No. 24-13814

In the United States Court of Appeals for the Eleventh Circuit

STATE OF FLORIDA,
Plaintiff-Appellant,

v.

U.S. SECRETARY OF EDUCATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 0:23-cv-61188-JB

BRIEF OF AMICUS CURIAE THE DEFENSE OF FREEDOM INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT'S JUDGMENT

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STATEMENT OF INTEREST[1]

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing educational freedom and opportunities for every American family and student and to protecting the civil and constitutional rights of Americans at school. DFI was founded in 2021 by former senior leaders of the U.S. Department of Education who are experts in federal agency law and policy and related constitutional and civil rights matters. DFI's litigation counsel have extensive experience with challenges to agency action under the Administrative Procedures Act ("APA").

INTRODUCTION SUMMARY OF ARGUMENT

The District Court failed to appreciate the significance of the new role that the Department seized for itself in its regulatory response to SB 7044 Ch. 2022-70, § 4, at 7, Laws of Fla; *see also* Ch. 2023-82, § 11, at 14, Laws of Fla. (amending SB 7044). After Governor Ron DeSantis signed SB 7044 on March 9, 2022, the bureaucratic machinery of the U.S.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, contributed money to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

Department of Education (the "Department") quickly went to work to undermine the new law by inventing new requirements that exceed its statutory authorization and mark a stark departure from its prior administration of the federal student aid program. SB 7044 seeks to ensure that students enrolled in Florida's state-supported universities and colleges receive a quality education by breaking up the monopoly exercised by a single accreditation agency, the Southern Association of Colleges and Schools Commission, over the accreditation of Florida's state-supported postsecondary institutions. The law is a critical reform that challenges the status quo in higher education and the comfortable sinecures favored by the Department.

Within months of the enactment of SB 7044[2] and hoping to discourage compliance with the law, the Department ignored notice-and-comment rulemaking requirements and rushed to use its favored policy-making vehicle: "rule by letter." On July 19, 2022, the agency issued two Dear Colleague Letters to institutions of higher education, GEN-22-11

[2] As originally enacted, the statute required schools to change accreditors every five years, but a 2023 amendment limited this to a one-time change. Ch. 2022-70, § 4, at 7, Laws of Fla; *see also* Ch. 2023-82, § 11, at 14, Laws of Fla. (amending SB 7044)

Guidance for Institutions Seeking to Change or Add Accrediting Agencies, U.S. Dep't of Educ., GEN-22-10 (July 19, 2022), https://tinyurl.com/3733ajth and GEN-22-10 *Procedures for Institutions Seeking Approval of a Request to Change or Add Accrediting Agencies,* U.S. Dep't of Educ., GEN-22-11 (July 19, 2022) (updated Sept. 26, 2022), https://tinyurl.com/4kyxvnkw ("DCLs"), as well as a letter to institutional accreditation agencies *Letter to Institutional Accrediting Agencies*, at 1, U.S. Dep't of Educ, https://tinyurl.com/4t9w8xjt (July 19, 2022) (citing 20 U.S.C. § 1099b(a)(2) (1994) ("Accreditor's Letter")(collectively, "Guidance").[3]

As explained more fully below, the Guidance violates the Higher Education Act, as amended ("HEA"), 20 U.S.C. § 1099b, and ignores basic rulemaking requirements imposed by the APA, 5 U.S.C. § 706. By attacking Florida's reform, the Department also violates prohibitions set

[3] Along with the Guidance, the Department also posted a related blog entry on its website on July 19, 2022, but the post has since been taken down. The post can still be found through a secondary website that captured it. *See Postsecondary Accreditation Cannot Become a Race to the Bottom*, Dep't of Educ. Blog ("Blog") (July 19, 2022) https://www.einpresswire.com/article/582207952/postsecondary-accreditation-cannot-become-a-race-to-the-bottom originally posted at blog.ed.gov.

forth in the Department of Education Organization Act ("DEOA"), 20 U.S.C. §§ 3401-3404 on the agency directing and interfering with a state's administration of its universities and colleges.

Notwithstanding the recent change in administrations, the Guidance has not been rescinded and remains in effect. This Court should reverse the District Court's decision and allow Florida's challenge to the Guidance to proceed to the merits.

