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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURVJUSTICE, INC., et al., Plaintiffs, v. ELISABETH D. DEVOS, in her official capacity as Secretary of Education, et al, Defendants.	Case Number: 3:18-cv-00535-JSC PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS HEARING NOTICED: July 19, 2018, at 2:00 p.m. DEMAND FOR JURY TRIAL

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MEMORANDUM OF POINTS AND AUTHORITIES

Statement of issues to be decided: (1) Whether Plaintiffs, SurvJustice, Inc., Equal Rights Advocates (ERA), and Victim Rights Law Center (VRLC), have standing to pursue their claims; (2) Whether the challenged Policy is final agency action; (3) Whether Plaintiffs have an adequate remedy for their APA claims; (4) Whether Plaintiffs state an Equal Protection claim; and (5) Whether Plaintiffs state an *ultra vires* claim.

INTRODUCTION

Nearly half of students are sexually harassed before they complete high school, with girls significantly more likely to be harassed than boys; and twenty percent of women are sexually assaulted while in college.[1] Amended Complaint, Dkt. No. 23 (FAC) ¶¶ 39-40. These experiences cause physical, psychological and academic harm, with "delayed and long lasting" consequences. *Id.* ¶ 41. Sexual harassment can impede students' equal access to educational opportunities, as required by Title IX of the Education Amendments of 1972 (Title IX).

In September 2017, Defendants the U.S. Department of Education, Secretary DeVos, and Acting Assistant Secretary Jackson (collectively ED) implemented a new Title IX Policy that reduces substantive and procedural protections for survivors of sexual harassment. This binding Policy is discriminatory and unconstitutional because it was motivated by the baseless sex stereotype that women and girls tend to misunderstand or lie about sexual harassment and it is unlawful because the changes do not have a reasoned basis, are arbitrary and capricious, and are contrary to law. Plaintiffs, who have all been injured by the new Policy, sued to vacate it. They now urge the Court to deny Defendants' Motion to Dismiss (Mot.), Dkt. No. 40, on all grounds.

BACKGROUND FACTS

Sexual harassment, which includes conduct ranging from harmful verbal comments to sexual assault or rape, is a pervasive problem on campuses and in schools across the country that

[1] Sexual harassment includes, *inter alia*, unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, nonverbal, or physical conduct of a sexual nature targeting someone because of their sex, including sexual assault or other sexual violence. FAC ¶ 38.

disproportionately harms women and girls. *See* FAC ¶¶ 38-42. ED has issued policies over the past twenty years setting forth and refining the application of Title IX to sexual harassment. *Id.* ¶¶ 46-81. These policies affirm that Title IX's prohibition on sex discrimination requires educational institutions that receive federal funds (hereafter, schools) to prevent and redress sex-based harassment. ED issued a Dear Colleague Letter in 2011 and a set of Questions and Answers in 2014 to respond to concerns raised by schools and students.[2] These documents reminded schools of their obligations to address peer sexual harassment, including steps to respond in accordance with ED's regulations and guidance, *id.* ¶ 71, and provided examples of efforts schools could take to prevent sexual harassment and potential remedies. *Id.* ¶¶ 78-80.

In 2017 ED reversed course, issuing a new Dear Colleague Letter and a new set of Questions and Answers (together, 2017 Title IX Policy or Policy). *Id.* ¶ 105.[3] This Policy rescinded the 2011 DCL and 2014 Q&A and contradicts earlier policies still in place. *Id.* ¶ 108. As Plaintiffs have alleged, the new Policy weakens protections for students who experience sexual harassment. *Id.* ¶¶ 107-09. ED's leadership responsible for this reversal, Secretary DeVos and Ms. Jackson, have criticized the protections that Title IX affords to women and other survivors of sexual harassment. *Id.* ¶¶ 83-87. Since the new Policy issued, schools have modified or stated their intention to modify their own sexual harassment policies. *Id.* ¶¶ 116-17.

STANDARD OF REVIEW

A subject matter jurisdiction challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the challenge is confined to the allegations pleaded. S*ee Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Because ED has not "converted the motion to dismiss into a factual motion by presenting

[2] U.S. Dep't of Educ., Ltr. from Ass't Sec'y Russlynn Ali (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("2011 DCL"); U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("2014 Q&A").

[3] U.S. Dep't of Educ., Ltr. from Ass't Sec'y Candice Jackson (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf ("2017 DCL"); U.S. Dep't of Educ., Q&A on Campus Sexual Misconduct (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf ("2017 Q&A").

affidavits or other evidence," this Court must treat the motion as a facial attack for which the allegations are assumed true and all reasonable inferences are drawn in favor of Plaintiffs. *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

"Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO BRING ALL OF THEIR CLAIMS.

For Article III standing, a plaintiff must show a past, ongoing, or threatened "injury in fact" that is "fairly traceable" to the defendant's actions and that is "likely to be redressed" by the relief sought. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).[4] An organization has standing to sue in its own right when "it show[s] a drain on its resources from both a diversion of its resources and frustration of its mission." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests").

Although only one plaintiff need have standing to seek the relief requested, *see Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651 (2017), each Plaintiff has standing to challenge the 2017 Title IX Policy. The Amended Complaint (hereafter, Complaint) sets forth detailed allegations identifying Plaintiffs' injuries, their cause, and the relief which will redress the injuries. Specifically, the Policy has impaired Plaintiffs' abilities to accomplish their legal and educational work on behalf of sexual harassment survivors. It has caused Plaintiffs to expend and divert resources, including funding and staff time, from other planned uses. And vacatur of

[4] Defendants do not contest that Plaintiffs satisfy prudential standing requirements.

the Policy would redress these injuries by lifting the impediments to Plaintiffs' work.

ED does not contest Plaintiffs' theories of causation and redressability. And ED's injury arguments are unpersuasive because ED fails to credit Plaintiffs' factual allegations, as required at this stage, and relies on an inaccurately narrow interpretation of *Havens Realty* that conflicts with binding Ninth Circuit decisions such as *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) ("a diversion-of-resources injury is sufficient to establish organizational standing at the pleading stage, even when it is broadly alleged").

A. Plaintiffs' missions have been frustrated by the 2017 Title IX Policy.

Work on behalf of sexual harassment survivors is central to each of Plaintiffs' missions. This includes advocacy in schools' Title IX complaint processes and work to ensure survivors maintain access to education. SurvJustice's mission is to increase the prospect of justice for survivors of sexual violence, including in the campus grievance process and in helping survivors access accommodations and services from schools. FAC ¶¶ 10-11. ERA is dedicated to protecting and expanding economic and educational access and opportunities for women and girls, and its work includes both Title IX representation and education and counseling related to sexual harassment and discrimination. *Id*. ¶¶ 23-24. And VRLC's mission is to provide legal representation to victims of rape and sexual assault, as well as comprehensive services to help restore victims' lives, including ensuring that survivors stay in school. *Id*. ¶¶ 28-29.

