

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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LAURA ARMOUR, CV No. 1:19-cv-02556-TJK

Plaintiff, Washington, DC
v. Thursday, November 5, 2020
11:00 a.m.

ELISABETH DEVOS, et al.,

Defendants.

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TRANSCRIPT OF ORAL RULING
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES VIA TELECONFERENCE:

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Proceedings recorded by machine shorthand; transcript produced
by computer-aided transcription.

P R O C E E D I N G S

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2 THE DEPUTY CLERK: We are on the record in civil
3 matter 19-2556, Laura Armour v. Elisabeth DeVos, et al.

4 Present for the plaintiff are Alexander Elson and
5 Eric Rothschild, and present for the defense is Sean Tepe.

6 THE COURT: All right. Well, good morning to
7 everyone on the line here.

8 Before I go any further, let me just express
9 condolences to plaintiff's counsel. I did see that the
10 original plaintiff in the case, Mr. Armour, has passed away,
11 and I express my condolences to Mr. Elson and Mr. Rothschild
12 for your client's loss.

13 Before me is a motion to dismiss filed by the
14 defendants -- that's ECF No. 5 -- and a motion for leave to
15 file a surreply in opposition to the motion to dismiss which
16 was ECF No. 11. Defendants moved under Rule 12(b)(6) to
17 dismiss the complaint for failure to state a claim because,
18 in their view, the relevant statutes and regulations
19 prevented the Department of Education from granting
20 Mr. Armour's application for a loan discharge. I did think
21 it would be more efficient for me to bring you all here and
22 just deliver my ruling orally than to put together an
23 opinion. So that's why I scheduled today's hearing. I am
24 going to grant plaintiff's motion to file a surreply and I
25 am going to deny the defendants' motion to dismiss, and I'll

1 explain those reasons for the -- for those decisions here
2 today.

3 Just a few words -- preliminary words about the
4 statutory and regulatory background.

5 The Higher Education Act, HEA, contains a
6 provision under which a student may seek discharge of
7 student loans if he cannot complete his program of study
8 because his school closes. If a student is, quote, Unable
9 to complete the program in which such student is enrolled
10 due to the closure of the institution, quote, The Secretary
11 shall discharge the borrower's liability on the loan, closed
12 quote, provide -- and that's United States Code Section 1080
13 -- 20 U.S.C. Section 1087(c)(1) -- provided, quote, The
14 student was enrolled or the student withdrew from the school
15 not more than 120 days before the school closed. That
16 latter -- closed quote. That last quote is from 34 C.F.R.
17 Section 685.214. If the Secretary of Education finds
18 exceptional circumstances -- that's a term in -- again, in
19 the regulation, 34 C.F.R. Section 685.214 -- the 120-day
20 period may be extended, as it was here to June 29th, 2018.

21 Defendants argue that an additional HEA section
22 and its implementing regulation provide further restrictions
23 on the closed school discharge regime. The statute states,
24 quote, If a recipient of assistance under this subchapter
25 withdraws from an institution during a payment period or a

1 period of enrollment in which the recipient began
2 attendance, the amount of grant or loan assistance (other
3 than assistance received under Part C) to be returned to the
4 subchapter IV programs is calculated according to paragraph
5 (3) and returned in accordance with subsection (b). That's
6 20 United States Code Section 1091b(a) (1). A leave of
7 absence that meets the following criteria need not be
8 treated as a withdrawal: quote, In the case of a student who
9 takes 1 or more leaves of absence from an institution for
10 not more than a total of 180 days in any 12-month period,
11 the institution may consider the student as not having
12 withdrawn from the institution during the leave of absence
13 and not calculate the amount of grant and loan assistance
14 provided under this subchapter that is to be returned in
15 accordance with this section, closed quote, when the
16 school's leave of absence party [sic] satisfies certain
17 preconditions. That's 20 United States Code Section
18 1091b(a) (2) (A). Quote, If a student does not return to the
19 institution at the expiration of an approved leave of
20 absence that meets the requirements of subparagraph (A), the
21 institution shall calculate the amount of grant and loan
22 assistance provided under this subchapter that is to be --
23 to -- that is to be returned in accordance with this section
24 based on the day the student withdrew as determined under
25 subsection (c). Again, that's 20 United States Code Section

1 1091b(a) (2) (B). Section 1091b appears in Part G of the HEA,
2 General Provisions Relating to Student Assistance Programs,
3 whereas 20 United States Code Section 1087 appears in Part B
4 entitled Family -- Federal Family Education Loan Program.

