25 If genuine ambiguity remains, [however], the agency’s reading must still be reasonable.”

26 ¹² GCU briefly argues that even if Defendants have authority to determine GCU’s nonprofit
 27 status, the Decisions are still contrary to law because they are wrong about GCU’s
 28 nonprofit status. (*See* MSJ at 16–17.) As GCU asserts that the Decisions reached an
 incorrect conclusion because the DOE did not adequately explain its reasoning and
 misapplied IRS authority, this argument is more appropriately addressed alongside GCU’s
 claims that the Decisions are arbitrary and capricious.

1 *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (internal citations and quotation marks
 2 omitted). But “when the language [of a regulation] is clear . . . [courts] need not look to
 3 history or purpose of a regulation. Indeed, to do so sometimes amounts to an invitation for
 4 a freewheeling judicial inquiry, given the often amorphous or conflicting history or purpose
 5 of a regulation.” *Mountain Cmty. for Fire Safety v. Elliot*, 25 F.4th 667, 677 n.4 (9th Cir.
 6 2022). GCU argues that the DOE’s change-in-control regulations, as well as the most
 7 “natural reading of [§] 600.2, which the Department long endorsed,” support the conclusion
 8 that Defendants have no independent authority to determine Title IV nonprofit status. (MSJ
 9 at 10–12.)

10 The DOE counters that the plain text of the HEA and § 600.2 both indicate that
 11 Defendants’ review is independent from that of the IRS and the state accreditor. (X-MSJ
 12 at 10–13.) The Court agrees with Defendants. All subsections of § 600.2 are connected by
 13 the word “and,” which reflects that the regulation requires all three subsections to apply in
 14 nonprofit evaluation. *See* § 600.2. Nothing in the surrounding regulation suggests that
 15 “and” should be read to mean “or,” let alone that Subsection i is inoperative. *See*
 16 *Confederated Tribes and Bands of Yakima Nation v. Yakima Cnty.*, 963 F.3d 982, 990–91
 17 (9th Cir. 2020) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930)) (explaining that
 18 while certain context-sensitive exceptions indicate that “and” means “or,” “when ‘and’ is
 19 used to join two concepts, it is usually interpreted to require ‘not one or the other, but
 20 both.’”) Relatedly, the DOE persuasively raises that accepting GCU’s interpretation of
 21 § 600.2 would render Subsection i mere surplusage. (*See* X-MSJ at 11; X-MSJ Reply at 4.)
 22 GCU asks the Court to functionally disregard Subsection i—asserting that the first
 23 subsection of a three-part regulation is an affirmation of the third section—but fails to rebut
 24 the presumption that every word in a statute or regulation is included for its specific
 25 meaning. (*See* MSJ Reply at 4); *c.f. Poder in Action v. City of Phoenix*, 481 F. Supp. 3d
 26 962, 976 n.6 (D. Ariz. 2020) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001))
 27 (“[Courts] are . . . reluctant to treat statutory terms as surplusage in any setting.”).

28 GCU also makes much of the contrast between § 501(c)(3) and the relevant

1 language in the HEA, but to no avail. (*See* MSJ Reply at 3.) Citing the HEA’s definition
 2 of a nonprofit as an institution “no part of the net earnings of which inures, *or may lawfully*
 3 *inure*, to the benefit of any private shareholder or individual,” GCU argues that “those
 4 institutions prohibited by law from engaging in private inurement qualify as nonprofit
 5 institutions for the Title IV programs.” (*Id.* (citing 20 U.S.C. § 1003(13)) (emphasis in
 6 original).) The italicized text is the only difference between the HEA nonprofit definition
 7 and the § 501(c)(3) nonprofit definition. But this circular argument again fails to rebut the
 8 presumption against surplusage. If IRS approval were the only criterion for nonprofit
 9 status, both Subsections i and ii of § 600.2 would be meaningless. And GCU’s narrow
 10 construction of “or” is not supported by the relevant law nor consistent with the statute
 11 itself. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253 (1994) (citing *McNally v.*
 12 *U.S.*, 483 U.S. 350, 358–59 (1987)) (“[The] second phrase in disjunctive [was] added
 13 simply to make the meaning of the first phrase ‘unmistakable.’”) Indeed, GCU’s
 14 interpretation of “or may lawfully inure” does not comport with the HEA’s purpose. One
 15 purpose of the HEA, and specifically of Title IV review, is undisputedly to guard the
 16 integrity of Title IV funds. (*See* MSJ Reply at 7–9 (acknowledging that Defendants are
 17 responsible for at least overseeing compliance with state accreditation and § 501(c)(3)
 18 nonprofit status); X-MSJ at 1.) If the Court adopted GCU’s interpretation of § 1003(13),
 19 an institution would qualify as a nonprofit even its earnings in fact privately inured, so long
 20 as the institution had previously been determined to be a § 501(c)(3) nonprofit. The
 21 relevant law and record do not support this conclusion.

22 Defendants correctly note that because the text of § 600.2 is clear, the Court need
 23 not look to GCU’s remaining arguments regarding the regulation’s interpretation. (X-MSJ
 24 Reply at 4.) Even so, GCU’s interpretation of the regulation still fails when accounting for
 25 the background of the regulation. GCU asserts that if the DOE intended to clarify that it
 26 independently reviewed nonprofit conversions, it would have done so during the 1992
 27 reauthorization of the HEA, but there was a “conspicuous absence of such talk.” (MSJ
 28 Reply at 5.) Firing back about the relevant “statutory and regulatory framework,”

1 Defendants persuasively recount that the DOE *did* state its intent to “independently
 2 scrutinize non-profit conversions in connection with” the HEA’s 1992 amendments. (X-
 3 MSJ Reply at 5 (citing 59 Fed. Reg. 22,333 (Apr. 29, 1994)).) The DOE stated,

4 The Secretary considers it reasonable to treat changes in business form [to a
 5 501(c)(3)] as significant changes warranting the same scrutiny section 498(i)
 6 of the HEA dictates for other, perhaps far less consequential changes in
 7 governance by schools. . . . [A]lthough a corporation may affect the change
 in form from taxable to tax-exempt, nonprofit status with little formality . . .
 these consequences of the change make it a change cognizable under [the
 change-in-control requirements] of the HEA.

8 59 Fed. Reg. 22,333.