The Policy frustrates these missions by shifting procedural and substantive standards against survivors, making it more difficult for Plaintiffs to obtain fair outcomes for survivors and to protect survivors' access to education. "An organization's ability to function … is impaired if its purpose is to provide a specified type of service and a defendant's actions hinder [it] from providing that core service." *Fair Hous. Counc. of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1225 (9th Cir. 2012) (citing *Havens Realty*, 455 U.S. at 378-79). The Policy also discourages some survivors from pursuing complaints, harming SurvJustice and VRLC.

1. The 2017 Title IX Policy makes it harder for Plaintiffs to obtain favorable outcomes, including equal access to education.

Plaintiffs work on behalf of survivors in school Title IX proceedings, advocating for them

in those proceedings and seeking to maintain those students' full and equal access to education. FAC ¶¶ 11, 24, 29. This work is frustrated by the 2017 Title IX Policy.

The Policy makes it more difficult for Plaintiffs to obtain successful outcomes on survivors' behalf. Among the many changes identified in the Complaint, *id*. ¶ 107, it eliminates a benchmark timeframe for resolving complaints promptly, permits schools to use the higher "clear and convincing evidence" evidentiary standard to determine responsibility for sexual harassment, and permits schools to provide rights of appeal only to alleged perpetrators, while denying them to complainants. *Id.* It is now more difficult for Plaintiffs to obtain relief, and significantly, timely relief, for survivors; and even where favorable outcomes are achieved, additional staff time and effort are required from Plaintiffs to obtain them. *Id*. ¶¶ 19, 27, 33.

By making the process of pursuing a complaint more burdensome for survivors, the Policy makes it more difficult for Plaintiffs to advocate on survivors' behalf. For example, it permits schools to refuse to provide interim measures[5] to complainants (where before they had been required), and when schools do provide such measures, the Policy allows institutions to force complainants to modify their schedules or housing assignments in order to make interim measures equally available to respondents, even though respondents have not had their safety and access to education threatened or undermined by sexual harassment.[6] *Id*. ¶ 107. The Policy also reverses course from earlier guidance, declaring that voluntary mediation is appropriate, even in cases of sexual assault. *Id*. ¶ 108.[7] It permits respondents to ask irrelevant questions

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[5] Examples of appropriate interim measures, which are steps a school takes to ensure equal access to its education programs and activities and protect the complainant as necessary during a sexual harassment investigation, are identified in the 2014 Q&A at 32.

[6] In addition to its failure to assume Plaintiffs' allegations are true, ED is incorrect that the change in interim measures is not harmful to survivors. To prevent sexual harassment from interfering with survivors' access to education, ED's prior policy required schools to provide interim measures that *protected complainants* to prevent further harm to them and to mitigate any negative impact on their ability to participate in educational programs and activities. 2014 Q&A at 32. The Policy ignores this rationale by *prohibiting* schools from taking interim measures that "favor" or are made available only to the complainant. 2017 Q&A at 3.

[7] While ED argues, irrelevantly, that voluntary mediation should be available to students, Mot. at 9, n.1, it does not dispute, nor could it, that the new Policy reverses ED's position on the

about a complainant's sexual history and permits schools to treat prior consensual activity as implying future consent. *Id.* ¶ 107. These changes increase the risk that a survivor will be further traumatized or otherwise be deprived of access to education as the result of reporting sexual harassment. *Cf. id.* ¶¶ 40-43. As such, the Policy frustrates Plaintiffs' missions. *Id.* ¶¶ 20, 26, 29.

ED does not dispute that reduced likelihood of beneficial outcomes can establish frustration of mission as a matter of law. Nor could it. *See El Rescate Legal Servs., Inc. v EOIR*, 959 F.2d 742, 748 (9th Cir. 1991) (practice of using incompetent translators frustrated plaintiffs' immigration efforts on behalf of non-English-speaking clients); *PETA v. USDA*, 797 F.3d 1087, 1091-95 (D.C. Cir. 2015) (failure to apply protections to birds held by private parties injured PETA by requiring it to redress mistreatment of those birds through less effective means).

Instead, ED erroneously seeks to dismiss the well-pleaded allegations by disputing their factual basis. It argues that Plaintiffs have not alleged sufficiently that schools have already responded to the new Policy. Yet Plaintiffs provide specific examples of schools doing exactly that. FAC ¶¶ 116-17. ED's quibbles with the significance of the schools' changes do not permit it to go beyond the general allegation, made more than plausible by Plaintiffs' allegations, that schools are heeding ED's changed Policy, just as would be expected after a public launch in which Secretary DeVos herself said the prior ED guidance was harmful.[8] *Id.* ¶¶ 93-96. While not

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appropriateness of voluntary mediation in cases of sexual assault from Guidance issued in 2001. FAC ¶ 108. This decision allows schools to evade responsibility for protecting students, *id.* ¶ 27, and creates significant potential for retraumatization. *See id.* ¶ 107; *see also* Anne Lawton, The Emperor's New Clothes: How the Academy Deals with Sexual Harassment, 11 Yale J.L. & Feminism 75, 130 (1999) ("[E]ven voluntary mediation can be coercive."). ED's apparent disagreement as a matter of policy is irrelevant to whether ED changed its guidance and whether Plaintiffs have sufficiently alleged that the change frustrates their missions.

[8] Plaintiffs' examples show members of the regulated community responding to the Policy based on their accurate perception that it imposes new requirements as to how they administer their Title IX processes and are thus indicative of finality. *See* FAC ¶¶ 116-17. That not all schools have publicly changed their procedures to specifically align with the Policy does not change this conclusion. Indeed, since the filing of the Amended Complaint, at least one more school has issued a new policy which provides for voluntary alternative resolution without exception for sexual assault, as required under prior ED guidance. *See* The George Washington University, Sexual and Gender-Based Harassment and Interpersonal Violence Policy (May 18, 2018),

all schools have announced programmatic changes, all must respond to Title IX complaints as filed and decide which procedures to follow, especially now that alleged perpetrators may forcefully claim to be entitled to additional rights and more favorable treatment. It is more than plausible that, as a result of the new Policy, schools' responses to sexual harassment complaints will continue to shift, either via school-wide policy changes or decisions in individual cases, to the detriment of survivors. *See Idaho Cons. Leag. v Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) ("To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge."); *see also Lujan*, 497 U.S. at 882-94 (injury may be based on "immediately threatened effect").

