Jennifer A. Reisch (CA Bar No. 223671)
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Ph: (415) 621-0672
Fax: (415) 621-6744
Email: jreisch@equalrights.org

Javier M. Guzman*
Robin Thurston*
Karianne M. Jones*
Democracy Forward Foundation
1333 H St. NW
Washington, DC 20005
Ph: (202) 448-9090
Fax: (202) 701-1775
Emails: jguzman@democracyforward.org, rthurston@democracyforward.org, kjones@democracyforward.org

Leecia Welch (CA Bar No. 208741)
Seth Galanter*
Alice Y. Abrokwa*
National Center for Youth Law
405 14th Street, 15th Floor
Oakland, CA 94612, *and*
1313 L Street, NW, Suite 130
Washington, DC 20005
Ph: (510) 835-8098
Fax: (510) 835-8099
Emails: lwelch@youthlaw.org, sgalanter@youthlaw.org, aabrokwa@youthlaw.org

Emily Martin*
Neena Chaudhry*
Sunu Chandy*
Elizabeth Tang*
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
Ph: (202) 588-5180
Fax: (202) 588-5185
Emails: emartin@nwlc.org, nchaudhry@nwlc.org, schandy@nwlc.org, etang@nwlc.org

**pro hac vice*

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SURVJUSTICE, INC., et al., Plaintiffs, v. ELISABETH D. DEVOS, et al., Defendants.	Case Number: 3:18-cv-00535-JSC PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT HEARING NOTICED: October 17, 2019 at 9:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

The Department of Education promulgated the 2017 Title IX Policy without acknowledging its numerous and significant changes from past guidance, without adequately explaining the reasons for those changes, and, as is now clear, without record evidence to support them. This Policy shifted the balance of protections in school Title IX processes against survivors and in favor of respondents, thereby burdening many student-survivors of sexual assault. Yet the Department failed to consider this harmful impact or acknowledge any cost to its rollback, let alone explain why it believed the cost was worth it. While an agency may reconsider a given policy at any time, it may do so only after careful and serious consideration that acknowledges the changes and weighs their effects. The record and briefing reveal that the Department's analysis was anything but careful and serious. Consequently, the APA requires the Policy's vacatur.

Nor should there be any lingering question that the 2017 Title IX Policy is final agency action. Defendants' attempt to again challenge that conclusion, this time by muddying the clear contractual requirements of the Department and OMB Assurances that bind recipients of Title IX funds fails again here.

I. The 2017 Title IX Policy is final agency action.

Defendants do not contest that the assurances are contractual in nature, and their supporting evidence confirms as much.[1] Their answer instead is that they alone get to decide what documents are encompassed by the words "guidelines and standards" and "policies." Dkt. No. 140-1 at ¶¶ 21, 23. But the assurances' meaning is determined pursuant to the federal common law of contracts, Dkt. No. 136 at 11 n.2, not one contracting party's post hoc assertions. *See Chickaloon-Moose Creek Native Ass'n., Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004) (refusing to defer to agency's interpretation of a contract to which it was a party).

[1] The Department acknowledges that it "may use the signed assurances of compliance in an enforcement action," including a civil action by DOJ under "any assurance or other contractual undertaking," confirming that an assurance is a type of "contractual undertaking." Dkt. No. 140-1 at ¶¶ 10, 12, 19 (citing 34 C.F.R. § 100.8(a)(1)).

The Department Assurance encompasses the 2017 Title IX Policy. As evidence of what the term "guidelines and standards" means—language used in Department assurances since at least 1980, *see* Declaration of Seth M. Galanter ¶¶ 2-5—Defendants offer only a declaration of an agency attorney, employed for less than two years. Dkt. No. 140-1 ¶¶ 1, 17. He provides *no* foundation for his conclusory assertions, *see id.* ¶¶ 20, 21, 23, and those assertions do not compel the conclusion that the Policy is not final. *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497-98 (9th Cir. 2015) ("The district court can disregard a self-serving declaration that states only conclusions and not facts that would be admissible evidence.").[2] Furthermore, the subjective view of one party to a contract does not dictate its meaning. *See Restatement (Second) of Contracts* §§ 200 cmt. b, 202 cmt. g; *Mohave Valley Irrigation & Drainage Dist. v. Norton*, 244 F.3d 1164, 1166 (9th Cir. 2001) (evidence that one party "thought at the time" that the contract would be read in a particular manner "may not be considered"); *O'Neill v. United States*, 50 F.3d 677, 685 (9th Cir. 1995) (same with respect to party's post-signing belief). Instead, the text governs and words are given their ordinary meaning. *Restatement*, *supra*, § 203(b); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). And Defendants do not (and cannot) contest that the 2017 Policy falls within the ordinary meaning of the term "guidelines" as defined in dictionaries and used in common speech, including by the current Secretary. *See* Dkt. No. 136 at 11-12; *Restatement*, *supra*, § 201 cmt. a (holding it is appropriate for the court to look at dictionary definitions); *U.S. Postal Serv. v. Ester*, 836 F.3d 1189, 1196-97 (9th Cir. 2016) (same).