9 On this very note, GCU cites a written exchange between Congress and the
 10 Secretary that occurred after the 1992 HEA amendments. (MSJ Reply at 5–6.) Congress
 11 opens by asking the DOE how its “new approach” to differentiating between proprietary
 12 and nonprofit institutions will address regulatory abuses by nonprofit schools, particularly
 13 when “school[s] change [their] status from for-profit to non-profit and . . . simply plough
 14 through all of [their] profits into salary and expenses.” (*Id.* at 5); Abuses in Fed. Student
 15 Grant Programs Proprietary School Abuses, S. Hr’g 104-477 at 222 (July 12, 1995) (“1995
 16 Hearing”). It would make little sense that Congress inquired as to how the DOE would
 17 ensure regulatory compliance if Congress had not tasked the DOE with ensuring regulatory
 18 compliance. And in keeping with the conclusion that the DOE is empowered to police such
 19 compliance, the DOE responded that certain states allow schools to “easily switch”
 20 between for-profit and nonprofit status, but the DOE planned to “subject schools that do
 21 change from profit to non-profit” to certain standards to “ensure that schools do not evade
 22 certain regulatory requirements.” (MSJ Reply at 6); 1995 Hearing. This exchange only
 23 confirms that the DOE may independently scrutinize conversions to ensure “the integrity
 24 of Title IV,” even though the DOE must respect a state’s independent determination of
 25 nonprofit status.¹³ (*See* X-MSJ at 1, 17 (quoting 75 Fed. Reg. 66832-01).)

26 ¹³ GCU also fails to address why it modeled the MSA off of previous changes in control
 27 approved by Defendants, as well as why it repeatedly conceded the DOE reviews changes
 28 in control under all three factors in § 600.02, if § 501(c)(3) status and state law were and
 are the controlling authorities for Title IV nonprofit status. (*See also* X-MSJ at 11 n.5 (GCU
 stating that “[t]o our knowledge, the [DOE] has never published any [policy] on any other
 factors that [it] would consider in assessing whether an institution qualifies as a nonprofit

1 GCU also points to the DOE’s definition of a foreign nonprofit educational
 2 institution, added after the HEA’s most recent reauthorization in 2008, to show that IRS
 3 approval is dispositive for nonprofit designation. (*See* MSJ Reply at 6.) As of 2010, the
 4 DOE “automatically accept[s]” a foreign institution as a Title IV nonprofit if it has been
 5 designated as a nonprofit by its “relevant tax authority,” on the condition that the tax
 6 authority applies the same criteria as the IRS. (*Id.*) But the DOE persuasively responds that
 7 this does not reflect that the DOE must defer to the IRS regarding domestic institutions.
 8 Foreign nonprofit institutions only receive Title IV funds for American students enrolled—
 9 the DOE need not allocate resources to monitor such a small output of funds. (*See* X-MSJ
 10 at 13 n.7.) Further, if the DOE clarified that § 501(c)(3) tax-exempt status controls
 11 nonprofit determination for foreign schools, it certainly could have done the same for
 12 domestic institutions. The absence of domestic institutions in this regulation, particularly
 13 given the existence of § 600.2’s three-part definition, confirms that the DOE need not defer
 14 to IRS nonprofit determination for domestic schools. *See N.L.R.B. v. SW General, Inc.*, 137
 15 S. Ct. 929, 940 (2017) (explaining that the interpretive canon *expressio unius est exclusio*
 16 *alterius* applies when “circumstances support a sensible inference that the term left out
 17 must have been meant to be excluded.”) (internal citation and quotation marks omitted).
 18 Notwithstanding GCU’s arguments to the contrary, the Court finds that reviewing change-
 19 in-control nonprofit conversions is clearly within the DOE’s authority under the HEA and
 20 not contrary to law.

21 **ii. Genuine Ambiguity**

22 Defendants alternatively argue that even if § 600.2 is ambiguous, the DOE’s
 23 interpretation of the statute is reasonable and entitled to deference. (X-MSJ at 13.) Courts
 24 presume that Congress intended an agency to have “the power authoritatively to interpret
 25 its own regulations [as] a component of the agency’s delegated lawmaking powers . . .
 26 Congress usually intends to give [agencies] considerable latitude to interpret the ambiguous
 27 rules they issue.” *Kisor*, 139 S. Ct. at 2412. “[T]he presumption that Congress intended
 28 _____
 entity for Title IV purposes beyond the three factors [of § 600.2].”).)

[such] deference stems from the awareness that resolving genuine regulatory ambiguities often ‘entail[s] the exercise of judgment grounded in policy concerns.’” *Id.* at 2413 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). But “the basis for deference ebbs when the subject matter of the dispute is distant from the agency’s ordinary duties or falls within the scope of another agency’s authority.” *Id.* at 2417 (cleaned up). Further, “an agency’s reading of a rule must reflect ‘fair and considered judgment’ to receive . . . deference [from courts].” *Id.* (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

The Court finds that if § 600.2 were ambiguous, the DOE’s interpretation is reasonable and warrants judicial deference. GCU argues that the DOE’s position is unreasonable, given that it “conflicts with its change-in-control regulations, deviates from its own prior interpretation, and takes the agency far outside its substantive expertise.” (MSJ Reply at 2.) As addressed in the previous subsection, § 600.2 includes three separate criteria for Title IV nonprofit status, and the DOE’s insistence that GCU meet each criterion does not contradict the regulation. Further, Defendants point out that while the DOE previously deferred in practice to the § 501(c)(3) determination of the IRS, there is no record that the DOE actually interpreted § 600.2 to leave nonprofit status to the IRS and the states, nor was any announcement made to suggest as much.¹⁴ (Doc. 95, Not. of Hearing Trans. (“Hr’g Tr.”) at 26:25–27:19.) And by GCU’s own admission, Defendants have been

¹⁴ GCU cites a passage from the regulatory history of the HEA in an attempt to argue that the DOE has publicly acknowledged that state and IRS approval are legally sufficient for Title IV nonprofit status. (See MSJ Reply at 7–8.) The passage in question reads, “[a]lthough changes in the form of incorporation from for-profit to nonprofit are governed by a variety of State laws, only those nonprofit organizations that meet the further restrictions of section 501(c)(3) of the Internal Revenue Code qualify to participate in the title IV, HEA programs as nonprofit institutions.” 59 Fed. Reg. at 22,334. But GCU omits the sentence that immediately follows: “To so qualify, a corporation must not merely ensure that its net earnings do not benefit private individuals, but that, unlike a general corporation that may engage in any lawful business, this nonprofit institution must be organized and operated exclusively for educational or other qualifying purposes.” Even in 1994, during the period when the DOE deferred to IRS determination of nonprofit status, Defendants detailed the criteria that an aspiring Title IV nonprofit needed to meet in order to survive *Departmental* scrutiny. As explained *infra*, it makes sense that certain Title IV nonprofit criteria are informed by IRS authority. But GCU’s contention that the DOE has no role in determining nonprofit status, even in the context of this regulatory history, does not comport with the regulatory scheme or history.