Shifting the balance of procedural and substantive Title IX processes against survivors was, of course, exactly what ED sought to achieve by the new Policy. *See* 2017 DCL at 1 (under prior guidance, "many schools have established procedures for resolving allegations that . . . are overwhelmingly stacked against the accused"); DeVos Speech[9] (prior system "pushed schools to overreach"). While ED may believe its reversals to be justified, it cannot seriously dispute that in so doing, ED has frustrated Plaintiffs' missions to obtain positive results for survivors.

2. SurvJustice's and VRLC's missions have been frustrated because the new Policy deters survivors from pursuing Title IX complaints.

The 2017 Title IX Policy has frustrated SurvJustice's and VRLC's missions by deterring some survivors from making claims to their schools, both because survivors anticipate a lower likelihood of success due to ED's reversal in course and because they are uncertain about their rights under the new Policy. FAC ¶¶ 16-17, 31. ED's dispute with these well-pleaded allegations inappropriately attempts to turn its facial challenge to Plaintiffs' standing into a factual dispute.

The factual allegations make this injury more than plausible. SurvJustice has experienced a decrease in the number of survivors seeking its services since September 2017, when the new

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https://haven.gwu.edu/sites/g/files/zaxdzs2106/f/downloads/Title%20IX%20Policy%20051818.pdf.

[9] Elisabeth DeVos, Sec'y of the U.S. Dep't of Educ., Remarks on Title IX Enforcement at George Mason University (Sept. 7, 2017), https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement ("DeVos Speech").

Policy went into effect, and has observed students questioning their plans to report sexual violence as a result of the new Policy. *Id*. ¶ 16. It has also observed confusion and uncertainty among students about their legal rights to report sexual harassment. *Id*. ¶ 17. So too, VRLC "saw an immediate chilling effect" following the new Policy and reports that "sexual violence and assault victims have expressed an unwillingness to report harassment and assault to campus authorities." *Id*. ¶ 31. This type of frustration-of-mission injury is legally cognizable. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (church's mission to provide transportation and shelter to undocumented immigrants had been frustrated by state law because church "reasonably fear[ed] that its volunteers will be deterred from participating" in its program); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (day laborer organization had standing to challenge an anti-solicitation ordinance in part because the ordinance deterred participation in hiring transactions, frustrating the mission of strengthening and expanding the work of day laborer organizing groups); *see also Hous. Opp'ties. Made Equal v. Cinc. Enquirer*, 943 F.2d 644, 646 (6th Cir. 1991) ("HOME alleges that defendant's discriminatory advertising has deterred potential renters from seeking housing at the advertised complexes. This, in turn, has caused HOME to devote resources to investigate and negate the impact of these advertisements. Allegation of this injury is sufficient to confer standing."). So too here, Plaintiffs' missions are frustrated by the Policy's deterrent effect.

ED's assertion that such a "chilling effect" cannot establish standing is incorrect. Plaintiffs' allegations describe presently observed effects. *See* FAC ¶¶ 16-17, 31. Their observations are a "specific present objective harm," not hypothetical future deterrence, as in *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1129 (9th Cir. 1996), cited by ED. *See also Jackson v. City & Cty. of S.F.*, 829 F. Supp. 2d 867, 872 (N.D. Cal. 2011) (distinguishing *San Diego* because plaintiffs' allegations established "immedia[te] and concrete[]" injury and questioning whether *San Diego*'s standing analysis was still good law following *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128-29 (2007)).

ED asserts that the Policy should not discourage survivors from pursuing complaints. The argument lacks credibility as ED plainly sought to reduce the number of sexual harassment

complaints when issuing the Policy. *See* DeVos Speech (stating that prior "failed system has generated hundreds upon hundreds of cases" in ED's Office of Civil Rights (OCR) and criticizing the prior guidance on the ground that it allowed "any perceived offense [to] become a full-blown Title IX investigation"). It is a plausible factual allegation that reductions in procedural and substantive protections for survivors would discourage them from pursuing complaints both at their schools and with ED for that matter, and doubly so where that was the very aim of the changes. Further, to mount a factual challenge to subject matter jurisdiction, ED must do more than speculate that the allegations are inaccurate and instead either "fil[e] an answer or otherwise present competing facts." 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1350 (1969); *see also St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Absent the presentation of competing facts, Plaintiffs' allegations—that they have observed survivors decline to file complaints as a result of the new Policy—must be taken as true at this stage. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015).

B. The 2017 Title IX Policy forces Plaintiffs to divert resources.

Plaintiffs' allegations show that they have "had to devote significant resources"—including staff time and money—"to identify and counteract" harms resulting from the Policy and thereby have standing in their own right. *Havens Realty*, 455 U.S. at 379. ED's response misstates and misapplies organizational standing law and fails to treat factual allegations as true.

SurvJustice and ERA are both expending additional resources on education and outreach to students because of the Policy. SurvJustice has provided an increased number of trainings and has done so at reduced rates to respond to increased student uncertainty about their rights. FAC ¶ 17. ERA has undertaken new methods of outreach to survivors through a national initiative launched in response to the Policy, including an Advice & Counseling Program, a new intake process, development of new resources for individuals facing sexual harassment, and the establishment of a network of attorneys to provide counseling and other assistance to survivors. *Id.* ¶ 26. The resources for these projects are "over and above what it would otherwise have expended" and have required ERA "to divert staff time and resources away from [other] core programmatic activities" such as other civil rights litigation. *Id.* Such diversions of resources

establish standing. *See Fair Hous. Counc. of San Fernando Valley*, 666 F.3d at 1219; *Fair Hous. Council of Or. v. Trav. Home & Marine Ins. Co.*, No. 3:15-cv-00925-SB, 2016 U.S. Dist. LEXIS 180576, at *16 (D. Or. Dec. 2, 2016); *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 943.

The Policy has also made Plaintiffs' work on behalf of survivors more time-consuming. Reviewing and understanding how the new Policy reversed longstanding prior guidance, which is required of Plaintiffs to advise clients properly, has required significant additional staff time by SurvJustice and VRLC. FAC ¶¶ 18, 34.[10] As a result of ED's lifting of the benchmark that investigations be completed within sixty days, schools are slowing their response times to survivors' complaints, requiring additional staff time from Plaintiffs to attempt to obtain prompt outcomes from schools. FAC ¶¶ 21, 33. *See Nw. Immig. Rights Project*, 2016 WL 5817078, at *10 (legal services organization had standing to challenge delays in processing clients' immigration applications because responding to delays required additional staff time). The Policy's allowance of new burdens on survivors who make claims—such as by requiring a survivor to modify her class schedule to avoid the accused or be subject to cross-examination about her sexual history—will also require additional effort by Plaintiffs to protect students' access to education. *See* FAC ¶¶ 20, 26-27, 33.