5 The regulation implementing 1091b in turn states,
6 as relevant here, quote, For purposes of this section (and,
7 for a Title IV, HEA program loan borrower, for purposes of
8 terminating the student's in-school status), an institution
9 does not have to treat a leave of absence as a withdrawal if
10 it is an approved leave of absence. A leave of absence is
11 an approved leave of absence if, among other things, the
12 number of days in the approved leave of absence, when added
13 to the number of days in all other approved leaves of
14 absence, does not exceed 180 days in any 12-month period,
15 closed quote. And that's 34 C.F.R. Section 668.22(d).
16 Finally, defendants contend that the withdrawal date must
17 then be set under 34 C.F.R. Section 668.22(b) (1) as, quote,
18 The last date of academic attendance as determined by the
19 institution from its attendance records.

20 Now, a little bit about the facts or at least the,
21 sort of, procedural posture here.

22 Armour's complaint alleges that the Department of
23 the -- Education's denial of his application for a
24 closed-school loan discharge -- Armour's complaint
25 challenges the Department of Education's denial of his

1 application for a closed-school loan discharge. Between
2 2010 and 2018, Armour attended Argosy University-Schaumburg,
3 pursuing a doctoral degree in psychology. That's ECF No. 1,
4 the complaint, Paragraphs 32, 34 and 40. Early in 2018,
5 Armour was diagnosed with a recurrence of colon cancer and,
6 in May 2018, requested a temporary leave of absence,
7 intending to return to the school for the fall term. That's
8 Paragraph 42. He contacted his advisor in August 2018 to
9 register for classes, but shortly thereafter informed her
10 that he would need to extend his leave in order to have
11 surgery. That's Paragraphs 45 and 46. On December 14th,
12 2018, the school closed. Armour had not yet been informed
13 of the school's closing and, by that same day, he emailed
14 his advisor to ask whether he needed to, quote, Fill out
15 additional medical leave paperwork at this time. She
16 responded, again, as laid out in the complaint, I think we
17 are fine. Do you anticipate a summer return?

18 Again, as laid out in the complaint, in March
19 2019, Armour submitted his application for discharge of his
20 loan debt because he had been unable to complete his program
21 of study due to the school's closure and had not transferred
22 his credits to another school. A letter from his loan
23 servicer informed him that he, quote, Appeared to meet the
24 criteria for discharge, closed quote, but stated it was not,
25 quote, A final determination of eligibility, closed quote.

1 In May of 2018 [sic], Armour was ultimately informed that he
2 did not meet the criteria with the following explanation:
3 quote, You withdrew from Argosy University-Schaumburg more
4 than 120 days before the official school closure date, as
5 established by the Department of Education. That's
6 Paragraph 6 of the complaint. Armour then submitted a FOIA
7 request to determine the basis for the Department's
8 decision, and he subsequently filed this suit.

9 Of course, the legal standard here on a motion to
10 assist -- on a motion to dismiss is, I'm sure, familiar to
11 the parties.

12 District Courts have discretion in deciding
13 whether to grant -- well, first, we'll do the legal standard
14 regarding the surreply which is also, I'm sure, familiar to
15 the parties.

16 District Courts have discretion to decide whether
17 to grant leave to file a surreply, although they are
18 generally disfavored. In -- quote, In exercising its
19 discretion, the court should consider whether the
20 movement's -- whether the movant's reply, in fact, raises
21 arguments or issues for the first time, whether the
22 non-movant's proposed surreply would be helpful to the
23 resolution of the pending motion, and whether the movant
24 would be unduly prejudiced were leave to be granted, closed
25 quote. That's Banner Health v. Sebelius, 905 F. Supp. 2d

1 174 at 187. It's a D.D.C. case from 2012.

