

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MERCEDES ROURKE-ROGRIGUEZ, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
EDUCATION, *et al.*,

Defendants.

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Civil Action No.:
8:25-cv-00738 (AJB/DJS)

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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Dated: February 4, 2026

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Plaintiffs respectfully submit this Memorandum of Law in support of their motion for summary judgment to hold unlawful and set aside the new requirement imposed by the United States Department of Education (“Department”) and its Secretary Ms. Linda McMahon that American Indians born in Canada (“Jay Treaty students”) seeking federal financial aid under Title IV of the Higher Education Act must provide documentation from the Department of Homeland Security (“DHS”) establishing that they are permanent residents of the United States. As set forth below, there is no genuine dispute as to any material fact and the plaintiffs are entitled to judgment as a matter of law.

LEGAL BACKGROUND

Federal financial aid programs for postsecondary students are administered by the Department under Title IV of the Higher Education Act of 1965. This Act provides in relevant part that, in order to receive assistance – a grant loan, or work assistance – a student must be:

a citizen or national of the United States, a permanent resident of the United States, or able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident;

20 U.S.C. § 1091(a)(5) (emphasis added). Thus, permanent residents of the United States are eligible for assistance.

American Indians born in Canada, by law, are permanent residents of the United States. This Court has succinctly summarized why:

Under Article III of the Jay Treaty of 1794, American Indians born in Canada have a right to freely cross the United States-Canada border. See Treaty of Amity, Commerce and Navigation (“Jay Treaty”), art. 3, Gr. Brit.-U.S., Nov. 19, 1794, 8 Stat. 118. This right to travel is codified in § 289 of the Immigration and Nationality Act, which exempts American Indians born in Canada who have at least 50-percent American Indian blood from standard immigration restrictions. 8 U.S.C. § 1359. Federal regulations adopted pursuant to the Immigration and Nationality Act provide that these individuals “shall be regarded as having been lawfully admitted for permanent residence.” 8 C.F.R. § 289.2.

Rourke-Rodriguez v. U.S. Dept. of Education, 2025 WL 2962758, at *1 (N.D.N.Y. 2025). “As lawful permanent residents, American Indians born in Canada who attend college (‘Jay Treaty students’) are eligible for federal financial aid.” *Id.* at *2.

All students seeking federal financial aid must first complete and submit a Free Application for Federal Student Aid (“FAFSA”) form which was devised by the Department. (Defs’ Answer to Amended Compl., ECF #28, ¶ 20). Colleges use the information on the FAFSA form to determine a student’s eligibility for aid after the student completes the college’s application requirements. See <https://www.usa.gov/fafsa>. The Department also publishes the Federal Student Aid Handbook (“Handbook”), which is the authoritative guide for everything having to do with federal student aid, from loans to grants to eligibility. The Handbook is used by college financial aid administrators and counselors who help students file the FAFSA form, verify information, and make corrections and other changes to the information reported on the FAFSA.

FACTUAL BACKGROUND

A. The Department’s Original, Longstanding Policy On Jay Treaty Students

For decades, the Department recognized that Jay Treaty students are eligible for Title IV financial aid and are not required to obtain any proof from DHS (or its predecessor agencies) of their status as permanent residents of the United States. The Department announced its position about Jay Treaty students in a January 1, 1998, “Dear Colleague” Letter GEN-98-2 which addressed several issues about student eligibility for financial aid. The Letter explained that Jay Treaty students “are not required to obtain documentation from the U.S. Immigration and Naturalization Service (INS) and are deemed ‘lawfully admitted for permanent residence’ [per 8 C.F.R. § 289.2.] and, thus, eligible for Title IV student financial assistance.” The Letter

explained that Jay Treaty students could document their status in four different ways, none of which involved the INS: (1) a “band card” issued by a Canadian Band Council or the Canadian Department of Indian Affairs; (2) a birth or baptismal record; (3) an affidavit from a tribal official or other person knowledgeable about the student’s family history; or (4) identification from a recognized Native American provincial or territorial organization. In full, the Letter’s discussion of Jay Treaty students stated:

APPLICATION PROCESSING FOR CERTAIN NATIVE AMERICANS

Individuals with at least 50% Native American blood who were born in Canada have certain unique rights under the Jay Treaty of 1794, subsequent treaties, and U.S. Immigration Law. The Jay Treaty provides that Native Americans with at least 50% Native American blood who were born in Canada have the legal right to enter freely into the United States. They are not required to obtain documentation from the U.S. Immigration and Naturalization Service (INS) and are deemed "lawfully admitted for permanent residence" and, thus, eligible for Title IV student financial assistance.