1 tasked for decades with reviewing changes in control, so its argument that Defendants have
 2 insufficient expertise to determine nonprofit status falls flat. (*See* MSJ at 11–12.) Finally,
 3 regarding the agency’s policy judgment, Defendants repeat that the DOE acts with the
 4 unique policy concern that Title IV funds are allotted to benefit the educational institutions
 5 which receive these funds, “serving [the HEA’s] purpose of preventing program
 6 weaknesses and abuse among for-profit institutions.” (X-MSJ at 13.) The Court agrees with
 7 Defendants that even if § 600.2 were ambiguous, the DOE’s interpretation should stand.

8 **b. Regulatory Rulemaking**

9 Under the APA’s “notice and comment” requirement, agencies must advise the
 10 public through a notice in the Federal Register of the substance of a proposed rule, allowing
 11 the public a period to comment. See 5 U.S.C. §§ 553(b), (c); *Auer*, 519 U.S. at 459. The
 12 notice and comment requirement does not apply to “interpretative rules, general statements
 13 of policy, or rules of agency organization, procedure, or practice.” *Erringer v. Thompson*,
 14 371 F.3d 625, 630 (9th Cir. 2004) (quoting 5 U.S.C. § 553(b)(3)(A)). In general, courts
 15 reviewing agency action under the APA must give “broad deference to agencies’
 16 interpretations of the statutes they are charged with implementing.” *California by and*
 17 *through Becerra v. Azar*, 950 F.3d 1067, 1074 (9th Cir. 2020).

18 GCU argues that the Decisions were a departure from prior DOE practices, namely
 19 the practice of deferring to an IRS grant of § 501(c)(3) tax-exempt status when determining
 20 whether an institution qualified as a nonprofit under Title IV. (MSJ at 14–16.) It follows,
 21 GCU argues, that the DOE needed to go through the formal process of notice-and-comment
 22 rulemaking if it were going to apply a different process for change-in-control review under
 23 § 600.2. (*See id.*) Defendants repeatedly counter that the HEA empowers the DOE to
 24 ensure “the integrity of Title IV programs,” meaning that Title IV funds are administered
 25 to benefit students rather than private companies. (X-MSJ at 17.) And “since at least 2016,”
 26 two years before the sale of GCU, the DOE had been more closely analyzing applications
 27 for change-in-control and nonprofit conversion. (X-MSJ at 23.) Defendants contend that in
 28 denying GCU’s application for nonprofit status, the DOE did nothing more than apply its

1 preexisting practice, in contrast to “actually chang[ing] [its] interpretation of the
2 [controlling] regulation.” (*Id.* (citing *Select Specialty Hosp.-Bloomington, Inc. v. Sibelius*,
3 774 F. Supp. 2d 332, 345 (D.D.C. 2011)).) The Court agrees with Defendants.

4 The record reflects that all parties understood that Defendants would independently
5 review GCU’s nonprofit status. As above explained, the DOE’s authority to administer the
6 HEA is distinct from the IRS’s grant of § 501(c)(3) tax-exempt status. (*Supra* at Section
7 II(A)(1)(a).) GCU accepted this conclusion throughout the change-in-control application
8 and following review period, during which GCU repeatedly acknowledged that the DOE’s
9 review is discrete. (X-MSJ at 24; AR-J-0077–78 (letter to DOE stating, *inter alia*, “[GCU]
10 recognize[s] the Department’s position that it must make an independent determination as
11 to [GCU’s nonprofit status].”), 0081.) GCU also acknowledges that Defendants have
12 previously taken other measures to ensure that institutions are not converting to nonprofit
13 status in bad faith. (*See* MSJ Reply at 8–9 (explaining that the DOE can “ensure [an]
14 institution had not converted to evade for-profit rules.”).)¹⁵ The relevant law and record
15 reflects that the DOE has long monitored compliance with § 600.2 by applying different
16 methods of scrutiny and control. Since 2016, the DOE has taken a more aggressive
17 approach to monitoring compliance, but this is in keeping with the DOE’s pattern of
18 ensuring compliance within the scope of its delegated power.

19 Confirming the consistency of the DOE’s process, the DOE gave GCU an
20 opportunity to explain why other schools’ service agreements were relevant to the DOE’s
21 analysis during the review period. (X-MSJ Reply at 7.) GCU declined to draw a parallel.
22 (*Id.*) Specifically, the DOE asked GCU to review its proffered list of other schools’ service
23 agreements and “identify any service providers that are affiliates, owners, or former owners
24 of the institution (including related persons and entities), and indicate whether any of the

25
26 ¹⁵ Attempting to minimize this history, GCU argues that the DOE’s role is “not to determine
27 whether the institution *is* a nonprofit for Title IV purposes; but, instead, to ensure the
28 institution had not converted to evade for-profit rules.” (MSJ Reply at 8–9.) This is a
distinction without a difference. The DOE acknowledges that it previously deferred to the
IRS evaluation of nonprofit status, yet the DOE still sought to at least ensure that nonprofits
were not unlawfully acting as for-profit corporations after converting. In other words, the
DOE wanted to make sure the nominally converted nonprofits were actually nonprofits.

servicing agreements were entered into in conjunction with a change in ownership transaction.” (X-MSJ at 25 (citing AR-J-0156).) GCU responded that the sale of GCU “stands on its own.” (*Id.* (citing AR-J-0086).) Consistent with the DOE’s “case-by-case” review and GCU’s assertion to the DOE that the sale should be evaluated individually, the DOE assessed the sale under its regulatory criteria and came to its reasoned Decisions. This is not regulatory rulemaking in violation of the APA.

2. Arbitrary & Capricious

The APA mandates that a reviewing court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary [or] capricious.” 5 U.S.C. § 706(2)(A). “Under . . . this ‘narrow’ standard of review, [courts] insist that an agency ‘examine the relevant data and articulate a satisfactory explanation for its action.’” *F.C.C. v. Fox Telev. Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). “[A] court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Id.* at 513–14 (internal quotations and citation omitted). This means that a reviewing court cannot “second-guess” the agency’s “weighing of risks and benefits [or] penalize [the agency] for departing from [a different authority’s] inferences and assumptions,” nor may the court “ask whether [an agency] decision is the best one possible or even whether it is better than the alternatives.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (quoting *F.E.R.C. v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016)).