But even if the Assurance were sufficiently ambiguous to require resort to extrinsic evidence, *see Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 560-61 (9th Cir. 2016), that

[2] If the Court is inclined to rely on the Trachman Declaration to determine that the 2017 Policy is not final agency action, Plaintiffs request the opportunity to submit a request for limited discovery pursuant to FRCP 56(d). Plaintiffs would explain that they have not had the opportunity to inquire about the basis for the conclusions in paragraphs 20, 21, and 23 of the Declaration and would request the documents on which Mr. Trachman relied in reaching those conclusions as well as a limited deposition of Mr. Trachman as to the basis for those conclusions.

evidence confirms that the term "guidelines and standards" is not limited to "certain notices or appendices that the Department published in the Federal Register or Code of Federal Regulations," as the Department maintains. Dkt. No. 140-1 at ¶ 20. *First*, since 1976, DOJ has required every federal agency to publish "guidelines for each type of program to which they extend financial assistance." 41 Fed. Reg. 52,669, 52,670 (Dec. 1, 1976) (codified at 28 C.F.R. § 42.404(a)). DOJ's instructions gave examples of guidelines in agency instructions, handbooks, and manuals, but nowhere suggested that guidelines must be published in the Federal Register. *See* Galanter Decl. ¶¶ 7-11. *Second*, between 1977 and 1981, what is now the Government Accountability Office equated the Department's "policy guidelines and compliance standards" with "guidance,"[3] and made clear that documents could be guidelines and standards without being published in the Federal Register.[4] *Third*, both before and after 1980, the Department described another document promulgated by OCR as "guidelines" even though it was not published in the Federal Register.[5] The extrinsic evidence thus supports interpreting "guidelines and standards" to include the 2017 Policy.

The OMB Assurance encompasses the 2017 Title IX Policy. Defendants have even less to say about why the 2017 Policy falls outside of the "policies" addressed by the OMB

[3] *See* GAO, *The Office for Civil Rights in the Departments of Education and HHS Have Improved the Management of Their Civil Rights Enforcement Responsibilities*, HRD-82-21, at 4 (Nov. 27, 1981), https://www.gao.gov/products/HRD-82-21.

[4] *See* GAO, *Review of the Department of Health, Education, and Welfare's Office for Civil Rights*, HRD-77-78, at 7 (Mar. 30, 1977), https://www.gao.gov/products/HRD-77-78 ("In some instances, [OCR] field offices independently developed their own policy guidelines and compliance standards without the knowledge of the headquarters operating divisions.").

[5] *See In re Chicago Pub. Sch. Dist. #299*, 1977 WL 57103, at *19 (HEW ALJ, Feb. 15, 1977) ("In 1975 the Department issued and distributed copies of the 'Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols*' to the School District. This report outlined guidelines for the School District . . . ."); *In re New York State*, 1989 WL 296751, at *5 (Education Appeal Board, June 10, 1989) ("guidelines issued in 1975 by the U.S. Department of Health, Education & Welfare's Office of Civil Rights, known as the 'Lau Guidelines.'"); *see also Rios v. Read*, 480 F. Supp. 14, 20 (E.D.N.Y. 1978) (describing "*Lau* Guidelines"); *Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 62 (E.D.N.Y. 1978) (same); Pub. L. No. 96-536, § 117, 94 Stat. 3166, 3171 (1980) (Congressional joint resolution describing the "Lau remedies" as a "guideline").