Because there are very few Title IV aid applicants who are eligible under the Jay Treaty, the citizenship question on the FAFSA does not have a separate response for such students. A Native American who is eligible for Title IV aid because of the Jay Treaty should report on the FAFSA that he or she is an "eligible noncitizen" and should fill in the Alien Registration Number with "A999999999." When the application is matched by the central processor (CPS) with the INS, this response will not be confirmed. It is then the responsibility of the financial aid administrator to obtain proof that the student has 50% Native American blood and was born in Canada.

Documentation of the applicability of Jay Treaty status for an applicant can be accomplished by asking the student to provide one or more of the following documents:

A "band card" issued by the Band Council of a Canadian Reserve, or by the Department of Indian Affairs in Ottawa;

A birth or baptismal record;

An affidavit from a tribal official or other person knowledgeable about the applicant's or recipient's family history;

Identification from a recognized Native American provincial or territorial organization.

If a Canadian-born Native American with at least 50% Native American blood can provide one of the above forms of documentation, and meets other Title IV

eligibility criteria, the institution, after documenting the student's file may award the student Title IV aid.

See Declaration of Sean C. Sheely in Support of Plaintiffs' Motion for Summary Judgment, dated February 4, 2026 ("**Sheely Declaration**"), Exh. A (emphasis added).

Thereafter, the Department repeated this explanation about establishing the eligibility of Jay Treaty students in each version of the Handbook that it issued. For example, the 2000-2001 edition provided:

Jay Treaty

There is one unusual circumstance where the school will need to collect documentation from the student but not submit it to the INS for Secondary Confirmation. The Jay Treaty of 1794 (as well as subsequent treaties and U.S. immigration law) gives Canadian-born Native Americans with "50% Indian blood" the legal right to live and work in the United States. Such individuals are not subject to the legal restrictions typically imposed on aliens by the INS, are not required to obtain documentation from the INS, and are considered "lawfully admitted for permanent residence."

Because few SFA applicants are eligible under the Jay Treaty, the FAFSA does not include a separate response for such students. Therefore, any student eligible for SFA funds through the Jay Treaty should report that he or she is an "eligible noncitizen" and fill in "A999999999" for the A-Number. The application will not be matched with INS, and a comment (comment 142) will be printed on the output document. The school must obtain proof that the student has 50% Native American blood and was born in Canada. To do so, the student should provide one or more of the following documents:

- A "band card" issued by the Band Council of a Canadian Reserve, or by the Department of Indian Affairs in Ottawa.*
- Birth or baptism records.*
- An affidavit from a tribal official or other person knowledgeable about the applicant's or recipient's family history.*
- Identification from a recognized Native American provincial or territorial organization.*

If the student can provide one of the above forms of documentation, and is otherwise eligible, the school must document the file and can award SFA funds.

Sheely Declaration, Exh. B at p. 1-29 (emphasis added; italics in the original).

The same explanation, in essentially the same language, was repeated in each subsequent edition of the Handbook up through 2023-24. The 2023-24 edition provided:

- **Jay Treaty students.** Section 289 of the Immigration and Nationality Act (INA) gives persons with at least 50% Native American blood who were born in Canada the legal right to live and work indefinitely in the U.S. This is based on the Jay Treaty of 1794 and subsequent court decisions. Such individuals are not subject to the legal restrictions typically imposed on aliens by the DHS, are not required to obtain documentation from the DHS, and are considered “lawfully admitted for permanent residence.” They must obtain an SSN for purposes of applying for Title IV aid. Students who may be eligible for Title IV funds should enter their valid ARN on the FAFSA and indicate they are eligible noncitizens. If they fail the DHS match, you must submit a third-step verification with the documentation. If they fail third-step verification, they can still be considered eligible if they meet the documentation requirements below for students without an ARN.

For students who do not have an ARN, they should enter A999999999 and indicate they are eligible noncitizens. Students who enter A999999999 for their ARN will receive comment 408 on the output document indicating that the ARN provided is invalid. Please note that a DHS Verification number will not be generated in this instance, so you will not be able to submit a third-step verification request. Instead, the school must obtain proof that such a student has 50% Native American blood and was born in Canada. To do so, the student should provide one or more of the following documents:

- A “band card” issued by the Band Council of a Canadian Reserve, or by the Department of Indian Affairs in Ottawa;
- Birth or baptism records;
- An affidavit from a tribal official or other person knowledgeable about the applicant’s or recipient’s family history;
- Identification from a recognized Native American provincial or territorial organization.

If the student can provide this documentation and is otherwise eligible, the school must note this in the student’s file, along with a copy of the documentation, and can award Title IV funds.

If you have questions about Jay Treaty students, contact applicationsystemsdivision@ed.gov.

Sheely Declaration, Exh. C at p. 12 (emphasis added).