But agencies must act within reasoned boundaries, and “[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *Fox Telev. Stations*, 556 U.S. at 515 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). Agency action can be set aside “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

1 product of agency expertise.” *State Farm*, 463 U.S. at 43. Additionally, courts “may not
 2 supply a reasoned basis for the agency’s action that the agency itself has not given.” *Id.*
 3 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

4 GCU argues that the Decisions are arbitrary and capricious for multiple reasons.
 5 GCU asserts that the DOE did not adequately explain or justify its “reinterpretation” of
 6 § 600.2, particularly its analysis of why it determined that GCU’s net revenue inures to the
 7 benefit of a private shareholder or individual. (MSJ at 18, MSJ Reply at 11–12, 16–20.)
 8 GCU argues that the DOE arbitrarily departed from the IRS’s and the HLC’s conclusions
 9 about GCU’s nonprofit status and misapplied IRS authority in the Decisions. (MSJ Reply
 10 at 12–14, 20–23.) GCU relatedly argues that the DOE unlawfully ignored its own
 11 regulations and denied GCU fair notice of the outcome of the Decisions, damaging GCU’s
 12 reliance interest. (*See id.* at 9–11.)

13 **a. Private Inurement**

14 The Decisions focused on Subsection i, the prohibition of private benefit from
 15 nonprofit earnings, in denying GCU nonprofit status. (2019 Decision at 10.) In the 2019
 16 Decision, the DOE analyzed the MSA’s revenue-sharing agreement using the Treasury’s
 17 operational test, which prohibits both private benefit and private inurement. (*Id.* at 10–11
 18 (citing 26 C.F.R. § 1.501(c)(3), (2), (1)).) The DOE explained that “unlike private
 19 inurement, private benefit does not necessarily involve the flow of funds from an exempt
 20 organization to a related private party, it can also include other benefits from the activities
 21 of the exempt organization to *an unrelated party*.” (*Id.* at 11 (citing *P.L.R. 200914063*,
 22 2009 WL 889714 (IRS PLR Apr. 3, 2009)) (emphasis in original).) The DOE went on to
 23 clarify that “[i]n looking at payments to a related for-profit enterprise, the focus is on
 24 whether ‘the entire enterprise is carried on in such a manner that the for-profit organization
 25 benefits substantially from the operation of the [nonprofit entity].’” (*Id.* (citing *Church by*
 26 *Mail, Inc. v. C.I.R.*, 765 F.2d 1387, 1392 (9th Cir. 1985)).) Applying these authorities to
 27 the MSA, the DOE concluded that GCU’s profits were benefitting GCE and its
 28 shareholders, violating Subsection i. (2019 Decision at 13.) The structure of the MSA,

1 including GCE’s entitlement to an uncapped dollar amount in exchange for services,
2 indicated to the DOE that “the revenues generated by GCU are transferred to and retained
3 by GCE for the benefit of its shareholders.” (*Id.* at 13–14.) After considering the AMSA,
4 the DOE found “the basic structure whereby a substantial portion of GCU’s revenues
5 benefits GCE remains unchanged.” (2021 Decision at 17.)

6 GCU argues that the DOE’s private inurement analysis is arbitrary and capricious
7 for multiple reasons. GCU first argues that the DOE has no “discernable standards” to
8 determine private inurement. (MSJ Reply at 2.) Second, the DOE applied IRS tax authority
9 in its private inurement analysis, which GCU contends is outside the scope of the DOE’s
10 expertise. (*See id.*) But GCU’s more detailed analysis reaches a less subtle conclusion: the
11 Decisions are simply incorrect, as GCU’s revenues do not privately inure. (*Id.* at 17–20.)
12 GCU asserts that because a nonprofit may incur “ordinary and necessary [operating]
13 expenditures” without jeopardizing its nonprofit status, and because it is undisputed that
14 GCU pays “fair market value” for GCE’s services, any money GCU pays to GCE is
15 “directly related to [GCU’s] nonprofit mission.” (*Id.* at 17–18.) Further, focusing on what
16 GCU describes as the “well-established private inurement test,” GCU argues that in order
17 for GCU’s revenue to be privately inuring to GCE, GCU’s *insiders* would need to
18 excessively benefit from GCU’s revenues. (*Id.* at 17–19.) Citing the numerous conflict
19 checks and corporate separation between GCU and GCE, GCU asserts that GCE is not an
20 insider of GCU. (*Id.* at 19–20.) In sum, GCU argues that there is no private inurement as a
21 matter of law. (*Id.* at 17.)

22 The Court finds the DOE’s analysis of private benefit and inurement in the
23 Decisions was not arbitrary and capricious. A reviewing court “must uphold a [decision] if
24 the agency has examined the relevant considerations and articulated a satisfactory
25 explanation for its action, including a rational connection between the facts found and the
26 choice made.” *F.E.R.C.*, 577 U.S. at 292. To justify the DOE’s conclusion that GCU’s
27 operation creates excess private benefit for GCE, Defendants again turn to the structure of
28 the MSA, whereby GCE receives 60% of GCU’s revenue in exchange for providing only

1 28% of the services necessary to run GCU. (X-MSJ Reply at 8; Hr’g Tr. at 9:1–2, 35:2–4.)
 2 Defendants also point to the \$870 million-dollar debt GCU owed GCE at the time of the
 3 Decisions, which only increased the percentage of revenue GCU paid to GCE. (X-MSJ
 4 Reply at 8.) Though GCU counters that GCE risks being undercompensated for its services
 5 that increase in value, the DOE points out that the opposite is also true, in that if GCU’s
 6 revenues substantially increase, GCE will be paid a far greater amount of money for
 7 providing the same services. (*Id.*; Hr’g Tr. at 9:5–14.) Given the windfall to GCE once the
 8 cost of its services are subtracted from its revenue share, the DOE reasonably determined
 9 that an unacceptable percentage of GCU’s revenue is enriching GCE, violating § 600.2’s
 10 prohibition of private benefit.

11 To the extent that the DOE specifically addressed private inurement, the Court also
 12 finds it acted within the bounds of reasoned decision-making. “A [nonprofit] is not to
 13 siphon its earnings to its founder, or the members of its board . . . or anyone else fairly to
 14 be described as an insider, that is, as the equivalent of an owner or manager. The test is
 15 *functional*. It looks to the reality of control rather than to the insider’s place in a formal
 16 table of organization.” *United Cancer Council v. Commissioner*, 165 F.3d 1173, 1176 (7th
 17 Cir. 1999) (emphasis added). “[A]n organizational structure . . . entailing domination by
 18 the founder . . . raises concern about the potential for abuse unless allayed by other
 19 information in the record.” *Fam. Trust of Mass., Inc. v. U.S.*, 892 F. Supp. 2d 149, 156
 20 (D.D.C. 2012) (quoting *Church of the Visible Intel. that Governs the Universe v. U.S.*, 4
 21 Cl. Ct. 55, 60 (1983)). “The [benefitting] insider could be a ‘mere’ employee—or even a
 22 nominal outsider, such as a physician with hospital privileges in a charitable hospital.”
 23 *United Cancer*, 165 F.3d at 1176 (citing *Harding Hosp., Inc. v. U.S.*, 505 F.2d 1068, 1078
 24 (6th Cir. 1974)).