Assurance. It acknowledges that some schools must also complete the OMB Assurance, Dkt. No. 140-1 at ¶ 22, but baldly asserts that the Department "does not consider the 2017 Guidance to be 'policies.'" Defs.' Opp. at 11. Again, the Department offers no textual reason for this position. Nor does it explain why its view should have any bearing on the interpretation of a contract term in an assurance used by a separate federal agency.

The Department's promise to forbear enforcement is irrelevant. Defendants also claim that the assurances have no legal consequence because the Department "has now unambiguously stated that it will not" enforce the 2017 Policy through the assurances. Defs.' Opp. at 11. But this promise does not bind either DOJ or future officials at either agency. Nor does it relieve a school of its duty to comply with the assurances. Indeed, the Department has previously taken the view that, due to the contractual nature of an assurance, "aggrieved persons who are beneficiaries of federally assisted programs or activities [have] the right to seek judicial enforcement of the regulation, under the third party beneficiary principle of contract law." 41 Fed. Reg. 29,548, 29,552 (July 16, 1976) (citing *Lemon v. Bossier Parish Sch. Bd.*, 240 F. Supp. 709 (W.D. La. 1965), *aff'd*, 370 F.2d 847, 851 (5th Cir. 1967)); *see City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971) (third-party beneficiary to agreements between an airport and the FAA could sue to enforce agreement). Notwithstanding its own promise, the Department cannot make any promises for third parties.

In any event, the relevant question is not whether the government *will* enforce the assurances, but whether it *can*. That much is clear from *Gill v. DOJ*, where an agency standard was final because the plain language of the applicable user agreement "*permit*[ed] the Department to revoke" participants' access. 913 F.3d 1179, 1185 (9th Cir. 2019) (emphasis added); *see id*. (describing the holding of *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977 (9th Cir. 2006), as finding finality when the government "*could* take enforcement

actions" against a permitholder (emphasis added)). Otherwise, an agency could defeat the finality of any action, including a regulation, simply by claiming it will not enforce it.[6]

II. The 2017 Title IX Policy is arbitrary and capricious.

The 2017 Title IX Policy shifted the balance of protections in school Title IX processes against survivors and in favor of respondents. *See, e.g.*, 2017 DCL at 1 (identifying procedural protections for survivors that the Department intended to change); *see also* Dkt. No. 96 at 23-34. Under the current Policy: the standard of proof may be higher, survivors are not entitled to equal appeal rights, mediation in cases of sexual assault is permissible, survivors are no longer entitled to interim measures while respondents can claim equal entitlement to any measures the school chooses to offer, the requirement of promptness has been relaxed, as has the requirement to investigate certain off-campus conduct, additional evidence of sexual history is permitted, and a school may no longer open an investigation without revealing the identity of the complainant.

The new Policy is rife with legal error. First, the Department's characterization of the record—and of the public reaction to the 2011/2014 Guidance generally—is inaccurate. While sexual violence is a subject of intense feeling and public debate, the implication that the rescinded guidance was widely agreed to be a failure is flatly untrue. Rather, a broad range of people and groups overwhelmingly urged the Department to leave its protections for survivors in place. The failure to acknowledge the full scope of the record and to consider the impact on survivors—a quintessential "important aspect of the problem"—makes the new Policy arbitrary

[6] The Policy is final agency action for another reason. The Ninth Circuit recently held that another way to show the second step of *Bennett v. Spear* "is whether the agency action imposes obligation on the agency," regardless of "whether it imposes obligations on Plaintiffs" or other third parties. *Sierra Club v. Trump*, 929 F.3d 670, 698 n.23 (9th Cir. 2019), *stay granted*, 2019 WL 3369425 (U.S. July 26, 2019); *see also Texas v. EEOC*, 933 F.3d 433, 445 (5th Cir. 2019) (guidance is final agency action when it "purports to bind EEOC staff when conducting investigations"). The 2017 Policy meets this standard because agency staff are obliged to follow the Policy in enforcing Title IX and its regulations. Dkt. No. 68 at 7-10 (plaintiffs); Dkt. No. 70 at 7 (Department) ("Defendants do not dispute that the 2017 Guidance informs OCR employees' decisions"); Dkt No. 115 at 7 (Department) (admitting that it "takes into account the views that it expressed in the 2017 Guidance when making enforcement decisions").

