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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATIONAL EDUCATION ASSOCIATION, et al., Plaintiffs, v. BETSY DEVOS, in her official capacity as Secretary of Education, et al., Defendants.	Case No. 3:18-cv-05173-LB **DEFENDANTS' NOTICE OF MOTION, MOTION TO DISMISS, AND MEMORANDUM IN SUPPORT** Date: Dec. 13, 2018 Time: 9:30a.m. Place: San Francisco, CA Judge: Hon. Laurel Beeler

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 13, 2018, at 9:30a.m. in the United States Courthouse at San Francisco, California, Defendants Betsy DeVos, in her official capacity as Secretary of Education, and the Department of Education, by and through undersigned counsel, will move the Court to dismiss this action.

MOTION TO DISMISS

Defendants hereby move to dismiss this action in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1), for the reasons more fully set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

In 2016, the Department of Education ("Department") modified its distance education regulations to require covered institutions of higher education to make certain public and individualized disclosures. The revised regulations were set to take effect on July 1, 2018, but in May 2018, in response to letters from the higher education community stating that there was "widespread concern and confusion . . . regarding implementation" of that rule, the Department issued a notice of proposed rulemaking ("NPRM") proposing to delay until July 1, 2020 the rule's effective date. In light of the concerns raised in the letters, the Department believed delaying the effective date was appropriate in order to provide the Department time to reconsider its rule. After considering comments received in response to the 2018 NPRM, the Department, in July 2018, published a final rule delaying the effective date of the 2016 rule.

Plaintiffs here—the National Education Association, California Teachers Association, and three individuals—challenge the process by which the Department issued that final rule. They allege that the Department should have engaged in a negotiated rulemaking process, even though the Department determined that it had good cause not to do so, given the impracticality of completing that time-consuming process before the 2016 rule would have gone into effect. Yet the Court need not reach the merits of Plaintiffs' challenge, because Plaintiffs lack standing to assert it. The procedural defect of which Plaintiffs complain does not constitute the type of "injury in fact" required to establish Article III standing, and Plaintiffs cannot remedy this deficiency by invoking the so-called "information injury" doctrine. Compounding this flaw in Plaintiffs' theory, the injuries they allege are at best speculative, not concrete and imminent. Moreover, Plaintiffs fail to meet the additional constitutional requirement that their asserted

injuries be fairly traceable to the Department's conduct. Accordingly, the Court should grant Defendants' motion to dismiss for lack of subject-matter jurisdiction.

STATEMENT OF THE ISSUES

Whether Plaintiffs' allegations of injury confer standing to proceed in this Court as required by Article III of the Constitution.

BACKGROUND

A. Statutory Background

Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070 et seq. ("HEA"), authorizes the Department to administer loan and grant programs that assist students in paying for post-secondary education. To participate in such a program, a post-secondary institution must satisfy certain statutory criteria, including that it qualify as an "institution of higher education," *id.* § 1094(a), defined in part as "an educational institution in any State" that "is legally authorized within such State to provide a program of education beyond secondary education." 20 U.S.C. § 1001(a)(2); *see id.* §§ 1002(b)(1)(B), 1002(c)(1)(B) (requiring state authorization for proprietary institutions of higher education and postsecondary vocational institutions). Consistent with Congress's broad delegation of authority to the Department to promulgate regulations implementing and administering the HEA, *see* 20 U.S.C. §§ 1221e-3, 3474, Congress did not further prescribe the state authorization requirements in the statute.

As relevant here, the HEA imposes two procedural requirements on the Department in promulgating regulations under Title IV. First, "[t]he Secretary shall obtain public involvement in the development of proposed regulations for [Title IV]," *id.* § 1098a(a)(1), a process commonly known as "negotiated rulemaking." Through this process, the Department "obtain[s] the advice of and recommendations from individuals and representatives of the groups involved in student financial assistance programs under [Title IV], such as students, legal assistance organizations that represent students, institutions of higher education, State student grant agencies, guaranty agencies, lenders, secondary markets, loan servicers, guaranty agency servicers, and collection agencies." *Id.* Draft regulations are considered by participants