ARGUMENT

The District Court found, inter alia, that Florida failed to plead viable causes of action under the Administrative Procedure Act. Doc. 43 –Pg 44. Contrary to the District Court's characterization, Florida does not merely present "rhetorical conclusions" to argue that the Guidance violated the notice and comment requirements, the arbitrary and capricious standards, and contravened the HEA. *Id.* at 42-44. With the Guidance, the Department assumes a new role as gatekeeper of accreditation decisions made by Florida and other states in their capacity as sovereigns responsible for the education of their citizens. This is a significant policy shift for the Department — one that improperly seeks to diminish Florida as an equal member of the HEA program integrity

triad, increases the Department's authority beyond its statutory limits, and ignores the procedural requirements of the APA.

I. THE GUIDANCE IMPROPERLY DIMINISHES FLORIDA'S ROLE IN THE TITLE IV PROGRAM INTEGRITY TRIAD.

As a sovereign state, Florida is an equal member of the Title IV "program integrity triad" established by Congress in the HEA, alongside (and not subject to) the Department and the accreditation agencies. DFI is gravely concerned that the Department aims to use the Guidance to leverage its oversight of accreditation agencies and management of the federal student aid program in a way that improperly reduces the role of the states in the accountability triad so as to undermine needed reforms in higher education.

State authority within the triad provides a balance within the federal scheme to assure students of the quality of postsecondary institutions eligible to receive financial aid under Title IV of the HEA. 20 U.S.C. § 1070 *et seq*. This statutorily mandated balance is intended to ensure that the Department does not become the ultimate arbiter over how public and private postsecondary institutions are managed and run for the benefit of students, parents, and taxpayers. As one authority has

explained, "[t]he United States does not have a centralized authority exercising singular national control over postsecondary educational institutions." *See* Alexandra Hegji, Cong. Rsch. Serv., R43826 *An Overview of Accreditation of Higher Education in the United States*, at 3 (2020).

Congress was clear about the Department's two primary responsibilities in the HEA program integrity triad: to ensure the "administrative capability and financial responsibility" of participating Title IV institutions and the quality of independent higher education accreditors. 20 U.S.C. § 1099c. The Guidance far exceeds this authority and is an affront to the balanced triad envisioned by Congress.

In issuing the Guidance, the Department acts as if Florida and other states have ceded their authority to unelected officials within the federal government for the management and quality of their states' public postsecondary institutions. The Department has no authority to question or circumscribe Florida's decision to dictate the timing of the process that its colleges and universities use to obtain and maintain accreditation.

Florida is not an outlier. States across the country have issued a variety of accreditation-related mandates for their state-supported postsecondary institutions, perhaps ironically in large measure due to pressure from the Department for states to take a stronger role in the HEA program integrity triad. *See, e.g.,* N.C. GEN. STAT. ANN. § 116-11.4 (prohibiting University of North Carolina constituent institutions from maintaining consecutive membership with accreditation agencies); W. VA. CODE ANN. § 18B-4-7a (removing the requirement that West Virginia institutions seek accreditation only from the North Central Association and freeing them to seek accreditation from any Department-recognized accreditation agency). Indeed, the Department published regulations on October 29, 2010, requiring states to take a more active role as members of the triad. *See* 34 C.F.R. §§ 600-03, 682, 685-86, 668, 690-91 (Oct. 29, 2010). The Department's capricious targeting of SB 7044, passed by a democratically-elected legislature and signed by a democratically-elected governor, ventures well beyond any statutory authority and sets a dangerous precedent for the Department to undermine state authority by picking winners and losers based on whether the current presidential administration favors a state's valid policy choices and political climate.

II. THE GUIDANCE IS SUBJECT TO REVIEW UNDER THE APA.

As the District Court noted, federal courts cannot review an administrative action that is not "final" within the meaning of 5 U.S.C. § 704. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001). "The core question [in determining finality] is whether the agency has completed its decisionmaking process and whether the result of that process is one that will directly affect the parties." *Norton*, 324 F.3d at 1236. "By contrast, the Supreme Court has defined a non-final agency order as one that 'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Id.* at 1237.