In summary, from 1998 through the 2023-24 school year, the Department’s policy was that, by law, Jay Treaty students are permanent residents of the United States and they are not

required to obtain/provide documentation of their status from DHS in order to receive federal financial assistance under the Higher Education Act.

B. The Department's Change Of Policy Regarding Jay Treat Students

1. The unannounced change for 2024-25

The Department began to change its policy regarding Jay Treaty students in the 2024-2025 edition of the Handbook, which was issued on February 28, 2024. The Handbook still stated that Jay Treaty students “are not required to obtain documentation from the DHS,” but it then required them to provide such documentation to the school: “the school must obtain proof from the student that USCIS [U.S. Citizenship and Immigration Services] or CBP [U.S. Customs and Border Protection] has determined that the student meets the requirements of INA 289. These students are likely to have a Form I-551 PRC with the code S13, an unexpired temporary I-551 stamp with the code S13 in a Canadian passport, or an unexpired temporary I-551 stamp with the code S13 on an I-94.” The new section on Jay Treaty students, in its entirety, was as follows:

Certain American Indians Born in Canada (formerly Jay Treaty Students)

Section 289 of the *Immigration and Nationality Act (INA)* gives persons with at least 50% Native American blood who were born in Canada the legal right to live and work indefinitely in the U.S. This is based on the *Jay Treaty* of 1794 and subsequent court decisions. Such individuals are not subject to the legal restrictions typically imposed on aliens by the DHS, are not required to obtain documentation from the DHS, and are considered “lawfully admitted for permanent residence.” They must obtain an SSN for purposes of applying for *Title IV* aid.

Students who may be eligible for *Title IV* funds should enter their valid A-Number on the FAFSA form and indicate they are eligible noncitizens. If they fail the DHS match, you must submit a third-step verification with the documentation. If they fail third-step verification, they can still be considered eligible if they meet the documentation requirements below for students without an A-Number.

Students who do not have an A-Number should enter A999999999 and indicate they are eligible noncitizens. Students who enter all 99s for their A-Number will receive comment 289 on the output document indicating that the A-Number

provided is invalid. Please note that a DHS case number will not be generated in this instance, so you will not be able to submit a third-step verification request. Instead, the school must obtain proof from the student that USCIS or CBP has determined that the student meets the requirements of INA [Immigration and Nationality Act] 289. These students are likely to have a Form I-551 PRC with the code S13, an unexpired temporary I-551 stamp with the code S13 in a Canadian passport, or an unexpired temporary I-551 stamp with the code S13 on an I-94. Information relating to this process can be found at <https://www.uscis.gov/policy-manual/volume-7-part-o-chapter-5>.

If you have questions about students who are American Indians Born in Canada, contact applicationsystemsdivision@ed.gov.

(Administrative Record (“AR”) 3, at USA000053-54) (emphasis added).¹

This unannounced change in policy soon caught the attention of one school² and generated a question to the Department, which forwarded that question to U.S. Citizenship and Immigration Services (“USCIS”). On March 11, 2024, a Department employee sent an email to USCIS seeking further guidance on Jay Treaty students because “we’ve had a question from a school come in regarding one of the edits that USCIS staff made to the guidance on acceptable documentation for American Indians born in Canada.” (AR 2A at USA000007). The writer explained:

USCIS suggested that we edit the 3rd paragraph so that the previously cited acceptable documents were removed, and a new list of acceptable documents was added, which we did. A school has written us asking if the previously acceptable documents are no longer acceptable. We were wondering if some or all of the documents previously cited might still be acceptable, in USCIS’s view, in addition to the newer(?) and perhaps preferable list of documents which we added for 2024-25.

Id. (emphasis added). The writer added that the Department preferred that both sets of documents be considered acceptable and hoped that would be “possible”:

Our sister office in ED, OPE (Office of Postsecondary Education) would prefer that a way forward on this might include continuing to accept the previously cited

¹ The Administrative Record is ECF #33-2.

² Evidently, this school was the University of Denver.

documents, in addition to the newly cited documents for 2024-25. Would that be possible, or were some of the previously cited documents no longer satisfactory?

Id. (emphasis added).

USCIS responded to the Department's query two weeks later, on March 25, 2024, stating that the determination of whether a student qualifies as an American Indian Born in Canada must be made by USCIS or CBP and that the documents previously deemed sufficient were unacceptable because they did not reflect a determination made by USCIS or CBP:

SAVE reached out to our legal counsel. They indicated that whether an individual is an American Indian Born in Canada (i.e., status based on section 289 of the Immigration and Nationality Act) is a determination made by USCIS or CBP. For SAVE purposes, the documents listed in the prior version of the handbook ("band card" issued by the Band Council of a Canadian Reserve or by the Department of Indian Affairs in Ottawa, birth or baptism records, an affidavit from a tribal official or other person knowledgeable about the applicant's or recipient's family history, or identification from a recognized Native American provincial or territorial organization) would not indicate that an individual has status based on INA as determined by USCIS or CBP.