nominated by the public and selected by the Secretary, and "[a]ll published proposed regulations shall conform to agreements resulting from such negotiated rulemaking unless the Secretary reopens the negotiated rulemaking process or provides a written explanation to the participants in that process why the Secretary has decided to depart from such agreements." *Id.* § 1098(b). The Secretary may depart from the negotiated rulemaking requirement when she "determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest (within the meaning of section 553(b)(3)(B) of Title 5), and publishes the basis for such determination in the Federal Register at the same time as the proposed regulations in question are first published." *Id.*; *see also* 5 U.S.C. § 553(b)(3)(B) (provision of the Administrative Procedure Act stating that notice and comment are not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

Second, the HEA generally requires the Department to administer Title IV student financial assistance programs on an annual basis. The HEA defines the relevant "award year" as "the period beginning July 1 and ending June 30 of the following year." 20 U.S.C. § 1088(a)(1). In order "[t]o assure adequate notification and timely delivery of student aid funds" during a Title IV award year, the HEA imposes a detailed "master calendar," which sets forth a series of dates by which the Department must take certain action in the year preceding the award year in order to ready forms, funding levels, and other administrative steps for the start of the award year. *Id.* § 1089(a). In a sub-section entitled "Delay of effective date of late publications," the master calendar section of the HEA provides:

> any regulatory changes initiated by the Secretary affecting the programs under this subchapter that have not been published in final form by November 1 prior to the start of the award year shall not become effective until the beginning of the second award year after such November 1 date.

Id. § 1089(c). A purpose of this statutory provision is to "apprise regulated institutions of the coming year's requirements." *Career Coll. Ass'n v. Riley*, 74 F.3d 1265, 1268 (D.C. Cir. 1996).

B. Regulatory Background

In 2012, the D.C. Circuit held that the Department's distance education regulation violated the Administrative Procedure Act ("APA"), because the final rule was not a logical outgrowth of the Department's notice of proposed rulemaking. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 461-62 (D.C. Cir. 2012). Subsequently, the Department announced that the topic of state authorization for programs offered through distance or correspondence education would be considered by a negotiated rulemaking committee. 78 Fed. Reg. 22,467, 22,468 (April 16, 2013); *see also* 77 Fed. Reg. 25,658 (May 1, 2012) (announcing intent to establish negotiated rulemaking committee "designed to prevent fraud and otherwise ensure proper use of Title IV, HEA program funds, especially within the context of current technologies"); 78 Fed. Reg. 69,612, 69,614 (Nov. 20, 2013) (announcing intention to establish a negotiated rulemaking committee to prepare proposed regulations regarding state authorization).

Following a notice of proposed rulemaking, 81 Fed. Reg. 48,598 (July 25, 2016), the Department issued its final rule on December 19, 2016. 81 Fed. Reg. 92,232 (Dec. 19, 2016) ("2016 Rule"). The 2016 Rule amended the Department's prior regulations to define "State authorization reciprocity agreement" and describe more fully the conditions for state authorization, including requiring that an institution make public and individualized disclosures about, *inter alia*, its state authorization status, the process for submitting complaints, adverse actions that a State entity or accrediting agency has initiated against the institution, and refund policies. 81 Fed. Reg. at 92,262-63. The regulations contained in the 2016 Rule were set to take effect on July 1, 2018. 81 Fed. Reg. at 92,232.

On January 30, 2017, the Department announced its intention to take regulatory action regarding the 2016 Rule, 82 Fed. Reg. 8,669, 8,669 (Jan. 30, 2017), and subsequently sought input "on Department regulations related to postsecondary education that may be appropriate for repeal, replacement, or modification," 82 Fed. Reg. 40,518, 40,518 (Aug. 25, 2017). On February 6, 2018, the Department received a letter from the American Council on Education expressing concern about the 2016 Rule's requirements pertaining to institutions' disclosures about the state complaint process for students' state of residence. 83 Fed. Reg. 24,250, 24,251

(May 25, 2018); *see also* Letter from Terry W. Hartle to Betsy DeVos, ECF No. 1-5 ("ACE Letter"). The following day, the Department also received a letter from the Western Interstate Commission for Higher Education ("WICHE") Cooperative for Education Technologies, stating that "there is widespread concern and confusion in the higher education community regarding the implementation of the [2016 Rule], particularly with respect to State authorization of distance education and related disclosures." 83 Fed. Reg. at 24,251; *see also* Letter from Russell Poulin et al. to Frank Brogan, ECF No. 1-6 ("WICHE Letter").