Whether the Guidance established a new interpretation or merely restated the Department's earlier interpretation matters because a final, reviewable agency action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *United States Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 591 (2016) (quotation marks omitted). "An agency's restatement of an already-existing policy or interpretation does not, on its own, determine any rights or obligations

and imposes no legal consequences." *Clayton Cty. v. FAA*, 887 F.3d 1262,1267 (11th Cir. 2018).

The Guidance clearly constitutes final administrative action under Section 704 and did not "le[ave] the world just as [the Department] found it." Doc 43 –Pg 38 (citing *Clayton Cty.*, 887 F.3d at 1266-67). Contrary to the District Court's conclusion, the Guidance leads to "additional consequences" for institutions and accrediting agencies, as is clear from the face of the Guidance. *See* Doc 43–Pg 37. The Guidance is not "preliminary" or "tentative," nor is it "[a]t best . . . interpretive rules." Doc 43 – Pg 43.

Rather, in the Guidance, the Department makes clear that adverse administrative action will result from any failure to comply with the terms of the Guidance, regardless of what state law may require. The District Court itself recognized that GEN-22-11 explicitly requires institutions to submit documentation demonstrating "reasonable cause" **before** applying to a new accrediting agency, revoking prior guidance requiring submission of this information after they begin that process. *See* Doc 43 – Pg 36. GEN-22-11 underscores its coercive impact by requiring institutions that are currently changing accreditors or adding

a new accreditor and relying on the process set out in the 2016 Guidance to "immediately inform the Department consistent with the procedures" of the DCL, or risk their Title IV funding eligibility. *See* GEN-22-11. This language underscores an abrupt shift in the Department's interpretation of the applicable authorities, and the guidance the Department gave in 2016, *see* Federal Student Aid, *Guidance for Schools Seeking New Accreditation* (August 5, 2016), https://tinyurl.com/fkf2jwva (the "2016 Guidance"), no longer governs. *See* GEN-22-11 Moreover, the Guidance revamps the process for changing accreditors in at least three significant ways, as discussed *infra*.

Due to the enormous risk to institutions arising from a loss of institutional eligibility to participate in the Title IV student loan program, the Guidance is already having its calculated effect. Florida's public educational institutions are left asking for the Department's approval to switch accreditors in the face of SB 7044, which requires that they switch accreditors whatever the Department's view. Failure to obtain the Department's approval places the institution's Title IV eligibility at risk; ignoring SB 7044 risks violating state legal requirements for public universities and colleges.

As the Department knows, Florida educational institutions cannot risk the adverse actions threatened in the Guidance; the prospect of losing federal funding is sufficiently grave that schools must accede to the Department's wishes in the Guidance. This chilling effect is why Florida seeks relief now and demonstrates that the case is ripe for judicial review.

A. The Department Lacks Statutory Authority To Require Institutions To Obtain Agency Approval Before Changing Accreditors Absent A Failure To Show Reasonable Cause.

"[R]evok[ing] and supersed[ing]" the Department's directions in the 2016 Guidance, GEN 22-11 "**updates** the procedures [under Section 1099b(h)] by requiring an institution to submit the required documentation to the Department **prior to** submitting an application to a new accrediting agency." GEN-22-11 (emphasis added). GEN 22-11 advises that "institutions [which] have begun the process of changing or adding an accrediting agency and relied on the 2016 [Guidance] . . . must immediately inform the Department consistent with the procedures described" in it. *Id.*

From July 1992, when it first promulgated regulations governing a change in accreditors under 20 U.S.C. § 1099b(h), the Department

understood this to impose a requirement for institutions to notify them upon seeking a change of accreditors. The Department, accreditation agencies, states, and institutions each understood this for the simple reason that nowhere does Section 1099b(h) authorize the Department to "pre-approve" a change in accreditors. Section 1099b(h) merely instructs schools seeking to move from one accreditation agency to another to "submit[] to the Secretary all materials relating to the prior accreditation, including materials demonstrating reasonable cause for changing the accrediting agency or association." Echoing Section 1099b(h), 34 C.F.R. § 600.11(a)(1) directs schools to send the Secretary "[a]ll materials related to its prior accreditation" and "[m]aterials demonstrating reasonable cause for changing its accrediting agency." Sections 600.11(a)(1)(i), (ii).