(AR 2A at USA000006) (emphasis added).

On the same day, March 25, 2024, the Department responded to the University of Denver and advised that "[a] new student applying for aid at your school for the 2024-25 award year can no longer utilize documents from the 2023-24 Handbook to establish eligibility." (AR 2B at USA000011). The Department added, however, that "if a student was eligible in a previous award year (before 2024-25) based on documents submitted from the 2023-24 FSA Handbook (or prior) [then] [w]e will provide guidance to you on a case-by-case basis." *Id.*

The University of Denver wrote back and noted that the Department's original policy regarding Jay Treaty students had been formally announced and explained in the 1998 "Dear Colleague" Letter. The University inquired whether the Department could issue a new "Dear

Colleague letter soon notifying financial aid administrators of this important change”? (AR 2B at USA000010).

The Department, however, did not issue a new “Dear Colleague” Letter. For the remainder of 2024, it responded to individual inquiries from universities about Jay Treaty students and took the position that students who had previously under the old documentation requirement could continue to establish their eligibility through that documentation:

- A “band card” issued by the Band Council of a Canadian Reserve, or by the Department of Indian Affairs in Ottawa;
- Birth or baptism records;
- An affidavit from a tribal official or other person knowledgeable about the applicant’s or recipient’s family history;
- Identification from a recognized Native American provincial or territorial organization.

(AR 2E, 2F, 2H).

2. The announced change for 2025

On January 15, 2025, the Department posted electronic notice GEN-25-06 on its website regarding “American Indian Born in Canada (formerly Jay Treaty student) – Student Eligibility.” (AR 1). It announced that “[a]fter consultation with the Department of Homeland Security (DHS) about acceptable documentation for confirming the Title IV eligibility of American Indians born in Canada (formerly Jay Treaty students), FSA updated the acceptable documentation in the [previous] 2024-25 FSA Handbook.” *Id.* Other than saying that it had consulted with DHS about making this change, the Department did not provide any rationale or justification for the change. This notice went on to detail the changed requirements for establishing eligibility. New applicants were required to provide documentation of their status from DHS, while students who had received aid in 2023-24 or previous years could continue to rely on their previous documentation if the school so elected. The notice directed students who

need documentation to contact USCIS for an appointment and also directed them to see additional information at the USCIS website discussing Green Card eligibility for an American Indian born in Canada (<https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-an-american-indian-born-in-canada>). *See id.*

The Department also published the 2025-26 Handbook at this time and further revised the discussion of Jay Treaty students in line with the newly announced policy. It dropped the statement – which had appeared in 2024-25 and all previous Handbooks -- that Jay Treaty students “are not subject to the legal restrictions typically imposed on aliens by the DHS, are not required to obtain documentation from the DHS, and are considered ‘lawfully admitted for permanent residence.’” Instead, the new discussion of Jay Treaty students provided:

American Indians Born in Canada (Jay Treaty Students)

Section 289 of the Immigration and Nationality Act (INA) gives persons with at least 50% American Indian blood who were born in Canada the legal right to live and work indefinitely in the U.S. They must obtain an SSN for purposes of applying for Title IV aid.

These students must enter their valid A-Number on the FAFSA form and indicate they are eligible noncitizens. If they fail the DHS match, you must submit a third-step verification with the student's documentation. If they fail third-step verification, they can still be considered eligible if they meet the documentation requirements below for students without an A-Number.

Students who do not have an A-Number should enter A999999999 and indicate they are eligible noncitizens. Students who enter all 9's for their A-Number will receive comment 289 on the output document indicating that the A-Number provided is invalid. A DHS case number will not be generated in this instance, so you will not be able to submit a third-step verification request. Instead, if an American Indian born in Canada claiming Title IV eligibility under the Jay Treaty received Title IV aid in the 2023-24 award year (or any prior award year), then the institution may elect under 34 CFR 668.133(b) to not require such a student to submit additional immigration documentation to establish their title IV eligibility where the documents used to establish that eligibility have not expired, and where the institution does not have reason to believe that the student's claim of citizenship or immigration status is incorrect.

If an American Indian born in Canada claiming Title IV eligibility under the Jay Treaty did not previously receive Title IV aid in the 2023-24 award year (or any prior award year) and is seeking to establish their status as an eligible noncitizen for the 2024-25 award year or later, then the student may submit any of the following immigration documentation to establish Title IV eligibility:

- Form I-551 PRC with the code S13;
- An unexpired temporary I-551 stamp with the code S13 in a Canadian passport; or
- An unexpired temporary I-551 stamp with the code S13 on an I-94

If you have questions about students who are American Indians Born in Canada, contact applicationsystemsdivision@ed.gov. See also DCL GEN-25-06.