On May 25, 2018, the Department issued a notice of proposed rulemaking, proposing to delay, until July 1, 2020, the effective date of the 2016 Rule. 83 Fed. Reg. 24,250, 24,250 (May 25, 2018) ("2018 NPRM"). The Department explained that the proposal was "[b]ased on additional concerns recently raised by regulated parties related to implementation of the [2016 Rule]," specifically those raised in the ACE Letter and WICHE Letter. *Id.* at 24,251. As relevant here, the Department found that the 2016 Rule's disclosure requirements "require further review," that "guidance is not the appropriate vehicle to provide the clarifications needed," and that "the Department believes that the clarifications requested are so substantive that they would require further rulemaking including negotiated rulemaking under the [HEA]." *Id.* Accordingly, and in light of the master calendar requirement and the fact that "[i]t would be confusing and counterproductive for the final regulations to go into effect before the conclusion of this reconsideration process," the Department believed that a rule delaying the 2016 Rule's effective date was appropriate. *Id.* at 24,252.

The 2018 NPRM expressly considered the effect that such a delay would have on students and institutions. *Id.* at 24,251-52. For instance, the Department found that the proposed rule would benefit students because institutions may, to the detriment of those students, choose to limit their programs rather than comply with the 2016 Rule. *Id.* at 24,251-52. The Department also noted that agency guidance pertaining to student complaints and student consumer disclosures "ensur[es] that during the delay institutions will be aware of their existing obligations and that students will receive these protections." *Id.* at 24,252. On the other hand, the Department acknowledged that the proposed rule "may require students to obtain this

information [required by the 2016 Rule] from another source or may lead students to choose sub-optimal programs for their preferred courses of study," and that "the delay of the disclosures related to the complaints resolution process could make it harder for students to access available consumer protections." *Id.* at 24,253. The Department also noted that the proposed rule would benefit institutions, insofar as those institutions would incur compliance costs related to the 2016 Rule. *Id.* at 24,254.

Additionally, the 2018 NPRM explained that "the Department has good cause to waive the negotiated rulemaking requirement with regard to its proposal to delay the effective date of the final regulations to July 1, 2020, in order to complete a new negotiated rulemaking proceeding to address the concerns identified by some of the regulated parties in the higher education community." *Id.* at 24,252. Specifically, the Department was unable to complete the time-consuming negotiated rulemaking process between the dates it received the ACE Letter and WICHE Letter—"the catalysts for the delay"—and the effective date of the 2016 Rule. *Id.* The Department thus believed that subjecting a proposed delay rule to negotiated rulemaking would be both impractical and inconsistent with the public interest. *Id.*

On July 3, 2018, the Department published in the Federal Register its final rule delaying the effective date of the 2016 Rule. 83 Fed. Reg. 31,296 (July 3, 2018) ("Delay Rule").[1] After reiterating the concerns raised in the ACE Letter and WICHE Letter, *id.* at 31,296-97, the Department addressed the comments submitted in response to the 2018 NPRM, *id.* at 31,297-300. These comments included, *inter alia*, support for the proposed rule; concern about the potential harm to students resulting from a delay; and concern regarding the procedures utilized by the Department in proposing the delay, specifically with respect to whether any proposed delay should have been effectuated through negotiated rulemaking. *Id.* After considering the comments and the effect of the delay, *id.* at 31,300-02, the Department determined that, as of June 29, 2018, the effective date of the 2016 Rule was delayed until July 1, 2020, thereby

[1] The Department placed the Delay Rule on public inspection with the Federal Register on June 29, 2018. https://www.federalregister.gov/public-inspection/2018/06/29.

"ensur[ing] that there is adequate time to conduct negotiated rulemaking to reconsider selected provisions of [the] 2016 final regulations and, as necessary, develop revised regulations." *Id.* at 31,296.