Plaintiffs' allegations are sufficient to plead a diversion of resources. Contrary to ED's suggestion, allegations of diversion of resources need not be pleaded with granular particularity, and the Ninth Circuit has found standing based on less robust allegations than here. *See, e.g.*, *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (finding sufficient allegations that, "to monitor the violations and educate the public regarding the discrimination at issue, [the plaintiff] ha[d] had . . . to divert its scarce resources from other efforts to promote awareness of—and compliance with—federal and state accessibility laws and to benefit the disabled community in other ways"); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir.

[10] ED's contention that staff time spent analyzing the new Policy is a "litigation cost" that is not "independent of the lawsuit" is incorrect. ED latches on to the word— "advocate"—to argue that the present case is an example of such "advocacy". Yet the allegations plainly describe advice, counseling, and advocacy within the school process, not the instant lawsuit. *See, e.g.*, FAC ¶ 20 ("SurvJustice often advocates for schools to provide accommodations to its clients…").

2002) (complaint alleged "economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices"); *see also Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015); *Thomas v. Hous. Auth. of L.A.*, No. 04-cv-6970, 2005 WL 6136432, at *15 (C.D. Cal. June 3, 2005); *Nw. Immig. Rights Project v. USCIS*, No. C15-0813, 2016 WL 5817078, at *10 (W.D. Wash. Oct. 5, 2016) (plaintiff "need not allege the magnitude of the diversion.").

ED's assertion that there is no diversion of resources if the additional resources are spent on activities that are "central to" or "entirely consistent with" the organization's mission is incorrect. There is no requirement that diverted resources be deployed in novel or atypical ways to constitute a cognizable injury. In fact, the Ninth Circuit has found a diversion of resources even where a legal services organization's resources were "diverted" to the organization's core activity. *See Nat'l Council of La Raza*, 800 F.3d at 1040–41 (resources used to register voters who should have been registered had state complied with NVRA were diverted from registering other voters and did not constitute plaintiffs going about their "business as usual"); *El Rescate Legal Servs., Inc. v EOIR*, 959 F.2d at 748 (policy requiring legal services organization to "expend resources in representing clients they otherwise would spend in other ways" was sufficient to establish standing); *see also Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 28 (D.D.C. 2017) (organizations' activities "wholly consistent" with mission).[11]

ED's argument that various actions taken by the Plaintiffs were not "necessary" to avoid additional injury flatly misstates the law. ED erroneously suggests that any expenditure short of statutory compulsion is not "necessary" and therefore fails to establish cognizable injury. In rejecting a similar argument that an organizational plaintiff had not been literally "forced" to act,

[11] *Jimenez v. David Y Tsai*, No. 16-cv-04434, 2017 WL 2423186, at *11 (N.D. Cal. June 5, 2017), cited by ED, does not change this conclusion. There the plaintiff failed to allege that its mission had been frustrated or to provide "concrete details" regarding its diversion of resources. *Id.* at *12. Interpreting this unpublished decision more broadly conflicts with binding precedent.

another district court in this Circuit explained:

> [B]oth the Supreme Court and Ninth Circuit have made clear, the frustration of an organization's mission is the personalized injury that "forces" the organization to spend money to alleviate the frustration; an organization is only "choosing" to spend money if the defendant's conduct does not affect the organization at all…. While the loss of credibility, support and organizational goodwill that [plaintiff] purportedly would suffer if it decided not to expend such resources may supply additional reasons why [plaintiff] was "forced" to do so, the frustration of its mission is alone sufficient to show that it was not a choice.

Animal Legal Def. Fund v. USDA, 223 F. Supp. 3d 1008, 1017 (C.D. Cal. 2016) (collecting cases); *see also Equal Rights Ctr. v Post Props., Inc*., 633 F.3d 1136, 1140 (D.C. Cir. 2011) (standing analysis does not depend on the voluntariness or involuntariness of the organizational plaintiff's expenditures); *We Are America/Somos Am.America v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1096 (D. Ariz. 2011). So too here, Plaintiffs' technically voluntary but mission-critical activities are not the type of "manufactured" injury rejected by courts. *Cf. Fair Hous. Counc. of San Fernando Valley*, 666 F.3d at 1219 ("An organization cannot manufacture [an] injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all.").

Unbelievably, ED posits that its discriminatory new Policy actually benefits ERA by providing ERA with an opportunity to *fulfill* its organizational purpose and cites successful fee litigation by ERA in support. First, ERA is not claiming injury as the result of its participation in the instant lawsuit, making ED's argument irrelevant. FAC ¶¶ 23-27. Moreover, if ED is arguing that ERA could not be injured because the Policy allows ERA to "fulfill" its organizational purpose of litigating against sex discrimination, such an argument is baseless and has already been rejected by the Ninth Circuit. *See Fair Hous. Council*, 666 F.3d at 1226 (not adopting dissent's argument that "an organization created to advance enforcement of a law is not hampered in its mission because the law is violated: absent violations, the organization would have to find a new mission."); *see also Nat'l Fair. Hous. Alliance*, 261 F. Supp. 3d at 28.

Legal services organizations, as all others, may suffer injury when their ability to provide those services is frustrated, requiring a diversion of resources separate from the lawsuit they bring to challenge the unlawful conduct. *El Rescate Legal Servs., Inc. v EOIR*, 959 F.2d at 748. That is exactly what ERA has alleged here. Nor do the cases that ED cites change this conclusion. They hold only that there was no injury where an organization dedicated to bringing a single constitutional challenge against the government brought exactly that case and made no other allegations regarding injury, *Doe v. Obama*, 670 F. Supp. 2d 435, 440 (D. Md. 2009), *aff'd*, 631 F.3d 157 (4th Cir. 2011), and where an organization whose only apparent diversion of resources related to the allegedly discriminatory conduct was the filing of a lawsuit to counter that conduct. *Goldstein v. Costco Wholesale Corp.*, 278 F. Supp. 2d 766, 771 (E.D. Va. 2003).