Sheely Declaration, Exh. D at p. 13.

It is evident that the Department's change in policy regarding Jay Treaty students was driven by DHS. And, so far as appears from the scant Administrative Record, DHS never provided the Department with any justification for the change. It simply announced that its "legal counsel" had indicated that the determination whether someone qualifies as a Jay Treaty student must be made by USCIS or CBP. For 25 years the Department had said that, by law, Jay Treaty students are not subject to the legal restrictions imposed on aliens by the DHS, and are not required to obtain documentation from the DHS. Neither DHS nor the Department claimed that the governing law had changed – because it had not. In sum, the change in policy was nothing more than a fiat issued by DHS and followed by the Department.

C. Plaintiffs Are Adversely Affected By The New Policy

The three plaintiffs are all adversely affected by the Department's new policy. Plaintiff Mercedes Rourke-Rodriguez is a sophomore at SUNY Canton where she was accepted and subsequently enrolled. She applied for and received federal student aid for her freshman year there (2024-25) pursuant to the Department's former policy that required her only to produce a tribal letter to document her status. She filled out a FAFSA for 2025-26 and subsequently

contacted SUNY Canton in July 2025 to ascertain the status of her application. She was advised that her application was not being processed because of the new policy. The school advised her that she would need a Green Card to establish her eligibility as a Jay Treaty student. Because her father is a United States citizen, she responded by applying for a U.S. passport in order to establish her eligibility for federal student aid as a citizen rather than as a Jay Treaty student. However, that process has not yet been completed after several rounds of correspondence with the passport authorities. She has received no federal student aid for the 2025-26 school year and so is taking only one on-line course at SUNY Canton this semester since her family has been forced to cover the cost. Had she received federal student aid as she did during her freshman year, she would be taking a full course load and living on-campus.

Plaintiff Ariwio Swamp was accepted to college and planned to attend SUNY Canton during the 2024-25 school year. He applied for and received an award of federal student aid for that year pursuant to the Department's former policy but ended up deferring his enrollment until the fall of 2025 and not using the aid. In the spring of 2025, he contacted the Tribe about submitting a FAFSA for 2025-26 and was advised of the Department's new policy for Jay Treaty students. He is unwilling as a matter of principle to comply with the Department's unlawful new requirements and so is not attending college at present. He would like to attend college but cannot afford to do so without federal student aid.

Plaintiff Jayla Thompson is a sophomore at SUNY Potsdam where she was accepted and subsequently enrolled. She applied for and received federal student aid for her freshman year there (2024-25) pursuant to the Department's former policy. When she went to prepare a FAFSA for 2025-26, her school guidance counselor advised her that she now needs a Green Card in order to submit a FAFSA. She is unwilling to apply for a Green Card and so is unable to

submit a FAFSA. In order to pay for school this semester without federal student aid, she has utilized financial aid from the Tribe, private scholarships, and \$3,000 in funds contributed by her mother and grandmother.

ARGUMENT

The Administrative Procedure Act (“APA”) authorizes federal courts to hold unlawful and set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2). The APA provides a right to judicial review of all “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704.

The Department’s new policy constitutes final agency action because: (1) it marks the consummation of the agency’s decision-making process—it is not merely tentative or interlocutory in nature; and (2) it determines obligations and legal consequences will flow from it. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Similar actions by the Department have been found to constitute final agency action subject to review under the APA. *See State of Tennessee v. Department of Education*, 104 F.4th 577, 598-601 (6th Cir. 2024) (guidance documents from Department were final agency action).

The Department’s new policy is contrary to applicable law for multiple reasons; it is fatally flawed both substantively and procedurally.

I. The Department’s New Policy is Contrary to Applicable Law

The Department’s new policy contravenes applicable law and so must be vacated. “[A] rule is contrary to law [when] an agency has attempted to promulgate a rule that countermands a higher authority, such as Congress or the Constitution.” *Walker v. Azar*, 480 F.Supp.3d 417, 429 (E.D.N.Y. 2020). “Congress enacted the APA ‘as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.’”

Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 391 (2024) (quoting *United States v. Morton Salt Co.*, 338 U.S., 632, 644 (1950)).

A. The policy exceeds the Department’s delegated authority

Here, the Department’s new policy exceeds its delegated authority under the Higher Education Act. Congress provided that any permanent resident of the United States is eligible for student aid under Title IV, and only requires a student seeking aid to provide evidence of their status from DHS if the student is *not* a citizen or permanent resident:

In order to receive any grant, loan, or work assistance under this subchapter, a student must—

* * *

[1] be a citizen or national of the United States, [2] a permanent resident of the United States, or [3] able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident;

20 U.S.C. § 1091(a)(5) (numbering added). The statute says nothing about how U.S. citizens or permanent residents must document their status in order to receive student aid.