and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Further, the Department failed to acknowledge its changes in position aside from the standard of proof and appeal rights, much less provide good reasons for them. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (when seeking to change positions on an issue of policy, an agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy."); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see also, e.g.*, *Organized Village of Kake v. USDA*, 795 F.3d 956, 967 (9th Cir. 2015) (en banc) (USDA had not adequately explained its change in policy); *Cal. Publ. Util. Comm'n v. FERC*, 879 F.3d 966, 977 (9th Cir. 2018) (FERC "had a longstanding policy" and "departed from this policy without acknowledgment or explanation," rendering the departure "arbitrary and capricious"). Even now that the Department acknowledges certain changes in positions (mediation and sexual history evidence), this acknowledgement is too late and the justifications it provides are unpersuasive. Further, its refusal to acknowledge the other changes (interim measures, promptness, off-campus conduct, and confidentiality) by itself renders those changes arbitrary and capricious.

As to the Department's proffered justifications, the lack of notice and comment for the prior guidance cannot warrant rescinding it *also* without notice and comment, much less imposing entirely new standards in the same manner. Nor is the Department's stated general concern about fair processes for respondents sufficient. While the record contains criticism regarding procedural protections, the Department apparently embraced this criticism without question or consideration of contrary evidence in the record. Such uncritical acceptance is arbitrary and capricious. *See, e.g.*, *Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66, 91 (D.D.C. 2019) ("[T]he agency must conduct a critical examination of comments on which it relies.") (citing *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1125 (D.C. Cir.

1984)). Adequate analysis would have shown that the record evidence now cited does not support the Department's specific policy changes.

Finally, the Court should reject the Department's effort to correct those deficiencies post hoc through arguments presented for the first time in this litigation and vacate the Policy as arbitrary and capricious. *See Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1048 (9th Cir. 2010) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

A. Defendants mischaracterize the record.

As an initial matter, Defendants mischaracterize the record and provide an inaccurate picture of the public's response to the 2011/2014 Guidance. In contending that the prior policies "received deafening criticism from all corners," Defs.' Opp. at 4, Defendants make selected references to the record, including to statements from organizations that assert that survivors tend to lie about sexual assault.[7] In reality, however, the record shows that support for the 2011 DCL and 2014 Q&A was strong and widespread. For example, the Department ignored poll results showing that the vast majority of voters supported policies in the 2011 DCL, including the preponderance of the evidence standard, AR_2184 (citing https://nwlc.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault), and multiple supportive letters from members of Congress. AR_1149-1151 (Sens. Gillibrand, McCaskill and Blumenthal); AR_2620-21 (Sen. Murray); AR_1152-1158 (52 Representatives "ask the Department to preserve the 2011 Title IX guidance for K-12 schools"); AR_1159-60 ("Colleges and universities … have made great strides addressing cases of sexual violence since the [2011 DCL]").

Further, contrary to Defendants' representation, the legal community's views of the rescinded Guidance varied but were often supportive. For example, while the American College of Trial Lawyers criticized the rescinded guidance and an ABA task force recommended a

[7] Laura Kipnis's book, *Unwanted Advances*, AR_1969, explicitly promotes the stereotype that women lie about sexual assault. Dkt. No. 96, at 17-18.

different standard of proof than the preponderance standard, Defs.' Opp. at 4, these organizations have expertise in *criminal* trials and procedure, which is different from school sexual harassment proceedings. Moreover, the ABA task force report was issued by the Criminal Justice Section Council, is not ABA policy, and explicitly was *not* endorsed by "any other section of the ABA, including the ABA Commission on Domestic and Sexual Violence and the ABA section of Civil Rights and Social Justice." AR_241. Defendants also omitted reactions from relevant civil rights, women's rights, and domestic and sexual violence bars. Among these, the Leadership Conference on Civil and Human Rights, along with other groups such as the NAACP, MALDEF, the Lawyers' Committee for Civil Rights Under Law, the National Bar Association, and the Southern Poverty Law Center wrote Secretary DeVos "in support of" the 2011/2014 Guidance, saying "[t]hese guidance documents and continued enforcement of the law are critical to making students' rights real." AR_1885-87. Defendants also ignored the perspectives of nineteen state Attorneys General, stating that the 2011/2014 Guidance "reaffirms the obligation of colleges and universities to protect survivors of sexual assault" and urging the Department to stop its "rushed, poorly-considered effort to roll back current policies." AR_2590-91.