C. Plaintiffs' Complaint

Plaintiffs—the National Education Association ("NEA"), California Teachers Association ("CTA"), and three individuals—filed the instant action on August 23, 2018. Compl. for Declaratory and Injunctive Relief, ECF No. 1 ("Compl.") ¶¶ 16-17, 20-22. Plaintiffs allege that NEA and CTA are professional organizations that advocate on behalf of their members enrolled in online and distance education programs. *Id.* ¶¶ 14-18. According to Plaintiffs, NEA and CTA "bring this suit on behalf of their members," who Plaintiffs claim have not received the benefit of the disclosures required by the 2016 Rule. *Id.* ¶ 19. Similarly, Plaintiffs allege the three individuals are two educators and an aspiring educator enrolled in or considering enrolling in online programs, and whose educational decisions may be affected by the disclosures required by the 2016 Rule. *Id.* ¶¶ 20-22.

Plaintiffs bring their action pursuant to the APA. *Id.* ¶¶ 98-101. Specifically, they claim that the Department lacked good cause to waive the HEA's negotiated rulemaking requirement with respect to the Delay Rule, and that the Department's failure to adhere to that requirement violated 5 U.S.C. § 706(2)(A) and § 706(2)(D). *Id.* Plaintiffs seek declaratory and injunctive relief, including an injunction prohibiting the Department from implementing the Delay Rule and an order requiring Defendants "to implement and give effect to the [2016 Rule]." *Id.*, Prayer for Relief at 26-27.

DISCUSSION

A. Legal Standard

A Rule 12(b)(1) motion challenges a federal court's jurisdiction over the subject matter of the complaint. The party invoking the court's jurisdiction bears the burden of establishing that the court has the requisite subject-matter jurisdiction to grant the relief requested. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court must grant a

Rule 12(b)(1) motion when, looking at the entirety of the complaint, its allegations fail to establish jurisdiction either facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). While in a facial attack, all material allegations are taken as true, the court does not assume the truthfulness of the allegations in a factual attack and may review evidence beyond the complaint without converting the motion into one for summary judgment. *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1236 (9th Cir. 2008).

B. Plaintiffs Lack Standing

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citation omitted). "For Article III standing, a plaintiff must satisfy three 'irreducible constitutional minimum' requirements: (1) he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139-40 (9th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs here have failed to demonstrate either the injury or traceability elements of standing, and so the Court must dismiss their Complaint.

1. Plaintiffs Have Failed To Allege An Injury In Fact

"A federal court's jurisdiction [] can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quotation omitted). Consistent with this longstanding principle, an organizational plaintiff—like Plaintiffs NEA and CTA in this case—must establish that it has either organizational standing based on an alleged "injury to itself" or associational standing based on "alleg[ations] that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit." *Id.* at 511. Here, neither the individual Plaintiffs nor the members on whose behalf NEA and CTA bring this action are able

to demonstrate an injury for purposes of Article III, because the purported harm from a lack of negotiated rulemaking is a procedural injury *in vacuo* that does not confer standing.

The principal allegation of Plaintiffs' Complaint is that "[b]y waiving the statutory negotiated rulemaking requirement without good cause, ED has violated the HEA and has acted in a manner that was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA." Compl. ¶ 10. In other words, Plaintiffs complain about the procedure by which the Department promulgated the Delay Rule. But "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *accord Wilderness Society, Inc. v. Rey*, 622 F.3d 1251, 1258 (9th Cir. 2010); *Glasser v. Nat'l Marine Fisheries Serv.*, 360 F. App'x 805, 806 (9th Cir. 2009); *Clatskanie Peoples Util. Dist. v. Bonneville Power Admin.*, 330 F. App'x 637, 638 (9th Cir. 2009). Irrespective of any procedural "right" under the HEA to negotiated rulemaking in connection with the Delay Rule, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 555 U.S. at 497. "[T]he injury-in-fact requirement" is not satisfied merely "by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Lujan*, 504 U.S. at 573. Thus, because "deprivation of procedural rights, alone, cannot confer Article III standing," Plaintiffs' challenge to the Delay Rule must be dismissed absent an allegation of some cognizable substantive injury. *Wilderness Society*, 622 F.3d at 1257-58 (rejecting the notion that an injury can be "sufficiently concrete and particularized" where "the harm [was] the loss of the opportunity to comment" without an "assert[ion] that any *specific* injury will occur," because such a "finding cannot be squared with the Supreme Court's analysis in *Summers*" (emphasis added)).