2 A motion to dismiss -- again, familiar legal
3 standard -- under Rule 12(b)(6) tests the legal sufficiency
4 of the complaint. The complaint must have facial
5 plausibility; meaning, it must plead factual content that
6 allows the court to draw the reasonable influence --
7 inference that the defendant is liable for the misconduct
8 alleged. And in evaluating such a motion, I must construe
9 all factual inferences in favor of the plaintiff. And I may
10 consider documents referenced in a complaint without
11 converting the motion to dismiss into a motion for summary
12 judgment, and I may take judicial notice of facts readily
13 determined from reliable sources, including facts in the
14 public record.

15 So to begin with, I will grant the plaintiff's
16 motion for leave to file a surreply. I do agree that
17 defendants' reply raised two new arguments: the definitions
18 in 20 -- in United States Code Section 1091b and 34 C.F.R.
19 Section 668.22 -- that is, the Return to Title IV
20 provisions -- whether those provisions apply to all of Title
21 IV; and the loan discharge statute and regulations -- and
22 whether the loan discharge statute and the regulations are
23 Return to Title IV provisions. Armour's surreply --
24 proposed surreply addresses only these new points; it is
25 helpful to resolve the pending motion; and I don't believe

1 the defendants will be prejudiced.

2 Next, I am going to deny the defendants' motion to
3 dismiss because I do believe Armour has stated an APA claim
4 and a procedural due process claim, and I'll lay out why.

5 On Count 1, Armour alleges that the Secretary of
6 Education and the Department of Education acted arbitrarily
7 and capriciously, in violation of the APA, when they denied
8 his application for loan discharge. I do conclude that
9 Armour has stated a claim on this count. To state a claim
10 for an arbitrary and capricious agency action under the APA,
11 a plaintiff must allege that the agency has relied on
12 factors which Congress has not intended it to consider,
13 entirely failed to consider an important aspect of the
14 problem, offered an explanation for its decision that runs
15 counter to the evidence before the agency, or is so
16 implausible that it could not be ascribed to a difference in
17 view or the product of agency expertise. And that's a
18 familiar standard from -- in this case quoted from *XP*
19 *Vehicles, Inc. v. Department of Energy*, 118 F. Supp. 3d 38
20 at 78, a D.D.C. case from 2015. Moreover, the requirement
21 that agency action not be arbitrary and capricious includes
22 a requirement that the agency adequately explain its result
23 in order to enable the court to evaluate the agency's
24 rationale at the time of the decision, and an agency's
25 explanation must minimally contain a rational connection

1 between the facts found and the choice made.

2 Now, Armour has, in my view, adequately alleged
3 the defendants acted arbitrarily and capriciously. He
4 alleges he was still enrolled at Argosy-Schaumburg during
5 the 120-day period and the extended window provided in 20
6 United States Code Section 1087(c)(1) and 34 C.F.R. Section
7 685.214, the provisions that govern loan discharge.
8 Specifically, the complaint states that his school closed on
9 December 14th, 2018; that he was on a temporary leave of
10 absence but still enrolled from May 7th, 2018, through
11 December 14th, 2018; and that the school expected him to
12 return from his leave. That's -- and that last one in
13 particular is at Paragraph 42 of the complaint. He alleges
14 that the school treated his absence as a temporary leave
15 rather than a permanent withdrawal. And the school called
16 his absence a temporary withdrawal, not a leave of absence,
17 but Armour alleges the school informed him that he would not
18 be considered permanently withdrawn unless he did not
19 register for the expected semester of return. That's ECF
20 No. 1-1 at 15. And he alleges he registered for the fall
21 semester but, in order to have surgery, subsequently
22 requested further temporary leave from which the school,
23 again, expected him to return. That's the complaint,
24 Paragraphs 45 to 49; and ECF 1-1 at 17 through 18. Armour
25 also alleges that defendants provided no reasoned

1 explanation for its conclusion that he withdrew outside the
2 eligibility window. Taking these allegations as true, he
3 has stated a claim that he was entitled to a loan discharge
4 which defendants arbitrary -- arbitrarily and capriciously
5 denied contrary to that evidence and with no reasoned
6 explanation.