The Department contends that its new policy is authorized by two Department regulations: 34 C.F.R. §§ 668.33(a) and 668.130. The first regulation provides:

§ 668.33 Citizenship and residency requirements.

(a) Except as provided in paragraph (b) of this section, to be eligible to receive title IV, HEA program assistance, a student must—

- (1) Be a citizen or national of the United States; or
- (2) Provide evidence from the U.S. Immigration and Naturalization Service that he or she—
 - (i) Is a permanent resident of the United States; or
 - (ii) Is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident; (emphasis added)

This regulation was originally promulgated in 1987 as 34 C.F.R. § 668.7(a)(4). *See* 52 Fed. Reg. 45712, 45725 (Dec. 1, 1987).

The second regulation, 34 C.F.R. § 668.130, simply reiterates the requirements of §

668.33(a)(2). It provides:

§ 668.130 General.

(a) Scope and purpose. The regulations in this subpart govern the responsibilities of institutions and students in determining the eligibility of those noncitizen applicants for title IV, HEA assistance who must, under § 668.33(a)(2), produce evidence from the United States Immigration and Naturalization Service (INS) that they are permanent residents of the United States or in the United States for other than a temporary purpose with the intention of becoming citizens or permanent residents.

(b) Student responsibility. At the request of the Secretary or the institution at which an applicant for title IV, HEA financial assistance is enrolled or accepted for enrollment, an applicant who asserts eligibility under § 668.33(a)(2) shall provide documentation from the INS of immigration status. (emphasis added).

This regulation was promulgated in 1993, six years after the first regulation. See 58 Fed. Reg. 3180, 3184 (Jan. 7, 1993).

It is immediately apparent that § 668.33 tracks the terms of the statute except in one respect: it requires students who are permanent residents to prove their status through documentation from INS. Adding this provision may have seemed a matter of no consequence to the Department because most students who are permanent residents will have gone through the Green Card process, and so producing an INS document is the logical way to have them confirm their status. However, the provision overlooks Jay Treaty students who, by law, are permanent residents of the United States and are not subject to INS requirements.

“[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated.” *United States v. Larionoff*, 431 U.S. 864, 873 (1977). “A regulation which ... operates to create a rule out of harmony with the statute, is a mere nullity.” *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936). To the extent that the Department’s regulations purport to require permanent residents to obtain documentation from DHS, they impose a limitation that Congress did not authorize and that exceeds the agency’s authority. See *Chauffeur’s Training School, Inc. v. Riley*, 967 F.Supp. 719, 726-27 (N.D.N.Y.

1997) (vacating Department action that exceeded its statutory authority). The Department could not rewrite the unambiguous statutory provisions in the guise of regulations that “implement” the statute. “A regulation may not serve to amend a statute, or to add to the statute ‘something which is not there.’” *Iglesias v. United States*, 848 F.2d 362, 366 (2d Cir. 1988) (citations omitted). “[A]n administrative agency’s regulation is ineffective to the extent it conflicts with its parent statute.” *Hawkins-El v. First American Funding, LLC*, 891 F.Supp.2d 402, (E.D.N.Y. 2012). Thus, the Department cannot rely on its regulations to justify its new policy regarding Jay Treaty students. Rather, the policy must be measured against the terms of the statute and it finds no support there.

Moreover, both of these regulations have been in effect since before the Department first enunciated a policy regarding Jay Treaty students in 1998. Yet that policy stated for 25 years that Jay Treaty students are not required to obtain documentation from INS or (later) DHS. Clearly the Department did not previously believe that these regulations allow it to impose such a requirement on Jay Treaty students. “The history of the regulation as implemented by [the Department] thus belies the agency’s recent litigation position[.]” *Funes v. Francis*, --- F.Supp.3d ----, 2025 WL 3263896, at *17 (S.D.N.Y. 2025).

B. The policy conflicts with the Immigration and Nationality Act

There is a second reason why the Department cannot impose its new policy on Jay Treaty students: it conflicts with the Immigration and Nationality Act. “[W]hen a statute and a regulation are in conflict, the statute ‘renders the regulation which is in conflict with it void and unenforceable.’” *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1156 (10th Cir. 2019). Even if the Department can require most permanent resident students to prove their status through documentation from DHS, it cannot require Jay Treaty students to do so because they are exempt from the INA.