Plaintiffs here fail to adequately allege such an injury for purposes of Article III. Their theory of standing—premised on the alleged lack of disclosures otherwise required by the 2016 Rule, Compl. ¶¶ 19-22—is most appropriately analyzed within the so-called "informational injury" doctrine. Pursuant to that doctrine, courts have recognized an Article III injury where a

plaintiff has been deprived of information to which they have a statutory right. *Wilderness Society*, 622 F.3d at 1258; *see also, e.g.*, *Cary v. Hall*, No. 05-cv-4363, 2006 WL 6198320, at *9 (N.D. Cal. Sept. 30, 2006) ("[I]nformational injury is implicated when plaintiffs are effectively denied information to which they would otherwise be entitled by statute." (citations omitted)). Thus courts have held that a plaintiff has demonstrated standing by being denied information statutorily required to be disclosed under, *inter alia*, the Federal Election Campaign Act of 1971, the Freedom of Information Act, the Fair Housing Act, the Clean Water Act, and the Federal Advisory Committee Act. *Wilderness Society*, 622 F.3d at 1258 (citations omitted). By contrast, no provision of the HEA requires the disclosures sought by Plaintiffs. That statute merely requires that an institution be "legally authorized" by a state to receive Title IV funds. 20 U.S.C. § 1001(a)(2); *see id.* §§ 1002(b)(1)(B), 1002(c)(1)(B). The disclosures that Plaintiffs allegedly seek, by contrast, are based solely on a regulation that never went into effect. 81 Fed. Reg. at 92,262-63. Accordingly, Plaintiffs' alleged lack of information is insufficient to confer standing, regardless of any procedures that the HEA might prescribe. *See Wilderness Society*, 622 F.3d at 1260; *see also Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 113 (D.D.C. 2015) ("[I]nformational standing arises 'only in very special statutory contexts,' where a statutory provision 'explicitly create[s] a right to information.'" (quoting *Animal Legal Def. Fund v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994))).

Moreover, Plaintiffs' allegations fail to demonstrate injury for purposes of Article III because the purported harm is speculative or conjectural, not "actual or imminent." *Lujan*, 504 U.S. at 561, 564. For instance, Plaintiffs allege that "NEA and CTA members are injured by the [Delay Rule] because they are actively considering whether to enroll in or continue enrollment in certain programs of higher education that would be required, under the [2016 Rule], to make certain disclosures." Compl. ¶ 19. But "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [courts] require." *Lujan*, 504 U.S. at 564. *Cf. Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) ("The proposition that these plaintiffs have standing because they may, at some point, depending on which candidates decide

to run in a future election, choose to cast a ballot for NOTC and therefore be denied a right that they assert exists epitomizes speculative injury.").

Equally speculative are Plaintiffs' allegations that they will not receive the subject disclosures. They fail to allege, for example, that such information is not publicly available (e.g., on an institution's website) or that they have attempted to obtain such information by contacting the institution directly but have been rebuffed.[2] To the contrary, Plaintiffs expressly contemplate that they may obtain the subject disclosures: "Because of the [Delay Rule], NEA and CTA members *may not* receive disclosures of adverse actions taken against a particular institution or program. NEA and CTA members *may not* receive other information about institutions being considered for enrollment . . . ." Compl. ¶ 19 (emphases added). Courts regularly reject such conjecture as insufficient under Article III's requirements. *E.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. Brown*, No. 2:16-cv-02441, 2018 WL 1535531, at *5 (E.D. Cal. Mar. 29, 2018) ("Although it is very possible, and in the Court's opinion possibly even likely, that some of Plaintiff's members will eventually be adversely affected when the Act is applied to them, based on the current allegations at least, that possibility is still speculative at best."); *Fletcher v. California Corr. Health Care Servs.*, No. 16-cv-04187, 2016 WL 5394125, at *2 (N.D. Cal. Sept. 27, 2016) ("Here, at most, Plaintiff only alleges the possibility of a disclosure of his medical information. Without more, the alleged injury is entirely speculative."); *Lovell v. P.F. Chang's China Bistro, Inc.*, No. 14-cv-1152, 2015 WL 4940371, at *2 (W.D. Wash. Mar. 27, 2015) ("[T]he fear that something might happen in the future is simply too speculative an injury to give rise to a present cause of action."); *accord Nat'l All. for Mentally Ill, St. Johns Inc. v. Bd. of Cty. Comm'rs of St. Johns Cty.*, 376 F.3d 1292, 1295 (11th Cir. 2004) ("Assertions about what might happen do not establish an injury that is 'concrete and particularized.'" (citation omitted)).