25 At the time of the Decisions, GCE’s only client was GCU.¹⁶ (Hr’g Tr. at 22:6; 2019

26 ¹⁶ GCU raises that GCE has since expanded to providing services for additional institutions.
 27 (Hr’g Tr. at 34:11–18.) But given that this Court’s review is limited to the Decisions and
 28 the information before the DOE at the time it issued the Decisions, GCE’s subsequent
 business ventures are immaterial under the APA. *Dep’t of Commerce*, 139 S. Ct. at 2573
 (“[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency’s
 contemporaneous explanation in light of the existing administrative record.”).

1 Decision at 13.) It is undisputed that the MSA caused the cost of operating GCU to
 2 increase,¹⁷ though it is unclear whether GCU could have obtained a more favorable service
 3 agreement, as there is no record that GCU ever solicited offers from other service providers.
 4 (Hr’g Tr. at 23:4–8.) In addition to the disproportionate percentage of revenue awarded in
 5 compensation for GCE’s services, the Decisions clarify the DOE’s concern that Mr.
 6 Mueller’s dual roles further commit GCU to operate for the financial benefit of GCE. (*See*
 7 X-MSJ 16–17.) As President, Mr. Mueller is an insider of GCU, yet he and the company
 8 he runs—GCE—stand to profit enormously from GCU’s income. Mr. Mueller’s
 9 entanglement between for-profit service provider and educational institution further
 10 explains the DOE’s conclusion that GCU is a source of captive income for GCE. GCU
 11 touts that GCE is performing the services under the MSA for fair market value, but
 12 particularly given the incomparable nature of this conversion and service agreement, it is
 13 reasonable that the DOE’s inquiry did not stop there. (*See* MSJ Reply at 21; X-MSJ Reply
 14 at 7 (DOE noting that the sale was “unlike any other prior nonprofit conversion”).) The
 15 Court concludes that the DOE articulated its reasons for finding GCU does not meet
 16 Subsection i and connected those reasons to factors which the DOE is required to consider.
 17 *See Fox Telev. Stations., Inc.*, 556 U.S. at 513–14 (“[A] court is not to substitute its
 18 judgment for that of the agency . . . and should uphold a decision of less than ideal clarity
 19 if the agency’s path may reasonably be discerned.”).

20 GCU makes much of the DOE’s particular scrutiny of the “economic profit split”
 21 transfer pricing method Deloitte and BKD used to analyze the fairness of the MSA and
 22 AMSA. (*See* MSJ Reply at 21–23; 2021 Decision at 13.) The DOE analyzed the transfer
 23 pricing study under 26 C.F.R. § 1.482-9, a Treasury regulation that speaks to applicability

24 ¹⁷ GCU asserts that Defendants’ calculation of GCU’s increased operating expense—\$810
 25 million to \$1.496 billion as a consequence of the fees paid to GCE—was based on
 26 “mathematical errors.” (MSJ at 23.) This purported error is rooted in the Barclays Report.
 27 (*See* 2019 Decision at 5; Doc. 59-10, Barclays Report at 33.) Yet the DOE did not make
 28 this conclusion about GCU’s operating expenses. It instead opined that “under the planned
 separation . . . the costs to operate [GCU] increase from \$810 million to \$1.496 billion
 solely as a result of the Services Fee paid to GCE.” (2019 Decision at 5; X-MSJ at 17 n.9.)
 It is undisputed that GCE and GCU are both contributing services to GCU. The DOE
 correctly observed that the Barclays Report showed a cost increase for both contributing
 parties, solely as a result of the MSA.

1 of different pricing methods for determining controlled transaction fairness.¹⁸ (2021
 2 Decision at 9.) Despite GCU’s attacks, the Court finds the DOE adequately explained its
 3 objections to the transfer pricing analysis before it. The DOE explained not only that
 4 transfer pricing is not a preferred method of analyzing purportedly arm’s length
 5 transactions, but also that transfer pricing analysis is normally applied to transactions
 6 between two parties under common control or ownership. (*See id.* at 7, 14.) The DOE noted
 7 that despite these indications that Deloitte and BKD did not use the appropriate evaluation
 8 method, “[n]either the Deloitte 2020 TPPR nor the BKD Review . . . explain why transfer
 9 pricing is an appropriate tool to evaluate a price being charged between two supposedly
 10 independent entities.” (*Id.* at 8.) The DOE also reiterated its more generalized skepticism
 11 of GCU and GCE’s incomplete separation, explaining that,

12 [b]oth Deloitte and BKD¹⁹ fail to acknowledge that the claimed lack of
 13 comparability [to other revenue-sharing agreements] is a creature of the
 14 unique structure of this transaction: taking a fully integrated proprietary
 15 institution and separating its academic and campus structure into a nonprofit
 entity, retaining the ‘servicing’ functions in the publicly-traded for-profit
 former owner for which the institution is the primary, if not only client, and
 providing services for a fee that is 59.9% of Tuition and Fee Revenue.

16 (2021 Decision at 10–11.) Even taking the analyses at face value, the DOE clearly
 17 explained its reasonable conclusion that the analyses commissioned by GCU indicated the
 18 MSA and AMSA were unique among service agreements, given the prior and ongoing

19
 20 ¹⁸ GCU also argues that the DOE improperly relied on a typo in the BKD report to condemn
 21 the transfer pricing study. (Doc. 63, Mot. to Supp. AR at 2; *see* MSJ at 27.) To support this
 22 contention, GCU moved to supplement the administrative record with a declaration from a
 23 BKD employee, in which the employee restates BKD’s conclusions and discusses how the
 24 DOE erred in applying § 1.482-9. (Mot. to Supp. AR.) While true that the Decision appears
 25 to reference the misstatement in the BKD report, the DOE based its analysis on other
 26 portions of § 1.482-9, all of which are accurate reflections of the statute. *See* 26 C.F.R.
 §§ 1.482-9, 1.482-1 (“An arm’s length result may be determined under any method without
 establishing the inapplicability of another method, but if another method subsequently is
 shown to produce a more reliable measure of an arm’s length result, such other method
 must be used.”); (2021 Decision at 9.) The Court therefore finds that supplementation
 would not aid the Court in understanding the complex issues at hand. *See Inland Empire*
Pub. Lands Council v. Glickman, 88 F.3d 697, 703–04 (9th Cir. 1996) (courts only
 supplement with extra-record materials when “necessary to explain technical terms or
 complex subject matter.”).