7 Now, defendants' argument here is that Armour has
8 not stated a claim because 34 C.F.R. Section 668.22 applies
9 and, under this regulation, Armour -- now Armour's estate --
10 cannot recover as a matter of law because his leave of
11 absence must be treated as a withdrawal that occurred before
12 the eligibility period. And to justify applying that
13 regulation in this way, defendants rely on the introductory
14 language of subsection (d) of the regulation which, to quote
15 again, reads, For purposes of this section (and, for a Title
16 IV, HEA program loan borrower, the purposes -- for purposes
17 of terminating the school's -- the student's in-school
18 status). Thus, according to the defendants, the regulation
19 broadly applies throughout all of Title IV, including, as
20 here, when the issue of terminating a student's in-school
21 status under the loan discharge provisions arises, and it
22 requires that a leave of absence exceeding 180 days must be
23 treated as a withdrawal.

24 There is also a second part to defendants'
25 argument. Defendants then contend that the withdrawal date

1 must be set under 34 C.F.R. Section 668.22(b)(1) as, quote,
2 The last date of academic attendance as determined by the
3 institution from its attendance records, closed quote.

4 And, again, providing -- applying these two
5 provisions together in Armour's case, defendants argue that,
6 because his leave of absence began on May 7th, 2018, it
7 lasted 221 days and exceeded the 180-day limit, making it an
8 approved -- an unapproved leave of absence that must be
9 treated as a withdrawal at least as of May 7th, 2018, which
10 falls outside the eligibility window for a loan discharge.

11 But even if defendants are right about the first
12 part of their argument -- that is, even assuming that
13 subpart (d) of the regulation broadly applies to all of
14 Title IV, including the loan discharge provisions -- and
15 this is the point that the parties spend most of their time
16 debating and discussing, and it's a point I don't think I
17 need to decide here today -- it does not necessarily mean
18 that the defendants are entitled to judgment as a matter of
19 law, because plaintiffs have not -- or not judgment as a
20 matter of law -- it does not necessarily mean that
21 plaintiffs are entitled to dismiss -- that defendants are
22 entitled to have the matter -- the complaint dismissed,
23 because defendants have not met their burden of showing that
24 subpart (b)(1) operates to automatically preclude recovery
25 by Armour. In order for their theory of dismissal to

1 prevail, they have to show that subpart (b) (1), in addition,
2 operates to automatically preclude recovery by Armour.

3 Subpart (d) provides only that, An institution
4 does not have to treat a leave of absence as a withdrawal if
5 it is considered an approved leave of absence, closed quote.
6 And, by implication, if the leave exceeds 180 days and is,
7 therefore, considered unapproved, it is treated as a
8 withdrawal. The provision does not, however, set the
9 withdrawal date for a student who takes an unapproved leave
10 of absence. For that, again, defendants have to turn to
11 subpart (b), and that -- but that section, by its plain
12 language, applies only, quote, For the purposes of this
13 section, which is 34 C.F.R. 668.22(b) for -- i.e. -- in
14 other words, for purposes of the institution, quote,
15 Determining the amount of Title IV grant or loan assistance
16 that the student earned as of the student's withdrawal date,
17 closed quote -- that's 34 C.F.R. 668.22(a) -- so that the
18 school can in turn calculate how much money must be returned
19 to the government when a student withdraws. Now, perhaps
20 defendants will renew some version of this argument at the
21 summary judgment stage, but at least for now they have not
22 adequately explained how subpart (b) must, as a matter of
23 law, apply in the loan discharge context, given the specific
24 language limiting it to, quote, For purposes of this
25 section. Thus, they have not adequately explained how the

1 regulation would have required them to set Armour's
2 withdrawal date as the last date of his academic attendance
3 such that, again, as a matter of law, Armour's estate could
4 not recover. And, of course, at this stage, I have no
5 record before me explaining exactly how defendants did, in
6 fact, reach the decision that he could not recover.
7 Accordingly, I cannot conclude that Armour has failed to
8 state a claim that the defendants acted arbitrarily and
9 capriciously because, at least on the record and the
10 arguments presented to me, I cannot conclude that, as a
11 matter of law, Armour's estate could not recover.