Plaintiffs fare no better in alleging that the subject disclosures "would help the NEA and CTA members identify programs that offer credentials that potential employers recognize and

[2] As explained below, *infra* at 14, Plaintiffs are likely able to obtain at least some information regarding an institution's state authorization through a variety of publicly available sources.

value." Compl. ¶ 19. Any such helpfulness is not only insufficiently concrete to confer Article III standing,[3] but is also embedded in a series of hypothetical events tied to the potential content of the disclosure as well as a student's potential application to, admission to, and attendance at a particular program that will ultimately be more optimal for the student. *See id.* ¶ 20 (Plaintiff Heiman's allegation that "[i]f Emporia made the disclosures required by the Final Rule, Mr. Heiman would carefully review such disclosures and, *depending on the information provided*, the disclosures *could* affect his decisions whether to continue his degree at Emporia, whether to transfer to a different institution or program, and whether to take out additional loans to finance his education." (emphases added)); *id.* ¶ 21 (Plaintiff Uyehara's allegation that "*[d]epending on the information provided*, her review of such a disclosure *could* affect her decision whether to enroll at University of New England, or whether to enroll at a different school instead." (emphases added)); *id.* ¶ 22 (Plaintiff Portilla's allegation that "*depending on the information*, the disclosure *could* affect her decision whether to continue her program at WGU, including whether to use her grant funding, whether to stop attending the program, or whether to *consider* transferring elsewhere." (emphases added)). "This theory stacks speculation upon hypothetical upon speculation, which does not establish an 'actual or imminent' injury." *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 587 (D.C. Cir. 2011) (citing *Lujan*, 504 U.S. at 560).

Further, the Court should reject Plaintiffs' theory of standing because, to the extent Plaintiffs have suffered any harm, it is self-inflicted. Plaintiffs themselves acknowledge that they may be able to obtain the requested information even absent the 2016 Rule. *See* Compl. ¶ 19 ("Delaying the requirement to provide these disclosures will require the NEA and CTA

[3] Plaintiffs' allegation that "the delay of the disclosures related to the complaint resolution process will make it harder for students to access available consumer protections" is likewise insufficiently concrete, particularly where such disclosures are not required under the informational injury doctrine. *See* Compl. ¶ 19; *see also Perry v. Columbia Recovery Group, LLP*, No. 16-cv-0191, 2016 WL 6094821 (W.D. Wash. Oct. 19, 2016) (the allegedly violated procedural requirements "are procedural rights designed to decrease the risk of injury identified by Congress in the FDCPA—abusive debt collection practices . . . . [and although] violating these procedural rights may result in the harm identified by Congress, it does not result in such an injury on its own. . . [Therefore], the bare procedural violations . . . alleged . . . do not amount to a concrete injury").