The Department confirmed this understanding in its 2016 Guidance, which "remind[ed]" postsecondary institutions "how to apply to the Department" to change accreditors. *See* 2016 Guidance. The 2016 Guidance set forth the procedure that institutions were required to undertake when seeking new accreditors. *Id.* The Department advised schools "to notify [it] in writing . . . as soon as possible when the

institution begins the process of obtaining a new accrediting agency" and, with its notification, provide "documentation of its current accreditation" and "demonstrate a reasonable cause for changing its accrediting agency." *Id.* The 2016 Guidance stated that the institution was also required to notify the Department later after securing accreditation with the new agency. *Id.*

The 2016 Guidance said nothing about needing Department approval before an institution could change accreditors, which is not surprising because Section 1099b(h) requires no such thing. The statute anticipates that an institution will already have begun the process of changing accreditors at the time it provides notice by requiring documentation of their "**prior** accreditation." *See* GEN-22-10 (emphasis added). Similarly, the 2016 Guidance stated that notice need only be provided "as soon as possible when" – that is, **after** – the school has applied to the new accreditor. 2016 Guidance.

In 2016, the Department recognized that providing notice and documentation under Section 1099b(h) was a fairly perfunctory procedure, not a high hurdle that would discourage changes in accreditors. The Guidance expressly "revoke[d] and supersede[d]" the

2016 Guidance, *see* GEN-22-11, replacing provisions that are tethered to the express meaning of the HEA with extra-statutory requirements that have no basis in law. And in a clear shot across the bow of states like Florida that contemplate accreditation reform, the Guidance warns ominously that following the Department's new directions, which go far beyond any statutory requirements, "will help protect institutions from an inadvertent loss of Title IV eligibility." GEN-22-11.

B. The Department Has No Statutory Authority to Demand More than "Reasonable Cause" from Postsecondary Institutions Seeking to Change Accreditors.

The Department's demand in GEN-22-11 for information and documentation from postsecondary institutions as part of the pre-approval process for accreditor changes also exceeds its authority under 20 U.S.C. § 1099b(h), which merely requires that when a postsecondary institution changes accreditors, it notify the Secretary and submit documentation demonstrating "reasonable cause" for the change. Exercising its sovereign authority and as a co-equal member of the HEA's program integrity triad, Florida has directed its public postsecondary institutions to change accreditors once. This state statutory directive

alone is "reasonable cause" within the terms of 20 U.S.C. § 1099b(h) for colleges and universities to change accreditors.

The Department's regulations identify two situations where cause cannot be "reasonable," and both concern institutions trying to avoid sanctions by their accreditors. *See* 34 C.F.R. § 600.11(a)(ii). Neither has any relevance to SB 7044, which requires only a one-time change for all Florida public institutions. Thus, reasonable cause should exist presumptively, at the least, for changes under SB 7044, and there is no valid purpose for holding up the entire process waiting for the Department.

The Department further exceeds its Section 1099b(h) authority by erecting new hurdles to a showing of "reasonable cause." For example, requiring that a postsecondary institution submit "any substantive correspondence or other communications with the new accrediting agency, including any substantive correspondence or other communications with the agency relating to the institution's planned application," *see* GEN 22-11, has nothing to do with the terms of the statute, which simply directs institutions to send information on their prior accreditation and reasonable cause for change. There is no basis in

the statutory text for the Department to launch a fishing expedition through an institution's communications with a new accreditor to see whether some possible impropriety may have occurred.[4]

Similarly, "reasonable cause" should not depend on "[w]hether the proposed change of agencies or multiple accreditations[5] would strengthen institutional quality" or "[w]hether the institution is seeking to change agencies or seeking multiple accreditations because the new agency and its standards are more closely aligned with the institution's mission than the current accrediting agency," which GEN-22-10 sets forth as factors the Department will now consider under Section 1099b(h). Such considerations have no statutory basis, and simply increase the Department's ability to exercise discretion that the statute does not give it.

[4] The Supreme Court has frowned on this kind of regulatory voyeurism as a potential infringement of constitutional rights. *See Ams. For Prosperity Found. v. Bonta*, 594 U.S. 595, 613-14 (2021).