Similarly, while Defendants identify statements by faculty or university administrators that question the 2011/2014 Guidance, Defs.' Opp. at 5,[8] they completely ignore both support within the academy and the perspective of K-12 educators. *See, e.g.*, AR_2044 (white paper signed by 100 law professors and scholars stating "[w]e particularly write to express our support for the [2011 DCL] and its guideline that schools use a preponderance of the evidence standard"); AR_1884-87 (letter opposing rescission of 2011/2014 Guidance signed by American Federation of Teachers, the National Education Association, the American Association of University Women, and the Association of University Centers on Disabilities, among others).

[8] As previously noted, the Harvard letter discusses Harvard's own policies, distinct from the federal Guidance. Pls.' Opp. to Mot. to Dismiss, Dkt. No. 96, at 20-21 & n.17.

Finally, and crucially, Defendants ignored and misconstrued the perspective of students and survivors themselves.[9] Among these, Alexandra Brodsky, a co-founder of Know Your IX, wrote in a law review article, "many survivors and their allies reported significant improvements" as a result of the 2011 DCL. AR_2065. The Association of Big Ten Student Governments, collectively representing more than a half a million students, wrote to the Department after announcement of the policy change, stating: "we strongly oppose the complete erasure of Title IX policies regarding sexual misconduct or other changes that would erode much needed protections for student victim-survivors. Eliminating Title IX guidelines will put these students in jeopardy." AR_1209-10; *see also* AR_2016, 2184 (information provided by NWLC); AR_1113-14.

In sum, the Department's analysis was all one-way traffic, ignoring evidence in the record from advocates, legal commentators, and public officials explaining why the 2011 DCL and 2014 Q&A created important safeguards for student-survivors of sexual assault and violence. This arbitrary and capricious approach dooms the 2017 Policy. *See State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has … failed to consider an important aspect of the problem."); *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action…. [A]n agency cannot ignore evidence contradicting its position."), *cited in Plascencia-De Haro v. Lynch*, 2016 WL 4073295, at *3 (N.D. Cal. 2016).

---

[9] Defendants' reliance on a statement by the Rape, Abuse, and Incest National Network is flatly misleading. First, Defendants' citation is not even to RAINN's actual statement, but to a publication by FIRE selectively quoting RAINN. AR_1219. Read in full, RAINN's statement, which was submitted two months *before* ED issued the 2014 Q&A, emphasizes that on-campus rape is not taken seriously by too many schools. Letter from RAINN to White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf (cited at AR_1219). And lest there be any doubt about RAINN's views, it issued a statement the same day the current Policy was issued saying that it was "deeply disappointed" with the policy change. RAINN, *RAINN Disappointed with DeVos Title IX Decision* (Sep. 22, 2017), https://www.rainn.org/news/rainn-disappointed-devos-title-ix-decision.

B. The Department did not provide good reasons for adopting provisions of the 2017 Title IX Policy that differ from the 2011/2014 Guidance.

The Department now sets forth a variety of explanations for the Title IX policy change—including arguments as to the standard of proof and appeals processes. None provide the "reasoned explanation" required when an agency changes policy. *See Fox*, 556 U.S. 502. They are as untimely as they are insufficient.

1. Defendants' generic argument on the lack of notice-and-comment rulemaking is insufficient to justify the 2017 Policy.

Defendants argue that because the 2011 DCL and 2014 Q&A were not promulgated pursuant to notice and comment, the policy changes it currently acknowledges were warranted to return to the status quo before 2011. Defs.' Opp. at 12 (standard of proof), 17 (appeal), 18 (mediation), 23 (sexual history). This catch-all argument does not hold water.