members to obtain this information from another source, if available at all, ..."). Yet they apparently have undertaken no effort whatsoever to determine whether such information is in fact available elsewhere. *See id.* ¶¶ 19-22. Nor would such efforts have been futile. For instance, Emporia State University, for which Plaintiff Heiman allegedly seeks information, Compl. ¶ 20, has on its website information pertaining to state authorization, including a link for complaint resolution contacts by state. *See* https://www.emporia.edu/distance/state-authorization (last visited Oct. 26, 2018); *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (considering publicly available materials, including press release and statement, because "[w]ith a factual Rule 12(b)(1) attack, . . . a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment"); *Moss v. Infinity Ins. Co.*, No. 15-cv-3456, 2016 WL 7178559, at *2 (N.D. Cal. Dec. 9, 2016) (on Rule 12(b)(1) motion, considering, *inter alia*, website printouts). Similarly, the University of New England, to which Plaintiff Uyehara allegedly plans to apply, includes on its website information regarding state authorization. *See* https://www.une.edu/sites/default/files/consumer_complaints_-_2018_1.pdf (last visited Oct. 26, 2018). And the Department has on its website a September 2017 final audit report pertaining to the use of Title IV funds by Western Governors University, in which Plaintiff Portilla is allegedly enrolled and for which she allegedly seeks information. Compl. ¶ 22; *see* https://www2.ed.gov/about/offices/list/oig/auditreports/fy2017/a05m0009.pdf (last visited Oct. 26, 2018). Accordingly, insofar as Plaintiffs have been unwilling to even attempt to obtain the purportedly sought-after information, they have failed to demonstrate an Article III injury. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) ("self-inflicted injuries" do not give rise to standing). *Cf. Lee v. Chase Manhattan Bank*, No. 07-cv-04732, 2008 WL 698482, at *2 (N.D. Cal. Mar. 14, 2008), *aff'd sub nom. Lee v. Am. Exp. Travel Related Servs., Inc.*, 348 F. App'x 205 (9th Cir. 2009) ("None of these purported disputes suffice to demonstrate a real or imminent injury, because Plaintiffs have taken no steps to actually attempt to arbitrate the disputes.").[4]

[4] As explained above, NEA and CTA lack associational standing because their members do not

2. Plaintiffs Have Failed To Allege That The Department Caused Any Injury

As explained above, Plaintiffs fail to allege a cognizable injury-in-fact because they cannot invoke the informational injury doctrine, and in any event they describe harms that are speculative, hypothetical, and self-inflicted. For largely the same reasons, Plaintiffs fail to satisfy the additional requirement that their asserted injuries be fairly traceable to the Department's conduct. *See Bellon*, 732 F.3d at 1141 (plaintiff must demonstrate that its injury is "causally linked or 'fairly traceable' to the [defendant's] alleged misconduct, and not the result of misconduct of some third party not before the Court").

The premise underlying Plaintiffs' claim to standing is that, if the 2016 Rule does not go into effect, higher education institutions will not be required to make certain "common sense disclosures to help prospective and enrolled students" in various ways. Compl. ¶ 2. Their claimed injury, then, would be inflicted not by the Department, but by institutions of higher education under the apparent theory that those institutions would respond to the 2016 Rule by disclosing information that would not otherwise be made publicly available. But as the Ninth Circuit has recognized, standing is ordinarily "substantially more difficult to establish" where a plaintiff challenges "the government's allegedly unlawful regulation (or lack of regulation) of someone else," i.e., in this case, the institutions that would be subject to new disclosure requirements. *Levine v. Vilsack*, 587 F.3d 986, 992 (9th Cir. 2009) (explaining that, in that circumstance, causation "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict"). As discussed above, Plaintiffs' speculative allegations

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"otherwise have standing to sue in their own right." *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). These organizational Plaintiffs also lack standing under the so-called "third-party standing" doctrine. Pursuant to that doctrine, a plaintiff may assert the rights of a third party provided the plaintiff has "suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant [] ha[s] a close relation to the third party, and there [] exist[s] some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). Here, NEA and CTA allege no harm to themselves, they lack a sufficiently close relationship to their members, and, as the individual Plaintiffs demonstrate, their members face no hindrance in protecting their own interests.

of harm fail to establish that they are likely to suffer any imminent injury, much less an injury tied to education institutions' responses to Department regulations. Plaintiffs' Complaint thus falls well short of asserting the "more particular facts" necessary to show standing based on allegations that "government action caused injury by influencing the conduct of third parties." *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014) (citation omitted).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

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