12 So as previously stated, I do not decide today --
13 and the main point the parties have argued back and forth --
14 whether the introductory language that -- of 34 C.F.R.
15 668.22(d) makes that subsection eligible to the loan
16 discharge provisions and the rest of Title IV because of --
17 at least on the record and as to the arguments submitted to
18 me now, I don't -- the defendants have not shown that
19 subpart (b) precludes recovery by the plaintiff as a matter
20 of law.

21 On Count 2, Armour alleges that the denial of his
22 application violated his procedural due process rights. And
23 I do, at this stage, conclude that Armour has stated a claim
24 here, as well. To bring a due -- procedural due process
25 claim, a plaintiff must allege that the defendant deprived

1 him of a cognizable liberty or property interest and that
2 the defendant did so without appropriate procedural
3 protections. For example, G -- that's the standard laid out
4 in, for example, GE v. Jackson, 610 F.3d 110 at 117, a D.C.
5 Circuit case from 2010. Defendants do not challenge that
6 Armour had a cognizable property interest at issue here. So
7 we move to the adequacy of the procedural protections. In
8 assessing the requirements of procedural due process in any
9 case, a court must weigh, quote, The importance of the
10 private interests at stake; the risk of an erroneous
11 deprivation of the interests because the procedures used --
12 of the procedures used and the probable value of additional
13 procedural safeguards; and the government's interests,
14 including the cost of additional procedures. Beyond the
15 basic -- and that's English v. District of Columbia, 717
16 F.3d 968 at 972, a D.C. Circuit case in 2013. Beyond the
17 basic requirements of notice and an opportunity to be heard,
18 the precise requirements of procedural due process are
19 flexible.

20 So I do believe that Armour has adequately alleged
21 that the procedures here were deficient. His complaint
22 states the Department of Education, through the loan
23 servicer at issue, provided only the following explanation:
24 quote, You withdrew from Argosy University-Schaumburg more
25 than 120 days before the official school closure date, as

1 established by the U.S. Department of Education, closed
2 quote. The letter at issue here informed Armour that he
3 could provide additional information but did not give him an
4 opportunity to appeal and thereby challenge the decision on
5 the existing record. Armour further alleges that a
6 substantial amount of debt -- over 100,000 -- under -- over
7 \$100,000 -- is at stake here -- that's Paragraph 9 of the
8 complaint -- and it would not have been much of a burden for
9 the Department of Education to explain more clearly how it
10 calculated his withdrawal date as more than 120 days before
11 the school's closure or to provide an appeal process.

12 Moreover, Armour alleges that the failure to
13 explain the basis for the denial or to provide an
14 opportunity for -- to appeal posed a risk of erroneous
15 deprivation of his interest. He asserts that the denial
16 letter did not provide notice that defendants were treating
17 his leave as unauthorized and thus a disqualifying
18 withdrawal -- that's Paragraph 92 -- that he had to file a
19 FOIA request to determine how defendants calculated his
20 withdrawal date -- that's 69 through 71 -- that there have
21 been public reports of erroneous denials of loan discharge
22 requests. That's Paragraphs 99 through 103. And, as the
23 D.C. Circuit has explained, without notice or the specific
24 reasons for the denial, a claimant is reduced to guessing
25 what evidence can or should be submitted in response and

1 driven to responding to every possible argument against
2 denial at the possible risk of missing the critical one
3 altogether. That's *Gray Panthers v. Schweiker*, 652 F.2d
4 146, 168 at 169, a D.C. Circuit case from 1980.