To be clear, Plaintiffs do not argue that the 2011 DCL or 2014 Q&A required notice and comment. But if Defendants do so believe, then the only permitted response would have been to rescind those documents through notice-and-comment rulemaking. *See D.H. Blattner & Sons, Inc. v. Sec'y of Labor, Mine Safety and Health Admin.*, 152 F.3d 1102, 1109 (9th Cir. 1998) ("[I]f a second rule repudiates or is irreconcilable with a [prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."); *accord Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked" and "may not alter [such a rule] without notice and comment."). Defendants' actions are thus inconsistent with their stated rationale: they sought to repeal the 2011/2014 Guidance without notice and comment, making their proffered justification—the need for notice and comment for that Guidance—noncredible. *See Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious.").

Nor, in any event, would a purported procedural deficiency in the issuance of the 2011/2014 Guidance allow the Department to shirk its duty under *Fox* to acknowledge and

explain its changes in position. And it certainly would not allow the Department to do more than *rescind* the prior guidance, as opposed to what the Department did here: issuing a full replacement policy that imposes *new* requirements and standards. As the D.C. Circuit has explained in similar circumstances, "[i]n administrative law, two wrongs do not make a right." *American Wild Horse Preservation Campaign v. Perdue*, 873 F.3d 914, 928 (D.C. Cir. 2017).

2. Defendants' explanation for changing the standard of proof is insufficient.

Defendants articulate four reasons to justify the change in the permissible standard of proof: that the 2011/2014 Guidance (1) placed improper pressure upon schools to adopt procedures that do not afford fundamental fairness; (2) led to deprivations of rights for many students; (3) did not succeed in providing clarity for schools to guarantee educational opportunities on an equal basis; and (4) were published without notice and comment. Defs.' Opp. at 13. As discussed above, the fourth justification is insufficient. Indeed, if the Department's goal was to return to the pre-2011 state of affairs, it would not have authorized use of the clear-and-convincing standard. Both supporters and opponents of the preponderance standard acknowledged that the Department had consistently required schools to use this standard well before the 2011 DCL. AR_931, 1081, 2052-53, 2080 & n.86.

The first three justifications are nothing more than broad restatements of the Department's view of the prior guidance *generally*, rather than about the specific standard of proof policy change. Such broad and conclusory statements are insufficient to justify specific changes in policy. *See Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 996 (9th Cir. 2004) (rejecting agency's "generalized conclusory statements" as insufficient); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1223-24 (9th Cir. 2008) (rejecting agency's "conclusory statements" that fail to "directly address substantial questions" (citation omitted)); *Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("At bottom, an agency must explain why it chose to do what it did. … And, to this end,

conclusory statements will not do; an agency's statement must be one of *reasoning*." (citation omitted)).

What's more, the Department has failed entirely to address the contradiction between the 2017 Policy and its prior conclusion that the use of the clear and convincing standard was "not equitable under Title IX" and that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard," 2011 DCL at 11. That failure is particularly egregious, given that the prior conclusion was tied to regulations requiring that Title IX proceedings be "equitable," *see* 34 C.F.R. § 106.8(b). Nor does the Department explain why it no longer considers it important to align the standard of proof in Title IX proceedings with that used by both OCR and courts under Title VII and other civil rights laws, *see* 2011 DCL at 10-11. The policy change is therefore arbitrary and capricious. *See Organized Vill. of Kake*, 795 F.3d at 966 ("[A] policy change violates the APA 'if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.'").

Defendants' citation to the record and post hoc arguments made in briefing cannot save it. The Department cannot simply assert that there was "overwhelming criticism" of the preponderance standard, Defs.' Opp. at 13, and ignore its obligation under the APA to conduct an independent and critical analysis of the prior policy. Further, the Department is incorrect that the preponderance standard was overwhelmingly criticized. As set forth above, the record includes numerous statements, letters, and white papers from scholars, advocates, and public officials expressing support for the 2011/2014 Guidance, including the preponderance of the evidence standard. *See* AR_2184; AR_1886; AR_2047-55. Additionally, Defendants provide no meaningful response to the evidence demonstrating that prior to 2011, a "substantial *majority* of colleges and universities were already using the preponderance standard." AR_2051 (emphasis added); AR_2080 ("A number of studies demonstrate that the vast majority of schools used the preponderance standard for all disciplinary proceedings … *before the Dear Colleague Letter*.");

AR_1886 (80 percent of surveyed schools used preponderance standard prior to 2011). Instead, Defendants concede that the 2017 DCL's assertion that "many schools" used clear-and-convincing evidence prior to 2011 "does not reflect the reason[] that OCR actually relied on" for this change. Defs.' Opp. at 13. Yet the 2017 DCL's inaccurate characterization of the record only further highlights its lack of reasoning.