27 ¹⁹ Defendants also note that GCU’s proffered expert opinions are not entitled to
 28 “controlling weight.” (X-MSJ at 19 (quoting *Azar*, 950 F.3d at 1100).) The Court agrees.
See Azar, 950 F.3d at 1096 n.28 (“[T]he agency has discretion to rely on its own expertise
 ‘even if, as an original matter, a court might find contrary views more persuasive.’”)

1 relationship between GCU and GCE. (*Id.* at 15.) The above explanation is all that is
 2 required of the DOE under the APA.

3 **b. IRS Review**

4 Defendants also argue that the DOE’s distinction from IRS review is not arbitrary
 5 and capricious. (X-MSJ 20–21.) GCU counters that the DOE had no proper basis to dismiss
 6 the conclusions of the IRS. (MSJ at 24.) GCU also argues that because Defendants merely
 7 applied IRS tax authority in the Decisions, the Decisions are not entitled to deference under
 8 the APA. (MSJ 23–24 (citing *Kisor*, 139 S. Ct. at 2417 (“[D]eference ebbs when the subject
 9 matter of a dispute is distant from the agency’s ordinary duties or falls within the scope of
 10 another agency’s authority.”)).)

11 The Court finds that the DOE reasonably explained its discrete analysis. As outlined
 12 above, the DOE administers the nonprofit compliance provisions in the HEA, some of
 13 which are reflected in § 600.2, and ensuring compliance with these authorities is within the
 14 scope of the DOE’s power and expertise. (*Supra* Section II(A)(1).) In delegating this power
 15 of review to Defendants, Congress did not mandate that Defendants promulgate authority
 16 completely distinct from that already applied by the IRS. (*See* Hr’g Tr. at 25:14–18
 17 (explaining that the IRS approved GCU’s § 501(c)(3) status but “does not have the
 18 expertise to understand what [MSA-provided] services are in the education context that the
 19 [DOE] has.”); X-MSJ at 21.) It is undisputed that the DOE applied IRS regulations in the
 20 Decisions. But given that the DOE has no independent body of law under which to analyze
 21 changes in control, applying IRS authority to reach a coherently-explained conclusion
 22 about GCU’s Title IV nonprofit status is a reasonable exercise of the DOE’s unique power
 23 of review. (*See* X-MSJ Reply at 12 n.9, 21); *see Encino Motorcars, LLC v. Navarro*, 579
 24 U.S. 211, 221 (2016) (the requirement of agency explanation “is satisfied when the
 25 agency’s explanation is clear enough that its ‘path may reasonably be discerned.’”); *c.f.*
 26 *Select Specialty Hosp.-Bloomington, Inc. v. Burwell*, 757 F.3d 308, 314 (D.C. Cir. 2014)
 27 (holding any “amorphous” decisional rule to be arbitrary and capricious).

28 **c. HLC Accreditation**

1 GCU also attacks Defendants’ lack of deference to the HLC’s determination as
2 arbitrary and capricious. (MSJ at 25.) Specifically, GCU argues that Defendants “had no
3 legitimate basis to dismiss” the HLC’s conclusions, which included that “[GCU’s] Board
4 of Trustees has sufficient independence to ensure it is free from undue influence of the part
5 of . . . GCE or its stockholders.” (*Id.* at 25–26.) From GCU’s perspective, the DOE
6 disregarded the fact that GCU’s “Executive Leadership team” and MSA Committee would
7 be free from conflicts of interest after the sale closed and that GCU retained ultimate
8 control over Mr. Mueller’s employment as President. (*Id.* at 26.) Though the HLC found
9 that GCU had dispelled any “apparent conflict of interest” by instituting these conflict
10 checks, the Decisions outlined how the DOE reached a different conclusion. (*Id.*; 2019
11 Decision at 16 (observing that most of the Executive Leadership team remained employed
12 by GCE after the sale closed and that GCE effectively operated GCU); 2021 Decision at
13 17 (“The Department makes its own determination regarding nonprofit status, and the fact
14 that HLC may have reached a different conclusion is neither binding nor persuasive.”).)
15 GCU asserts that the DOE’s conclusion regarding the HLC “fails the APA’s requirement
16 to fairly consider the relevant evidence before it.” (MSJ at 27.)

17 Defendants contend that they considered the HLC’s determination and explained
18 why they reached a different conclusion, which suffices under APA review. (X-MSJ at 22);
19 *see Fox Telev. Stations, Inc.*, 556 U.S. at 513. Neither the HEA nor the relevant regulations
20 mandate that the DOE defer to the assessment of an accreditor. On the contrary, the HLC
21 itself noted that it must defer to Defendants’ assessment of whether GCU qualifies as a
22 nonprofit under Title IV. (X-MSJ at 22 (citing AR-G-0048).) The Court finds that the
23 DOE’s disagreement with the HLC’s conclusion does not render the Decisions arbitrary
24 and capricious. *See Ass’n of Private Sector Colleges and Univs.*, 681 F.3d at 441 (under
25 “fundamentally deferential” court review of agency decisions, an agency decision is
26 arbitrary and capricious if it “offered an explanation of its decision that runs counter to the
27 evidence before the agency, or is so implausible that it could not be ascribed to a difference
28 in view or a product of agency expertise.”)

d. Fair Notice to GCU

Asserting that it relied on the DOE’s prior practice of equating § 501(c)(3) status with Title IV nonprofit status, GCU argues that the DOE “failed to provide fair notice . . . about its standards governing nonprofit status.” (MSJ Reply at 9; *see* MSJ at 18.) Defendants concede that they have raised their level of scrutiny in assessing applications for Title IV nonprofit status. (*See* Hr’g Tr. at 27:5–14; X-MSJ at 23.) “[T]he choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application . . . [although] there could be instances where reliance on adjudication rather than rulemaking would amount to an abuse of discretion.” *Chisholm v. F.C.C.*, 538 F.2d 349, 365 (D.C. Cir. 1976) (citing *NLRB v. Bell Aerospace*, 416 U.S. 267, 291–95 (1974)). “Such [an abuse of discretion] may present itself where the new standard, adopted by adjudication, departs radically from the agency’s previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application.” *Pfaff v. U.S. Dept. of Housing and Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996).