C. Plaintiffs have standing to bring an Equal Protection claim.

ED's argument that Plaintiffs do not have standing to bring their Equal Protection claim because they do not allege sex discrimination directly against their organizations is baseless. Civil rights organizations are routinely found to have organizational standing to challenge discrimination, even when they are not the object of the discrimination, if they can show cognizable injuries to themselves as Plaintiffs have done under *Havens Realty*. *See, e.g.*, *N.C. State Conference of NAACP v. N.C. State Bd. of Elections*, 283 F. Supp. 3d 393, 405 (M.D.N.C. 2017) (local NAACP had organizational standing to bring equal protection challenge to mass voter registration cancellation); *Comm. for Immig. Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177 (N.D. Cal. 2009) (organization dedicated to immigrant rights had organizational standing to bring equal protection and other claims regarding discriminatory immigration enforcement); *Gay-Straight All. Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1105 (E.D. Cal. 2001) (anti-homophobia organization had organizational standing to bring equal protection and other challenges to discrimination against gay students).

ED cites no cases adopting its novel argument, which would severely limit civil rights organizations' ability to oppose discrimination. The third-party standing cases ED does cite do

not address a scenario where an organization has properly pleaded a *Havens Realty* theory regarding injury to itself resulting from discriminatory actions against others. *See Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (not discussing applicability to *Havens Realty*); *Legal Aid Soc. of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017, 1030 (9th Cir. 1998) (plaintiff alleged representational standing only); *Diamond v. Corizon Health, Inc.*, No. 16-cv-03534, 2016 WL 7034036, at *5 (N.D. Cal. Dec. 2, 2016) (family members of deceased inmate did not have standing to seek future injunctive relief because they had not shown risk of future harm). Nor does ED's citation to *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979), change this analysis, as *Feeney* does not discuss organizational standing.

II. THE 2017 TITLE IX POLICY IS FINAL AGENCY ACTION.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. While judicial review is limited to "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, the APA is rooted in "a strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

The 2017 Title IX Policy is reviewable final agency action. An agency action is "final" when it marks the "consummation of the agency's decision-making process" and is one "by which rights or obligations have been determined, or from which legal consequences will flow." *Pac. Coast Fed'n. of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1033 (9th Cir. 2001) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The inquiry is not governed by the labels an agency uses or an agency's boilerplate disclaimers. *See Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094-95 (9th Cir. 2014) ("[C]ourts consider whether the practical effects of an agency's decision make it a final agency action, regardless of how it is labeled."); *In re Appalachia Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). Instead, finality "must be interpreted in a pragmatic and flexible manner," focusing on the "practical" as well as "legal effects of the agency action." *Or. Nat. Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006). Echoing the Ninth Circuit's approach, the Supreme

Court recently emphasized that it has "long taken" a "'pragmatic' approach" to the standards governing finality. *U.S. Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807, 1815 (2016).

The new Policy announces ED's definitive position on a host of topics and immediately binds regulated parties at risk of enforcement proceedings for non-compliance, resulting in loss of federal funds. It has had a direct and immediate effect on school operations and, consequently, on Plaintiffs. Consistent with the "pragmatic and flexible" approach required by the Supreme Court and Ninth Circuit, the 2017 Title IX Policy constitutes final agency action under the APA.

Aside from its arguments on finality, the government's only challenge to the APA theories is its argument that the Policy need not have gone through notice and comment, a claim not specifically alleged in the Complaint, Count 1. Plaintiffs' APA claim alleges that the Policy is unlawful because, among other reasons, it lacks reasoned explanation, it departs from prior policy without acknowledgment, it is based on mistakes of fact and law, it is arbitrary and capricious, and it is contrary to law. FAC ¶¶ 123-131. The government does not contest Plaintiffs' ability to state a claim under these theories alleged in Count 1.

A. The Policy is the consummation of ED's decision-making process.

On the first element of finality, the Policy marks the consummation of ED's decision-making process in that it has (1) "decided to withdraw" the 2011 DCL and 2014 Q&A, 2017 DCL at 2; and (2) "provide[d] information about how OCR will assess a school's compliance with Title IX." 2017 Q&A at 1. As such, it reflects ED's "definitive position" on schools' present obligations with respect to sexual harassment. *Or. Nat. Desert Ass'n*, 465 F.3d at 984.

That ED may replace the 2017 Title IX Policy in the future does not change its current finality. *See Cali. v. HHS*, 281 F. Supp. 3d 806, 823 (N.D. Cal. 2017) (interim rule constituted final agency action because "interim refers only to the Rule's intended duration—not its tentative nature."); *Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 45 (D.D.C. 2011); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 7 (D.C. Cir. 2017) (stay of compliance date was final because "the applicable test is not whether there are further administrative proceedings available, but rather whether the impact of the order is sufficiently final to warrant review"). Moreover, more than eight months have passed since the Policy issued without a notice of proposed rulemaking from

ED—itself the first step of a lengthy process. The Policy thus governs for the foreseeable future.

B. The Policy determines rights and obligations and establishes legal consequences for non-compliance.

The Policy meets the second element of finality because it determines rights and obligations and establishes legal consequences for non-compliance. "Courts have consistently interpreted *Bennett* [*v. Spear*] to provide several avenues for meeting the second finality requirement," including when agency action "impose[s] an obligation, den[ies] a right, or fix[es] *some* legal relationship as a consummation of the administrative process." *Or. Nat. Desert Ass'n*, 465 F.3d at 986-87. In this vein, the Supreme Court recently reaffirmed that an agency document "specifying" that certain items were, or were not, exempt from regulation was final even though the document "'had no authority except to give notice of how the [agency] interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular [regulated entity].'" *Hawkes,* 136 S. Ct. at 1815 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967) and citing *Frozen Food Express v. U.S.*, 351 U.S. 40, 44-45 (1956)).

The Policy likewise gives schools the choice between compliance with detailed agency instructions or the risk of enforcement and the corresponding termination of federal funds. *See* 2017 Q&A ("these questions and answers … provide information about how OCR will assess a school's compliance with Title IX."); *see also Hawkes*, 136 S. Ct. at 1815 (agency action was final because "while no administrative or criminal proceeding can be brought for failure to conform to the approved [agency action] itself, [it] warns that if they [take a certain action], they do so at the risk of significant criminal and civil penalties"). Thus, schools that continue to comply with the 2011 DCL and 2014 Q&A are no longer assured of avoiding Title IX enforcement by ED. *See* 2017 DCL at 2 ("The Department will not rely on the withdrawn documents in its enforcement of Title IX."); *see also Hawkes*, 136 S. Ct. at 1815 (deprivation of safe harbor from statutory enforcement indicates finality).