Section 289 of the INA, 8 U.S.C. 1359, provides that “[n]othing in this subchapter [*i.e.* the INA] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.” In 1974 a federal court (the esteemed Judge Gignoux) carefully examined this provision and concluded that “the intent of Congress in enacting Section 1359 was ... to exempt Canadian-born Indians from all immigration restrictions imposed on aliens by the Immigration and Nationality Act.” *Akins v Saxbe*, 380 F.Supp. 1210, 1219 (D. Me. 1974). To reach that conclusion, the court meticulously reviewed the history of Congress’ enactment of this provision in 1928. It found that “Congress’ purpose in using the Jay Treaty language in the 1928 Act was to recognize and secure the right of free passage as it had been guaranteed by that Treaty and delineated by the District Court decision in *McCandless* [*U.S. ex rel. Diabo v. McCandless*, 18 F.2d 282 (E.D. Pa. 1927), *aff’d*, 25 F.2d 71 (3rd Cir. 1928)].” *Id.* at 1220-21. The decision in *McCandless* “held that Canadian-born American Indians were not aliens subject to the immigration laws.” *Id.* at 1220 (emphasis added). Congress “recognize[d] and secure[d]” that exemption by codifying it in the INA.³

The United States has long treated the *Akins* decision as definitive. The Solicitor General declined to authorize a Government appeal of the decision, and the Immigration and Naturalization Service Central Office subsequently advised the Board of Immigration Appeals that it considered *Akins* correct. *See Matter of Yellowquill*, 16 I. & N. Dec. 576 (1978). This explains why the Department, from 1998 through 2023-24, took the position that Jay Treaty students are not subject to the legal restrictions imposed on aliens by INS/DHS and are not

³ This was a time period when Congress focused on Native American rights. Just four years earlier, in 1924, Congress had enacted the Snyder Act, 43 Stat. 253, which granted citizenship to all Native Americans born in the United States.

required to obtain documentation from the INS/DHS.⁴ The Department remains bound by the *Akins* decision. “In the post-*Chevron* era, ... interpretation of [a] statute is a question of law, and accordingly, it is the court, and not the administrative agency, that determines its meaning.” *Art & Antique Dealers League of Am., Inc. v. Seggos*, 121 F.4th 423, 435 (2d Cir. 2024).

There has been no change in the law that authorizes the Department’s new policy.⁵ It is nothing more than a bureaucratic fiat issued by DHS and followed by the Department. But “[a]n agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.” *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 325-26 (2014). The Department’s policy flouts the specific and unambiguous statutory directive that Canadian-born Indians are exempt from the requirements of the INA. It is contrary to law and so must be set aside pursuant to the APA. *See Wynnewood Refining Co., L.L.C. v. Occupational Safety and Health Review Comm.*, 933 F.3d 499, 501 (5th Cir. 2019) (an agency cannot subvert a congressional directive).

II. The Department’s New Policy Is Procedurally Defective

The Department’s new policy regarding Jay Treaty students is also fatally flawed as a procedural matter even if the agency had the authority to issue it (which the agency did not).

A. The new policy is a legislative rule issued without notice and comment

The new policy is a legislative rule that was promulgated without the requisite public notice and comment. *See* 5 U.S.C. § 553. The notice-and-comment “requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule. A

⁴ The authority of DHS to regulate permanent residents of the U.S. stems from the INA, *see Geda v. Director, USCIS*, 126 F.4th 835 (3d Cir. 2025), and Jay Treaty students are exempt from the INA.

⁵ The *Akins* decision remains definitive, and was cited by another federal court as recently as 2025. *See McGillvary v. U.S. Dept. of Homeland Security*, 2025 WL 1065474, at *3 (D.N.J. Apr. 7, 2025).

basic principle of administrative law is that ‘an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.’” [*Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 \(2d Cir. 2018\)](#) (citation omitted). “Similarly an agency ‘may not alter such a rule without notice and comment.’” *Id.* (citation omitted).

Legislative rules “are those that ‘create new law, rights, or duties, in what amounts to a legislative act.’” [*Sweet v. Sheahan*, 235 F.3d 80, 91 \(2d Cir. 2000\)](#) (quoting [*White v. Shalala*, 7 F.3d 296, 303 \(2d Cir. 1993\)](#)). An agency rule that establishes eligibility requirements not contained in the statute, itself, is “the classic example” of a legislative rule. *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1046 (D.C. Cir. 1987). Plainly, the documentation requirements that the Department imposes on students to establish their eligibility for financial assistance are legislative rules. That is why, when the Department originally promulgated those requirements in 1987, it did so through notice-and-comment rulemaking and published the final rule in the Federal Register.