The Decisions do not meet this standard. The Court already explained that this enhanced scrutiny is not a “radical” departure from prior interpretation of § 600.2, but instead is in keeping with the DOE’s pattern of using various methods to ensure compliance with its regulations. In turn, GCU acknowledges that the DOE denied nonprofit status to an institution with § 501(c)(3) status in 2016, so GCU cannot persuasively argue that the Decisions present a completely new interpretation of § 600.2. (Hr’g Tr. at 12:21–24.) Lastly, GCU does not dispute that it is still able to participate in Title IV as a proprietary institution and certainly faces no fines or damages as a direct result of the Decisions.²⁰ (*Id.*

²⁰ Even though the DOE points out that its heightened scrutiny of nonprofit conversions has spanned multiple presidential administrations, “it is hardly improper for an agency head to come into office with policy preferences and ideas . . . and work with staff attorneys to substantiate the legal basis for a preferred policy.” *Biden v. Texas*, 142 S. Ct. 2528, 2547 (2022) (quoting *Dep’t of Commerce*, 139 S. Ct. at 2574); (Hr’g Tr. at 28:2–8.)

1 at 15:22–16:1, 18:7–12.) The Court finds that the Decisions comport with the standards for
 2 fair agency adjudication mandated by the APA.

3 GCU also raises that it asked the DOE if there were any “additional requirements”
 4 for nonprofit approval before closing the sale but received no response from the DOE.
 5 (MSJ at 18.) The DOE counters that GCU had the opportunity to gather information from
 6 the DOE about the status of its application through the preacquisition review process, but
 7 GCU chose to time the sale in such a way that it did not wait to receive the DOE’s
 8 particularized guidance. (X-MSJ Reply at 8 n.3.) The Court agrees with the DOE. GCU
 9 does not and cannot assert that the DOE forced or incentivized GCU to seek out HLC
 10 approval in early 2018. Had GCU not sought HLC approval on its own timeline, it would
 11 not have needed to close the transaction on July 1, 2018. (*See* MSJ SOF ¶ 53.)

12 Related to its fair notice argument, GCU argues that the DOE “ignored” its own
 13 statutes, regulations, and guidance regarding changes in ownership. (MSJ Reply at 14.)
 14 The HEA forbids the DOE from exercising “direction, supervision, [and] control” over a
 15 nonprofit institution’s “employment or administrative decisions.” (*See* X-MSJ Reply at
 16 13); 20 U.S.C. § 1232a; *Vitarelli v. Seaton*, 359 U.S. 535, 539–40 (1959) (an agency must
 17 follow its own regulations). GCU asserts that by repeatedly criticizing Mr. Mueller’s dual
 18 roles as President of GCU and CEO of GCE, the Decisions attempted to interfere with
 19 GCU’s employment decisions in violation of § 1232a.²¹ (MSJ Reply at 14.) But the
 20 Decisions belie GCU’s argument. In the 2021 Decision, the DOE noted GCU’s preference
 21 for retaining Mr. Mueller as President of GCU and expressed concern over Mr. Mueller’s
 22 potentially conflicting role *as CEO of GCE*. (2021 Decision at 18.) There is no record that

23 ²¹ GCU also argues that the Decisions interfere with GCU’s ability to contract out services,
 24 in violation of DOE regulation which “expressly allow[s]” revenue-sharing agreements.
 25 (*See* MSJ Reply at 14 (citing 34 C.F.R. § 668.25(a)).) To support this argument and
 26 evidence that the DOE failed to consider the prevalence of colleges that use service
 27 agreements, GCU asks the Court to include a Government Accountability Office (“GAO”) report
 28 regarding many service agreements used by various educational institutions. (Mot. to Supp. AR at 3.) While GCU now argues the DOE should have considered such data, this GAO report did not exist at the time of either Decision. Additionally, given the evidence already in the record, the Court does not doubt that many institutions used such service agreements at the time of the Decisions, nor does the GAO report independently clarify a complicated issue. The Court will not add the GAO report to the administrative record. *See Glickman*, 88 F.3d at 703–04.

1 the DOE “conditioned GCU’s nonprofit status on removing its chosen President,” but
 2 instead the Decisions suggest that GCU’s application for Title IV status would have been
 3 stronger if Mr. Mueller were not the CEO of GCE. (*See* MSJ at 22.) GCU has pointed to
 4 no regulation, and the Court knows of none, indicating that the DOE may not speak to the
 5 employment decisions of a for-profit service provider associated with an institution seeking
 6 recognition as a Title IV nonprofit.

7 GCU’s argument that existing nonprofits have similar revenue sharing agreements
 8 does not change the outcome of the Motion. (*See* MSJ at 20; MSJ Reply at 1.) Defendants
 9 are not expressly empowered by the HEA to “monitor service agreements of existing
 10 nonprofits,” even though DOE regulations permit the Secretary to periodically review an
 11 institution’s eligibility to participate in Title IV programs. (*See* MSJ at 20); 34 C.F.R.
 12 § 668.13(b) (enabling but not requiring the Secretary to periodically review and reauthorize
 13 an institution’s eligibility for Title IV programs); *Fla. Coastal Sch. of Law v. Cardona*, No.
 14 3:21-cv-721-MMH-JBT, 2021 WL 3493311, at *17–18 (M.D. Fla. Aug. 9, 2021)
 15 (discussing an institution’s application for recertification under Title IV). Instead, the
 16 regulations at issue empower the DOE to review the eligibility of institutions undergoing
 17 a change in control for participation in programs under Title IV. (*See* X-MSJ at 24 (quoting
 18 AR-J-0329) (“The Department’s decision to deny a conversion to nonprofit status ‘*depends*
 19 *on the structure and impact of the Transaction* in the context of the regulatory requirements
 20 for a nonprofit institution.”).) This Court’s review is limited to whether the agency acted
 21 in accord with its own governing regulations in the instant Decisions. *See Dep’t of*
 22 *Commerce*, 139 S. Ct. at 2569 (“[Courts] may not substitute [their] judgment for that of the
 23 Secretary . . . but instead must confine [them]selves to ensuring that he remained within
 24 the bounds of reasoned decisionmaking.”) (internal citation and quotation marks omitted).

25 Lastly, GCU has consistently expressed that the DOE’s “case-by-case” review of
 26 nonprofit conversions undermines fair notice to institutions like GCU and leads to
 27 inconsistent results. (MSJ at 20; *see* Hr’g Tr. at 41:21–25; MSJ Reply at 9–10.) Specifically
 28 citing the Purdue-Kaplan transaction, GCU asserts that there is no reasoned distinction

1 between the DOE’s decision to grant Purdue Global nonprofit status and deny it to GCU.
 2 (See Hr’g Tr. at 40:18–41:6.) Defendants agree that there was no specific standard for
 3 service agreement structure at the time of the Decisions, but persuasively raise that GCU
 4 could have received case-specific guidance had it waited for the results of the DOE’s
 5 preacquisition review. (*Id.* at 30:6–12.) Further, Defendants point to the fact that GCU
 6 received guidance through the 2019 Decision and chose not to substantially address many
 7 of DOE’s concerns outlined in that Decision.²² (See *id.* at 31:16–24.) Particularly where,
 8 as here, the agency provided ample case-specific feedback in the 2019 Decision and would
 9 have provided preacquisition feedback, the Court does not find its case-by-case
 10 adjudication process to be arbitrary and capricious.