5 Defendants argue -- their main argument that this
6 claim should be dismissed is because more process could not,
7 as a matter of law, change the result which is an argument
8 that largely depends on the one it advanced and the one the
9 Court found wanting at least on the record before it now
10 regarding Count 1. And, again, I think it's important to
11 note that I don't have an agreed upon administrative record
12 that explains precisely how and why defendants, in fact,
13 reached the decision they did that would help evaluate the
14 adequacy of the notice they provided the defendant [sic].
15 And, finally, even if defendants ultimately prevail on Count
16 1 and the plaintiff cannot show that the defendants acted
17 arbitrarily and capriciously, that does not mean that Armour
18 has not stated a claim on Count 2. In theory, Armour could
19 ultimately show that he was deprived of due process without
20 proving that he was, in fact, entitled to loan discharge, in
21 which case the proper result, there's at least some case law
22 that suggests, would be nominal damages. And I direct the
23 parties to *Winstead v. District of Columbia*, 720 F. Supp. 2d
24 44 at 50 to 51, a D.D.C. case from 2010.

25 So for all those reasons, I will enter an order

1 granting the motion for leave to file a surreply and denying
2 the motion to dismiss. I will also order that Armour and
3 the defendants confer and submit a joint status report
4 within 30 days of this order -- within 30 days of today
5 regarding how they wish to proceed. I think, you know,
6 obviously, my ruling here today, in some ways, kicks perhaps
7 some of the cans down the road that the parties may
8 ultimately, sort of, revisit at the summary judgment stage,
9 but on the other hand I know there have been -- there was an
10 effort at mediation in the past. The parties may wish to
11 revisit that -- those efforts at mediation either through
12 the Circuit Executive's program or through a magistrate
13 judge, or they may wish to move straight to summary judgment
14 briefing and laying out a schedule for that briefing, but
15 I'll ask the parties to confer and, within 30 days, inform
16 me what they'd like to do, and if it is to go to a summary
17 judgment briefing, simply propose an agreed upon schedule
18 for that briefing.

19 Let me ask -- let me just turn to plaintiff's
20 counsel. Is there any questions you have or, especially
21 with regard to the road forward, anything more you think I
22 need to address here today?

23 MR. ELSON: Thanks, Your Honor. This is Alex
24 Elson. No questions. I would just ask, will there be an
25 opinion entered or is the transcript here considered the

1 written record?

2 THE COURT: The transcript here will be -- my
3 order will simply just refer to the reasons I've given here
4 today.

5 MR. ELSON: Okay. Thank you.

6 THE COURT: Sure.

7 Mr. Tepe, any questions or anything further about
8 the way forward here?

9 MR. TEPE: No, Your Honor. I just -- as you may
10 have noticed from the docket, I've just substituted in.
11 So --

12 THE COURT: I understand.

13 MR. TEPE: -- I need to get my arms around this
14 case. I think 30 days should be sufficient for me to
15 consult with the agency and with plaintiff's counsel. I
16 know the organization. So you know, I'm sure we can work
17 something out and get you a joint status report within 30
18 days.

19 THE COURT: All right. The other thing -- and
20 this is -- I -- the other thing is, obviously, the fact that
21 the original claimant and plaintiff has passed away might,
22 in some way, alter the plaintiff's thinking about how to
23 proceed, as well. I -- certainly, that's not the reason
24 I'm, sort of, asking the parties to do that, but I think
25 that's another potential thing that factors into how the

1 parties would like to proceed.

2 So with that, then, I will -- you all will see an
3 order; I'll look for that status report; and then we will go
4 forward based on that report.

5 So then is there anything with -- if there's
6 nothing further, then, from both sides, I'll -- the parties
7 are dismissed, and everyone please stay safe out there.

8 MR. ELSON: Thank you, Your Honor.

9 MR. TEPE: Thank you, Your Honor.

10 MR. ROTHSCHILD: Thank you, Your Honor.

11 (Proceedings concluded at 11:38 a.m.)

12 * * * * *

13 CERTIFICATE OF OFFICIAL COURT REPORTER

14 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify
15 that the above and foregoing constitutes a true and accurate
16 transcript of my stenographic notes and is a full, true and
17 complete transcript of the proceedings to the best of my
18 ability, dated this 6th day of November 2020.

19 /s/Timothy R. Miller, RPR, CRR, NJ-CCR
20 Official Court Reporter
21 United States Courthouse
22 Room 6722
23 333 Constitution Avenue, NW
24 Washington, DC 20001
25