[5] Although schools are allowed to become accredited by more than one agency, the overwhelming majority do not. In any event, multiple accreditation is not relevant to a change under SB 7044.

C. Schools Complying with SB 7044 Are "Voluntary" Members of Accrediting Agencies Within the Meaning of Section 1099b(a).

Under 20 U.S.C. § 1099b(a)(2) and 34 C.F.R. § 602.14(a), the Department recognizes only accreditation agencies with a "voluntary membership" of schools. The Guidance sets forth a new understanding of "voluntariness" and signals that the Department intends to withdraw recognition from accreditors accepting requests from Florida schools complying with SB 7044. A one-time change pursuant to state statute does not cause the relationship between accreditor and postsecondary institution to somehow become "involuntary," especially given that accreditation is hardly voluntary as a practical matter.

Moreover, as the Complaint avers, the "voluntary membership" requirement "merely makes clear that neither the federal government nor accrediting agencies may force institutions to participate – not that States are prohibited from running their own institutions. *See* 20 U.S.C. § 1099b(a) (listing 'voluntary membership' as a requirement for accrediting agencies, not institutions)," Doc 1 – Pg 38, ¶ 146; *see also id.* Pg 28-29 ¶ 100; that is, under the HEA, schools could not be forced by the

Department or agencies to be accredited in order to operate. The requirement has nothing to do with complying with state law.

Unlawfully expanding its statutory role, the Department now makes a specific finding of "voluntariness" a prerequisite for institutions to change accreditors under Section 1099b(h), when it should only be a prerequisite to recognition of an accreditor under Section 1099b(a).

Purporting to clarify Section 602.14(a), the Accreditor's Letter states that a "voluntary association is intended to engender a willing and cooperative environment for the review and improvement of educational programs at American institutions of higher education." Accreditor's Letter at 1. The Accreditor's Letter then accuses Florida's SB 7044 of "potentially undermin[ing] the voluntary nature of the relationship and the independent roles of the various actors in the triad." *Id*, at 2. In light of the new Florida law, the Department states, it "has **reexamined** the issue of voluntary membership in two circumstances: [1] when institutions seek to change accrediting agencies (or seek multiple accreditation) and [2] when the Department reviews accrediting agencies as part of its recognition process." *Id.* (emphasis added). Although it

had traditionally considered "voluntary membership" only in the latter circumstance, the Department will now do so in the former as well.

Furthermore, the Accreditor's Letter states that even when the Department finds reasonable cause to change, accrediting agencies still must **"conduct their own independent evaluation of whether an institutional change of accrediting agencies (or multiple accreditation) is voluntary"** to determine "whether accrediting an institution will compromise the voluntary nature of their membership **prior to** approving a membership application." *Id.* at 2 (emphasis in original).

SB 7044 merely requires that Florida's public colleges and universities change accreditors once, and the choice of which agency an institution will apply to for accreditation belongs entirely to the institution. If the accreditation process were "voluntary" in the way that the Guidance means, then how could the Department have restricted schools from accreditation by agencies outside their geographic regions, as it did for years before the 2019 amendments to 34 C.F.R. § 602.11?[6]

[6] If the Department wants to return to the regional accreditation monopolies it eliminated in its 2019 rulemaking, *see* 84 Fed. Reg. 58834

The Guidance cannot define as "involuntary" compliance with state statutes that the Department dislikes, while finding that compliance with federal law (at least, as pronounced by the Department) is "voluntary."

III. THE COMPLAINT ADEQUATELY STATES A CLAIM THAT THE GUIDANCE REQUIRED NEGOTIATED RULEMAKING AND PUBLIC NOTICE AND COMMENT.

The District Court erred in finding that the Guidance's newly instituted pre-approval process, never before required by the Department, did not trigger notice-and-comment requirements, Doc 43 – Pg 43, notwithstanding the significant shift announced by the Guidance regarding the materials required to demonstrate "reasonable cause" and the timing of an institution's submission of those materials. Importantly, the District Court acknowledged that the Guidance "requires the institution to obtain **approval** before making the switch, whereas the 2016 [Guidance] only required the institution to **notify** the Department of the switch," Doc 43 – Pg 36 (emphasis in original), and recognized Florida's assertion that the Department had referred to the

(2019), it must do so through negotiated rulemaking and not make legislative rules by issuing desk edicts through guidance.