Indeed, ED *requires* schools to agree to comply with this (and other) policy guidance. ED requires all recipients of federal financial assistance to sign an Assurance of Compliance and is authorized to "specify the form of the assurances." 34 C.F.R. § 106.4(a) & (c). The current

Assurance, posted on ED's website,[12] requires recipients to assure that they will comply with "[a]ll regulations, guidelines, and standards issued by the Department under any of these statutes," including Title IX. Similarly, the generic OMB assurance form (SF424B), which ED requires from at least some recipients, requires an applicant to certify that it "[w]ill comply with all Federal statutes relating to nondiscrimination," including Title IX, and that it will "comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program."[13] The 2017 Title IX Policy documents are, on their face, the types of "guidelines" or "standards" or "policies" to which these assurances extend, making them determinative of schools' legal obligations. *See State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031 (N.D. Cal. 2018) (imposition of a certifying condition is final agency action).

Even without the Assurances, the mandatory language contained in the Policy is sufficient to make it a final agency action. *See Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) ("It is enough for the agency's statement to 'purport to bind' those subject to it, that is, to be cast in 'mandatory language' so 'the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences."). For example, "[d]isciplinary sanction decisions must … consider[] the impact of separating a student from her or his education," 2017 Q&A at 6, and a school "may not" make interim measures available to only one party, *id*. at 3. In addition, the 2017 Title IX Policy removes requirements and prohibitions that were described in the withdrawn policies. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (deregulation subject to judicial review under the same standards as regulation). For example, the new Policy tells schools that they are no longer required to: use a preponderance of the evidence standard; provide appellate rights equally; or address an incident of alleged harassment where the incident occurs off-campus and does not involve a school program or activity. FAC ¶ 107. Further,

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[12] U.S. Dep't of Educ., Office for Civil Rights, *Assurance of Compliance – Civil Rights Certificate*, https://www2.ed.gov/about/offices/list/ocr/letters/boy-scouts-assurance-form.pdf

[13] Revised Assurances Template, U.S. Dep't of Ed., https://www2.ed.gov/admins/lead/account/stateplan17/reviseded18100576.pdf, at 5, 6-7 ¶¶ 6, 18.

schools may now permit the use of mediation to resolve claims of sexual assault. *Id*.

ED treats its policies as equivalent to binding regulations. ED's *Case Processing Manual*, last amended in March 2018, permits OCR to unilaterally modify settlement agreements with schools "in response to changes in controlling case law, statutes, regulations, *or agency policy*;" and it requires OCR to "reference the relevant facts, the applicable regulations(s) *and OCR policy*, and the appropriate legal standards" when it issues a letter containing findings about whether its investigation located unlawful discrimination.[14] ED's argument that the 2017 Title IX Policy "does not eliminate OCR's discretion in enforcing Title IX" is therefore plainly contradicted by its own Manual and the terms of the Policy itself. OCR can no longer find a violation, for example, if a school does not use a preponderance of the evidence standard, or does not give reciprocal appeal rights, or uses mediation for claims of sexual assault. The entire point of the 2017 Title IX Policy, as expressed by ED leadership, was to limit the circumstances in which OCR could find a violation or find compliance, thus giving safe harbor to schools that follow the Policy. *See Hawkes*, 136 S. Ct. at 1815; *Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *1 (N.D. Cal. June 20, 2016) (Corley, J.) ("If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is—a binding rule of substantive law.") (citation omitted).

ED's boilerplate disclaimer that the Policy "does not add requirements to applicable law," 2017 DCL at 2, 2017 Q&A at 7, is belied by the Policy's mandatory language. *See In re Appalachia Power Co.*, 208 F.3d at 1023; *see also Philip Morris USA Inc. v. FDA*, 202 F. Supp. 3d 31, 46 (D.D.C. 2016). Notably, the rescinded policies contained the same disclaimers as the new Policy, 2011 DCL at n.1, 2014 Q&A at n.1, yet ED described the rescinded policies as imposing "regulatory mandates" and "regulatory burdens." 2017 DCL at 2. Moreover, the response of regulated institutions confirms that the 2017 Title IX Policy is, as a practical matter, being treated as establishing new rights and obligations. Plaintiffs have made specific allegations

[14] Case Processing Manual, U.S. Dep't of Ed. (March 5, 2018), https://ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf at 21 (§ 503(a)), 17 (§ 303(e)) (emphasis added).

showing that schools are monitoring ED's conduct and that some are changing their policies citing the Policy as the sole cause. *See* FAC ¶¶ 116-17. While not every school has taken formal action, there can be no doubt that the new Policy has significant practical effects.[15]

And although ED asserts that it would still base any enforcement action on Title IX and its implementing regulations, this assertion, even if compatible with the Case Processing Manual provisions quoted above, does not change the practical and legal consequences of the Policy. *See Manufactured Hous. Inst. v. EPA*, 467 F.3d 391, 398 (4th Cir. 2006) ("EPA's response, that petitioners are being regulated today as they were before the policy became final, is no defense to the fact that a realistic fear exists of being subject to the regulation" under the policy); *Texas v. United States*, 201 F. Supp. 3d 810, 825 (N.D. Tex. 2016) (finding final agency action because "[u]sing a pragmatic and common sense approach, [ED's guidelines on the rights of transgender students] and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines").[16]

III. PLAINTIFFS LACK AN ADEQUATE REMEDY FOR THEIR APA CLAIMS.

ED's cursory argument that Plaintiffs' APA claims are barred by 5 U.S.C. § 704 is unpersuasive. ED does not actually identify any alternative remedy, much less an adequate one. ED notes that Plaintiffs may be able to bring a Title IX sex discrimination claim against schools "assuming the requirements for standing are otherwise met," even while arguing that Plaintiffs lack standing as organizations to bring claims for sex discrimination. That is hardly sufficient to make the necessary showing under section 704 that "as a *category of case*," the injuries experienced by Plaintiffs can "*always* be adequately remedied" by a Title IX suit against schools.

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[15] ED disputes the degree to which the schools' changes injure Plaintiffs, which is not relevant, as discussed above, but does not dispute that the changes are in response to the Policy, making them indicative of finality.

[16] ED's argument that the 2017 Title IX Policy is not final because it does not "directly affect[]" Plaintiffs' rights and liabilities is baseless. As an initial matter, ED claims that it is quoting the term "directly affects" from an APA finality case (either *Bennett* or *Hawke*). But that term does not appear in either of those cases. Further, we are aware of no case law that suggests that whether an action is "final" under the APA depends on the identity of the plaintiff, no doubt because of the bizarre consequences of such an interpretation.