Evidently, when the Department promulgated its rule that requires permanent residents to provide documentation from the INS, it simply overlooked Jay Treaty students. After all, “there are very few Title IV aid applicants who are eligible under the Jay Treaty[.]” (Sheely Declaration, Exh. A). Subsequently, when the issue of the Jay Treaty students came to the Department’s attention circa 1998, the Department decided to address it through a “Dear Colleague” Letter and an addition to the Handbook, rather than going through the bother of amending the regulations. No one complained about this procedural shortcut because it relieved the affected parties – the Jay Treaty students – of an unlawful obligation and provided a practical solution.

Having delineated the documentation requirements for Jay Treaty students through the Handbook for some 25 years, the Department opted to take the same approach when it changed those requirements and imposed new documentation obligations. But this shortcut is unlawful. And because the Jay Treaty students are adversely affected by this shortcut, they are challenging its legality.

The Department cannot defend its action on the ground that it did not implement its original policy on Jay Treaty students through the notice-and-comment process and so need not follow that process to change the policy. The Southern District of New York recently rejected that argument:

[T]he 2018 [agency manual] Revisions, at a minimum, effectively amended a prior legislative rule—the public charge framework memorialized in the Field Guidance and the [agency manual] prior to January 3, 2018. Defendants contend that such prior rules were not legislative because they did not go through notice-and-comment rulemaking. This arguably circular logic simply ignores the fact that such agency actions established a substantive set of rules governing public charge determinations beyond the minimum requirements set forth in the INA [Immigration and Naturalization Act].

Make the Road New York v. Pompeo, 475 F.Supp.3d 232, 263-64 (S.D.N.Y. 2020). Likewise, here the Department’s revisions to the Handbook also amended a prior legislative rule – documentation requirements for a Jay Treaty student that go beyond the provisions of the Higher Education Act. *See also Mendoza v. Perez*, 754 F.3d 1002, 1024-25 (D.C. Cir. 2014) (agency Training and Employment Guidance Letters were legislative rules because they effected a substantive change in existing law or policy and effectively amended a prior legislative rule.).

Because the new policy was put into place without public notice and comment as required by the APA, it must be set aside. *See Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d at 115-16.

B. The Department provided no rationale for its change in policy

In order to avoid the notice-and-comment requirement, the Department may argue that its new policy regarding Jay Treaty students is not a legislative rule, but merely an interpretive rule not subject to rulemaking requirements. This argument is wrong for the reasons set forth above. But even were it correct, the new policy is still fatally flawed and must be set aside.

Where an agency action changes prior policy, it need not demonstrate “that the reasons for the new policy are better than the reasons for the old one.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2008). It must, however, “show that there are good reasons for the new policy.” *Id.*; see *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (agencies must “offer a reasoned explanation for” deviations from past agency practice). Here the Department did not provide any rationale or justification for its radical change in policy. “Where the agency has failed to provide even [a] minimal level of analysis, its action is arbitrary and capricious.” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016).

The Department contended (in opposing the motion for preliminary injunction) that it did provide a rationale for the new policy: “[t]he Department’s electronic announcement from January 2015 expressly stated that the Guidance was issued ‘after consultation’ with DHS to identify ‘acceptable documentation for confirming the Title IV eligibly of American Indians born in Canada.’ ” ECF #12-1 at 17 (emphasis added). But, this perfunctory announcement contains “not even a minimal level of analysis,” nor any “reasoned explanation” of the Department’s change in policy. The Department did not offer any “good reasons” for changing its policy because there are none; the new policy is based on an unexplained fiat from DHS. The lack of any justification for the new policy stands in sharp contrast to the 1998 rollout of the former policy, where the Department provided a straightforward explanation:

Individuals with at least 50% Native American blood who were born in Canada have certain unique rights under the Jay Treaty of 1794, subsequent treaties, and U.S. Immigration Law. ... They are not required to obtain documentation from the U.S. Immigration and Naturalization Service (INS) and are deemed "lawfully admitted for permanent residence" and, thus, eligible for Title IV student financial assistance.

(Sheely Declaration, Exh. A). Of course, since none of these reasons for the original policy have changed, the Department cannot offer any reasoned explanation for reversing that policy.

The Southern District of New York recently faced a similar situation: an agency did “not articulate why they are changing [a regulatory] definition, why this new definition is needed now, or why the definition ... is reasonable.” *New York v. U.S. Dept. of Homeland Security*, 408 F.Supp.3d 334, 349 (S.D.N.Y. 2019). The court concluded that “[t]he Rule is simply a new agency policy ... in search of a justification.” *Id.* The same conclusion obtains here. Because the Department “has failed to provide even [a] minimal level of analysis” in support of its new policy, its action is arbitrary and capricious and must be set aside pursuant to the APA. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. at 221.

CONCLUSION

For the reasons stated herein, the Department’s new policy is contrary to law and so must be set aside. Accordingly, plaintiffs respectfully request that the Court grant their Motion for Summary Judgment.

Respectfully submitted,

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