Guidance as a basis on which to collect additional information from institutions seeking to apply to a new accrediting agency, Doc 43 – Pg 38. Nonetheless, the Court concluded that the Guidance did not impose any "binding obligations," and thus constituted "interpretive" rules not subject to notice-and-comment rulemaking. *Id.* As discussed *supra* this conclusion ignores the immediate new obligations Florida's institutions of higher education face as they change accreditors in compliance with SB 7044 and seek to follow the new requirements the Department has set out in the Guidance under threat of becoming ineligible for Title IV funding.

The District Court demanded a level of substantive pleading that Fed. R. Civ. P. 12(b)(6) does not require. All that is required is that a complaint "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As the case moves forward, Florida can introduce evidence demonstrating the substantial burdens placed on its schools by the Guidance. This is not merely a case of Florida complaining because it does not want to "apply the law as it exists [instead of] as the State would like it to be." *Id.* at 44-45. The Complaint adequately alleged that

the Guidance is not merely interpretive, but a body of substantive, "legislative" rules that ignore the negotiated rulemaking requirements of the HEA, and the notice and comment requirements of the APA, 5 U.S.C. § 553(b). And this Court should, in reviewing *de novo*, "accept[] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Chabad Chayil, Inc. v. Sch. Bd. of Miami-Dade Cty.*, 48 F.4th 1222, 1229 (11th Cir. 2022). Such review establishes that the District Court abused its discretion by dismissing the Complaint. *Id.*

The District Court wrongly determined that the Guidance did not "impose binding obligations" and thus, were "not subject to notice and comment." Doc – 43 Pg 43. In large part, that conclusion is based on the Court's mistaken finding that the Guidance had no effect independent of the HEA and "merely advised the institutions as to what was already required" under that law. *Id.* at 39. This conclusion ignores the new submission requirements and obligations the Guidance imposes on both accreditation agencies and institutions and its expansion of the Department's discretion in recognizing an institution's switch to a new accrediting agency. The District Court's holding conflicts with clear precedent that requires courts to examine the function and not the form

of agency actions. S*ee Azar v. Allina Health Servs.*, 587 U.S. 566, 575 (2019).

The District Court relied on cases establishing general notice and comment requirements, but none of them deal with the kind of binding changes imposed by the Guidance. *See,e.g., Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-98 (2015) (analyzing whether opinion letters issued by Department of Labor fell into category of interpretive rules and noting that what defines a rule is difficult to discern because "precise meaning is the source of much scholarly and judicial debate"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03, 314-16 (1979) (holding that regulations of Defense Logistic Agency of Department of Defense which directly identified themselves as "interpretive rules" did not have binding effect).

The DCL's here are much more than interpretive rules. They impose binding obligations and have the force of law because educational institutions must comply with them in order to maintain access to federal funding under Title IV of the HEA, and the agency itself relies on them during the process of recognizing an institution's change of accreditors. *See Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987); *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1144 (10th Cir.

2010)(Gorsuch, J.); *Navient Sols. LLC v. Dep't of Educ.,* 646 F.Supp. 3d 705, 725-26 (E.D. Va. 2022).

Rather than simply reiterating pre-existing requirements, the Guidance imposes new obligations on schools and their accreditors, elevates the Department into an unauthorized accreditation gatekeeper role, and undermines efforts by Florida and other states to ensure a quality education for students attending public university and college systems. The Complaint adequately pleads that the Guidance places binding obligations on Florida's institutions of higher education and thus, notice and comment were required, which in turn states a proper claim under the APA. *See, e.g.,* Doc 1 – Pg 39, ¶ 153 (the Guidance "'affect[s] individual rights and obligations' because they add requirements for institutions that wish to change accreditors and obligate accrediting agencies to police those requirements").

IV. THE COMPLAINT ADEQUATELY STATES A CLAIM THAT THE GUIDANCE VIOLATES THE APA.

Florida properly stated a claim that the Guidance misconstrues the "voluntary membership" requirement for accreditor recognition under Section 1099b(a). The Complaint clearly cites the Department's longstanding interpretation that the purpose of the "voluntariness"

requirement under the HEA was to ensure that the Department and accreditors did not force schools to become accredited in order to operate; participation in Title IV programs is not mandatory. *See* Doc 1 – Pg 38, ¶ 146. The evidence will show that prior to the issuance of the Guidance, Department practice was consistent with this interpretation.