Bowen v. Massachusetts, 487 U.S. 879, 907 n.43 (1988) (second emphasis added). *See also Californians for Renewable Energy v. EPA*, C 15-3292 SBA, 2018 WL 1586211, at *11 (N.D. Cal. Mar. 30, 2018) (citing *Bowen*, 487 U.S. at 901) ("doubtful and limited relief" is an inadequate alternative remedy); *N.Y.C. Employees' Ret. Sys. v. SEC*, 843 F. Supp. 858, 870 (S.D.N.Y. 1994) (K. Wood, J.) (citing *Bowen*, 487 U.S. at 910 & n.48) (the "the adequate alternative remedy provision of the APA does not bar review of agency action where the alleged alternative action could remedy only part of the claimed injury").

Suing schools directly would not provide complete relief in at least the following ways: (1) Plaintiffs seek an order vacating the 2017 Title IX Policy, which they would be unlikely to obtain in individual litigation against individual schools; (2) Plaintiffs would only be able to allege violations of Title IX and its implementing regulations specific to the individual school, requiring, at best, piecemeal litigation with remedies typically limited to individual schools; and (3) Plaintiffs would not be able to challenge the substantive deficiencies of the Policy, such as its lack of reasoned explanation and its arbitrary and capricious nature. Further, there is no "'clear and convincing evidence' of 'legislative intent' to create a special, alternative remedy and thereby bar APA review." *Id.* (citing *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 846 F.3d 1235, 1244 (D.C. Cir. 2017)). *See also Texas v. United States*, 201 F. Supp. 3d at 826–27.

Natl. Wrestling Coaches Ass'n v Dept. of Educ., 383 F.3d 1047 (D.C. Cir. 2004), does not change this conclusion, because the alleged injuries there resulted from the schools' actions, which were not required by the Title IX policy being challenged. Here, as described above, the new Policy shifts the rights of students and obligations of schools in ways that hurt survivors and deter them from seeking justice, making a suit against schools an inadequate remedy. Moreover, the *Nat'l Wrestling Coaches* court did not consider the availability of remedies for claims that the challenged policy was arbitrary and capricious or without a reasoned explanation (as plaintiffs allege here) and discussed only the availability of a remedy for violations of Title IX and its implementing regulations. *Id.* at 1048.

IV. PLAINTIFFS' ALLEGATIONS THAT THE POLICY WAS MOTIVATED IN PART BY DISCRIMINATORY STEREOTYPES ABOUT WOMEN AND GIRLS STATE AN EQUAL PROTECTION CLAIM.

Plaintiffs set forth detailed allegations that in promulgating the Policy decisionmakers at ED were motivated by the discriminatory and baseless gender stereotype that women and girls lack credibility when reporting sexual harassment. *See* FAC ¶¶ 82-104. When a challenged government action is facially neutral, as here, a plaintiff may show an equal protection violation when "invidious discriminatory purpose was a motivating factor." *Id.* (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)); *Ave 6E Investments, LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016) ("any indication of discriminatory motive may suffice to raise a question that can only be resolved by a factfinder.") (quoting *Pac. Shores Props. v. City of Newport Beach*, 730 F.3d 1142, 1156 (9th Cir. 2013)). The Supreme Court has set forth several non-exhaustive elements for such an analysis, which need not all be proved: "the events leading up to the challenged decision and the legislative history behind it, the defendant's departure from normal procedures or substantive conclusions, and the historical background of the decision and whether it creates a disparate impact." *Id.* (citing *Arlington Heights*, 429 U.S. at 266-68). Here, each element favors the conclusion that ED was motivated by sex stereotypes.

First, the actions and statements leading up to the Policy reveal its discriminatory basis. Plaintiffs cite statements from senior ED leadership, close in time to the issuance of the new guidance, revealing stereotyped views of women and girls who report sexual violence and harassment. *See* FAC ¶¶ 83-98; *see also Masterpiece Cakeshop, Ltd. v. Col. Civ. Rts. Comm'n*, -- S. Ct. -- (2018) (contemporaneous statements by adjudicators can indicate bias by an agency against a protected group). For example, Defendant Jackson told the New York Times that 90% of Title IX investigations result from a woman's later regret of consensual sexual activity. FAC ¶ 92. This statement plainly reveals the baseless belief that women and girls routinely make false reports of sexual misconduct. Jackson was "previewing her plans" at ED for a revamped Title IX

sexual harassment policy,[17] making it the type of "contemporaneous statement" of a decisionmaker contemplated by *Arlington Heights*.[18] Likewise, Secretary DeVos' dismissal of the veracity of sexual harassment claims, FAC ¶ 96, and overemphasis on the frequency of false accusations constitute contemporaneous statements based on gender stereotypes, FAC ¶ 94. And the officials' prior acts show their discriminatory views are consistent. FAC ¶¶ 84-87.

Contrary to ED's argument, statements revealing a disbelief of women's and girls' accounts of sexual harassment may show intentional discrimination. Acting on stereotypes, even if not motivated by outright hostility towards women, gives rise to an equal protection claim. *See Latta v. Otter*, 771 F.3d 456, 485-86 (9th Cir. 2014) ("Laws that rest on nothing more than the baggage of sexual stereotypes … have been declared constitutionally invalid time after time.") (internal quotations omitted); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2nd Cir. 2004) ("stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive"). Similarly, numerous courts have found that female domestic violence victims may state equal protection claims against police departments that failed to take their complaints seriously because the departments hold stereotyped views of women. *See, e.g.*, *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1988); *Motley v. Smith*, 2016 WL 3407658 at *8 (E.D. Cal. June 20, 2016); *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

The stereotype that women misunderstand and lie about sexual harassment is old and enduring,[19] so in this context reference to false accusations of sexual violence is just the kind of

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[17] Erica L. Green & Sheryl Gay Stolberg, *Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. Times, July 13, 2017, https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html.

[18] ED's citation to *Arlington Heights* inaccurately suggests that "contemporary statements" are limited to meeting minutes or reports, Mot. at 23, when on the contrary, the Court did not so limit the possible types of contemporary statements. *Arlington Heights*, 429 U.S. at 267.

[19] *See, e.g.*, Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1026 (1991); Kimberly A. Lonsway & Joanne Archambault, Start by Believing: Changing Attitudes Toward Sexual Assault, The Police Chief (April 2014), http://www.policechiefmagazine.org/start-by-believing-changing-attitudes/.

coded language that makes the allegation of discriminatory intent against women and girls probable. Thus, the probative statements need not specifically identify women where "code words" show discriminatory intent. *Ave. 6E Investments*, 818 F.3d at 506-07.