11 **B. First Amendment Claims**

12 GCU argues that Defendants’ licensing policy prohibiting GCU from holding itself
 13 out to the public as a nonprofit under Title IV is an unconstitutional prior restraint on
 14 speech. (MSJ at 30); *see* 34 C.F.R. § 668.71(b) (a Title IV participant may lose Title IV
 15 funding if it makes “substantial misrepresentations about the nature of its educational
 16 program, its financial charges, or the employability of its graduates.”). The DOE does not
 17 restrict GCU from representing itself as a § 501(c)(3) tax-exempt entity or from openly
 18 disagreeing with the DOE’s Title IV nonprofit determination, but GCU argues that there is
 19 no reason for the DOE’s narrower ban. (See X-MSJ at 29; MSJ at 31.) According to GCU,
 20 any representation of nonprofit status by GCU is not misleading because GCU is a
 21 nonprofit. (MSJ at 30.) And regardless, GCU argues, “there is no evidence in the record
 22 that students place any importance on the [DOE]’s elusive nonprofit/for-profit distinction.”
 23 (*Id.* at 30–31.) Defendants persuasively counter these claims.

24 As a threshold matter, “false or misleading commercial speech” is not protected
 25 under the First Amendment. (X-MSJ 26); *Hoffman v. Cap. Cities/ABC, Inc.*, 255 F.3d 1180,

26
 27 ²² Defendants have repeatedly distinguished the Purdue-Kaplan transaction—after which
 28 the DOE recognized Purdue Global as a public institution—from GCU’s sale. (See X-MSJ
 at 25, 25 n.16.) And again, GCU informed the DOE that the sale “stands on its own,” which
 undermines its current claim that Defendants unfairly deviated from their decision
 regarding Purdue Global’s Title IV status. (See X-MSJ at 25 (citing AR-J-0156).)

1 1184–85 (9th Cir. 2001) (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24
 2 (1995)). The DOE argues that GCU “marketing itself as a nonprofit *school* suggests to
 3 students and the public that the [DOE] considers GCU a nonprofit under its regulations.”
 4 (X-MSJ at 29.) GCU has an “economic motive” to present itself as a nonprofit institution,
 5 as evidenced by Mr. Mueller’s comments that GCU recruiting has boomed since losing its
 6 for-profit stigma. (See X-MSJ SOF ¶ 32); *Am. Academy of Pain Mgmt. v. Joseph*, 353 F.3d
 7 1099, 1106 (9th Cir. 2004) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–
 8 67 (1983)) (speech is commercial when “(1) the speech is admittedly advertising; (2) the
 9 speech references a specific product; and (3) the speaker has an economic motive for
 10 engaging in the speech.”). GCU suggests that some of its speech inviting enrollment at
 11 GCU is advertising. (See MSJ at 30.) Any such misleading speech is not protected by the
 12 First Amendment.

13 Defendants also contend that the DOE’s speech licensing provision is a “permissible
 14 condition on [GCU’s] receipt of federal funds under Title IV.” (X-MSJ at 26.) The Court
 15 agrees. “If speech is not ‘purely commercial’—that is, if it does more than propose a
 16 commercial transaction—then it is entitled to full [protection].” *Mattel, Inc. v. MCA*
 17 *Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (quoting *Hoffman*, 255 F.3d at 1185–86).
 18 But “if a party objects to a [speech-related] condition on the receipt of federal funding, its
 19 recourse is [usually] to decline the funds.” *Agency for Intern. Dev. v. Alliance for Open*
 20 *Society Intern., Inc.*, 570 U.S. 205, 214 (2013). A speech-related condition on funding is
 21 only unconstitutional if “prohibits the recipient from engaging in the protected conduct
 22 outside the scope of the federally funded program.” *Id.* at 217 (quoting *Rust v. Sullivan*,
 23 500 U.S. 173, 197 (1991)). GCU is not forbidden from calling itself a § 501(c)(3) tax-
 24 exempt organization, nor is it forced to adopt the DOE’s opinion about its Title IV nonprofit
 25 status—on the contrary, it may openly disagree with the DOE’s determination and receive
 26 the same Title IV funding. *C.f. id.* at 218–19 (funding condition that forced recipients to
 27 “espouse [the Government’s] belief as its own” violated the First Amendment).
 28 Defendants’ speech condition only requires that GCU accurately represent the outcome of

1 the Decisions to the public. As such, the condition is a permissible restriction within the
2 scope of Title IV. *Ass'n of Priv. Sector Colleges and Univs*, 681 F.3d at 435 (“[S]tudents
3 are expected to repay their federal loans; their failure to do so shifts their tuition costs onto
4 taxpayers. But schools receive the benefit of accepting tuition payments from students
5 receiving federal financial aid, regardless of whether those students are ultimately able to
6 repay their loans. Therefore, Congress codified statutory requirements in the HEA to
7 ensure against abuse by schools.”)

8 **IV. CONCLUSION**

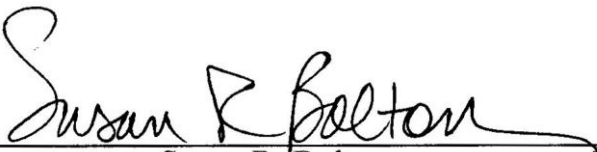
9 The record and law reflect that the DOE has authority to determine whether an
10 institution qualifies as a nonprofit under Title IV. Further, Defendants have shown that the
11 Decisions were not arbitrary and capricious. The Court concludes that Defendants lawfully
12 decided that GCU is not a nonprofit under Title IV, and therefore the DOE does not violate
13 the First Amendment by placing corresponding restrictions on GCU’s self-representation.

14 **IT IS ORDERED** denying Plaintiff Grand Canyon University’s Motion for
15 Summary Judgment (Doc. 59) and granting Defendants Department of Education and
16 Miguel Cardona’s Cross-Motion for Summary Judgment (Doc. 74).

17 **IT IS FURTHER ORDERED** denying Plaintiff Grand Canyon University’s
18 Motion to Supplement the Administrative Record and Take Judicial Notice (Doc. 63).

19 **IT IS FURTHER ORDERED** directing the Clerk to enter Judgment.

20
21 Dated this 1st day of December, 2022.

22
23
24 
25 _____
26 Susan R. Bolton
27 United States District Judge
28