Similarly, the Complaint properly alleges that the Guidance is an arbitrary and capricious departure from past Department policy and practice when institutions change accreditors. *See, e.g.,* Doc 1 – Pg 39, ¶149. As set forth in the Complaint, *see, e.g.,* Doc 1 – Pg 22, ¶¶ 39-40; *id.*, Pg 28-29 ¶¶ 100-102, and described in more detail *supra*, Florida adequately referred to "past practice" and described the Department's role before the Guidance as much more limited and consistent with Section 1099b(h).

The Complaint also adequately alleges that the entire rationale for the Guidance is arbitrary and capricious. *See* Doc 1 – Pg 39, ¶ 150; *see also id.* Pg 29-30 ¶ 103. The notion that the Department applied the Guidance to prevent a "race to the bottom"[7] is meaningless because **the**

[7] Blog, *supra* note 3, https://www.einpresswire.com/article/582207952/postsecondary-accreditation-cannot-become-a-race-to-the-bottom-a-race-to-the-bottom originally posted at blog.ed.gov.

Department itself is responsible for recognizing accreditors as "reliable authorit[ies] as to the quality of education or training offered" by postsecondary institutions in order to receive federal funding under Section 1099b(a); *see also* 34 C.F.R. § 602.1(a) (Department "recognizes accrediting agencies to ensure that these agencies are . . . for . . . Federal purposes, reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit"). To the extent an accreditor lowers accreditation standards in order to attract schools, the Department can simply exercise its oversight authority granted by Congress to limit, suspend, or terminate recognition of recalcitrant accreditation agencies. Where an institution demonstrates "reasonable cause," the applicable authorities only require notification to the Department, not its approval. The approval requirement imposed by the Guidance is not legally supported by Section 1099b(h).

V. THE DEPARTMENT'S ORGANIZATION ACT BARS IT FROM UNDERMINING FLORIDA'S ACCREDITATION REFORM.

In addition to HEA and APA deficiencies, the Guidance also violates the DEOA, 20 U.S.C. § 3401 *et seq.*, which established the Department in 1979.

The DEOA expresses Congress's clear intention to circumscribe the Department's power to prevent it from interfering with a state's lawful exercise of policymaking in education:

> It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education **shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States** and the local school systems and other instrumentalities of the States.

20 U.S.C. § 3403(a) (emphasis added).

Along with this express reservation of authority to state and local government, the DEOA establishes affirmative boundaries on the Department's power:

> No provision of a program administered by the Secretary . . . shall be construed to authorize the Secretary . . . **to exercise any direction, supervision, or control over the . . . administration . . . of any educational institution, school, or school system, [or] over any accrediting agency or association** . . . except to the extent authorized by law.

20 U.S.C. § 3403(b) (emphasis added).

In attacking Florida's efforts to improve its public colleges and universities by reforming the process through which they are accredited,

the Department ignores the clear legislative mandate that it wield federal power only in support of state and local policymaking authority and "to strengthen and improve" state control over educational programs and policies. The Department's interference with Florida's authority over its public higher education system is unlawful and opens the door to a much more muscular agency approach to undermining state higher education policy with which a given presidential administration disagrees, notwithstanding the limits on federal authority set forth in the DEOA.

By threatening accreditors with withdrawal of federal recognition if they fail to carry out the Department's priorities in opposing SB 7044, the Department similarly violates the DEOA's prohibition on supervising or controlling the administration of accrediting agencies or associations. In its desire to hamstring the implementation of the Florida law, the Department trespasses on the authority of the other two co-equal members of the program integrity triad: the states and accrediting agencies. This overreach by the Department in the Guidance violates the DEOA.

CONCLUSION

Amicus curiae DFI respectfully requests that this Court reverse the District Court.

April 4, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and 11th Cir. R. 32–4 and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font. The brief contains 5,269 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

Dated: April 4, 2025
Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that I e-filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 4, 2025.

Dated: April 4, 2025
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