The influence of others with stereotyped views on ED decisionmakers is also relevant. A showing of discriminatory animus by those to whom a government decisionmaker is responsive supports a finding of discriminatory intent, "even if the officials do not personally hold such views." *Ave. 6E*, 818 F.3d at 504. Accordingly, DeVos' preferential access for those who assert that women lie about their experiences of sexual harassment in the months before issuing the Policy, FAC ¶ 89-90, is probative, as are the statements of the President of the United States, who directs Administration policy goals and to whom DeVos reports. FAC ¶¶ 99-104.[20]

Second, the substantive conclusions ED presented as justification for the new guidance were factually and legally baseless, raising the inference of discriminatory intent. *See* FAC ¶¶ 93-95, 112. *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2nd Cir. 1997) ("The lack of a credible justification for the zoning decision raises an additional inference that the decision was based on impermissible factors."). ED's attempt to frame the reversals of policy as good-faith disagreements is undercut by the glaring inaccuracies in its discussion of the actual Policy, such as the inflated characterizations of the problem of false accusations, FAC ¶¶ 92, 94, the erroneous characterization of school findings of responsibility as equal to criminal sanctions (e.g., using the criminal term "guilty," 2017 DCL at 1, and DeVos' description of a student found not responsible as "go[ing] free" and "walk[ing] free," DeVos Speech),[21] and Secretary DeVos' misleading characterization of the effects of the prior Guidance. FAC ¶ 93.

Third, the new Policy, which limits protections for students who experience sexual

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[20] ED argues that the allegations showing expressions of disbelief of the President's many accusers only consist of doubt about specific allegations of misconduct, not stereotyped views in general. Mot. at 22 (citing FAC ¶¶ 86, 99-100). Plaintiffs submit that the statements alleged and those available in the public record for judicial notice make it more than plausible that President Trump holds discriminatory views about women and girls.

[21] Title IX is a civil rights law. Schools' Title IX investigations may not and do not impose criminal punishments (e.g., prison) on students found responsible for sexual harassment.

harassment, disproportionately harms women and girls, as ED admits, Mot. at 22 n. 3. *See* FAC ¶¶ 39-41. ED does not contest this factor, other than to note that men and boys may also experience sexual harassment. While people of all genders face sexual harassment, women and girls are affected at disproportionately high rates. *Id*.

V. PLAINTIFFS STATE AN *ULTRA VIRES* CLAIM.

In addition to obtaining review under the APA, Plaintiffs may also obtain review of ED's actions under non-statutory review because ED's actions, through its officials, were *ultra vires*, meaning the actions were beyond its jurisdiction, improper, or clearly wrong.

ED's contention that the Ninth Circuit has never applied the *ultra vires* doctrine outside of labor law ignores *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018). There, the Ninth Circuit recognized "[t]his cause of action, which exists outside of the APA" as "an additional avenue" that "allows courts to review *ultra vires* actions" by government officials (including the President) "[e]ven if there were not 'final agency action' review under the APA." *Id.* at 683 (citing, among other cases, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902)). Contrary to ED's argument, Plaintiffs need not show that ED is acting "outside of ED's jurisdiction" or in conflict with "clear and mandatory" statutory language. Rather, an official may have acted *ultra vires* when he "exceeded his authority or . . . his action was clearly wrong." *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109-110 (1904).

The Ninth Circuit has held that the "clearly wrong" standard of review articulated by the Supreme Court in *Bates & Guild* is the same as the APA's "arbitrary and capricious" standard. *Sierra Club v. USPS*, 549 F.2d 1199, 1201 (9th Cir. 1976). Further, an administrative action is *ultra vires* when it fails to meet the two-part *Chevron* inquiry, i.e., when it is arbitrary or capricious. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 525 (9th Cir. 2012) (en banc); *see also Baca v. Holder*, 367 F. App'x 854, 857 (9th Cir. 2010). *Cf. Duncan v. Muzyn*, 833 F.3d 567 (6th Cir. 2016) (standard of review of APA and *ultra vires* claim are often the same); *Peoples Gas, Light & Coke Co. v. U.S. Postal Serv.*, 658 F.2d 1182, 1192 (7th Cir. 1981) ("[a]n exercise of discretion is presumptively reviewable for legal error, procedural defect, or abuse.")

The rationale of all these cases was affirmed by *City of Arlington v. FCC*, 569 U.S. 290

(2013), which holds that there is no distinction between an agency exceeding its jurisdiction and an agency acting improperly. The power of federal agencies "to act and how they are to act are authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*." *Id.* at 297. Thus, this Court has authority to review under the *ultra vires* doctrine whether ED acted "improperly" in adopting the 2017 Title IX Policy. While mere policy disagreements are not enough, if ED acted "improperly" or was "clearly wrong," e.g., did not provide a reasoned basis for its decision or relied on factors the statute does not make relevant, this Court may enjoin its enforcement.

Plaintiffs' allegations state a plausible claim that ED's actions are *ultra vires*. For example, ED now requires that when schools determine disciplinary sanctions, they must consider the impact of separating a student found responsible for a sexual harassment violation from his or her education. 2017 Q&A at 6. While Title IX is properly read to require that a school's response to sexual harassment must remedy the sexually hostile environment—and thus may require that the response be sufficient to deter and remediate such sex discrimination—there is nothing in Title IX that purports to give ED the authority to require schools to *limit* the punishment of students found to have committed sexual harassment. Similarly, permitting a school to disregard sexual harassment that it determines more likely than not happened (i.e. by a preponderance of the evidence) does not further Title IX's prohibition on sex discrimination. By promulgating a policy based on criterion unmoored from sex discrimination, ED is exceeding its statutory authority to "effectuate" Title IX, 20 U.S.C. § 1682, and has acted *ultra vires*.[22]

CONCLUSION

Plaintiffs respectfully request that the Court deny the Motion to Dismiss in its entirety or, in the alternative, grant leave to amend the Complaint.

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[22] Relying on *Pacific Maritime Ass'n v. NLRB*, 827 F.3d 1203 (9th Cir. 2016), ED recites a purported second element of a non-statutory review claim, namely that, absent judicial review, Plaintiffs will be deprived of "a meaningful and adequate means of vindicating their statutory rights." *Id.* at 1208. The Ninth Circuit in *Hawaii* did not require a similar showing. In any event, ED does not contest that Plaintiffs have not sufficiently alleged this element.

Respectfully submitted, Date: June 8, 2018

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