Finally, while the Department emphasizes the impact of the standard of proof on *respondents*, the new Policy is silent on how the more burdensome standard of proof will affect *survivors*. The Department appears to have implicitly decided that the tradeoff between fewer findings of responsibility for sexual violence and enhanced protections for respondents was worth it as a policy matter, but it needed to have acknowledged the cost of this trade off, which it utterly failed to do. *Cf. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1198 (an agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards"). Additionally, while the Department focused on the serious nature of expulsion, Defs.' Opp. at 16, the new policy applies regardless of the severity of the sanction. The Department did not consider the numerous types of sanctions less severe than expulsion when it struck the balance in favor of respondents.

In sum, the Department's policy change as to the proper standard of proof in sexual assault cases was not the product of reasoned decision-making and therefore cannot be upheld.

3. The explanation for changing policy on appeals is insufficient.

Defendants' only justification for changing policy as to the appeals process was that "the 2011 DCL had imposed new obligations and deviated from past OCR practice without engaging in notice and comment rulemaking." Defs.' Opp. at 17. As explained above, that argument is entirely insufficient. And as Plaintiffs previously observed, Pls.' Br. at 22-23, Defendants cite nothing *in the record* for the assertion that the status quo prior to the 2011 DCL was that "many schools" offered appeals rights only to respondents, rather than to both parties. *See* Defs.' Opp. at 17 (citing the 2017 DCL). The Department seemingly acknowledges its error, given that it has

now proposed to return to the 2011 standard and require equal appellate rights for liability determinations and sanctions. Defs.' Opp. at 18. But that decision cannot save the Department's failure in 2017 to justify its change in position, especially given the impact on survivors of unequal appeal rights, again unacknowledged by the Department.

C. The Department did not acknowledge or provide a reasoned explanation for what it now agrees are changes in its policy.

For two other changes in two policies—sexual history and mediation—Defendants now acknowledge a change from the 2011 DCL and 2014 Q&A. Yet, just as above, the post hoc grounds offered for the changes are insufficient.

1. *The Department's current acknowledgement of changing its policy on complainant's sexual history is too late and the change unjustified.*

Defendants acknowledge that the Department withdrew the "mandates contained in the 2014 guidance" that "articulated a blanket prohibition on evidence concerning a complainant's prior sexual history" in a hearing. Defs.' Opp. at 23. Accordingly, survivors are no longer protected from invasive personal questioning at the hearing or the unwarranted presumption by the decisionmaker that a prior relationship (with the respondent or a third party) implies consent. That is a quintessential change in policy, and the Department's failure to acknowledge or explain it at the time of issuing the 2017 Policy was arbitrary and capricious.

Moreover, Defendants' post hoc reasoning is both irrelevant and unsupported by the record. They assert that it was reasonable to adopt a policy that allows schools to consider evidence of a complainant's sexual history based on "*extensive* criticism that the 2011 DCL and 2014 Q&A's recommended evidentiary procedures inappropriately restricted the rights of the accused." Defs.' Opp. at 23 (emphasis added). Defendants' evidence of this "extensive" criticism is a single letter from the Foundation for Individual Rights in Education ("FIRE"), which claimed generally that the prior Title IX Guidance did not afford respondents "basic procedural protections … (like rules of evidence)," with *no mention* of sexual history evidence at all. *Id.* (citing AR_1218). And even if the FIRE letter addressed sexual history evidence, the

Department should have applied its own "critical examination" to it. *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 91. Had it done its work rather than simply outsource, the Department would have considered the fact that sexual history questioning and evidence often rely on victim-blaming myths and "slut-shaming" that retraumatizes survivors, misleads investigators and decisionmakers, and discourages survivors from reporting sexual assault. *See, e.g.*, AR_0041 at 3-4, 13; *see also* 2014 Q&A at 31 ("The school should also ensure that hearings are conducted in a manner that does not inflict additional trauma on the complainant."). Failure to consider this important aspect of the problem was, in its own right, arbitrary and capricious. *State Farm*, 463 U.S. at 43.[10]

2. The Department's current acknowledgement of changing its policy on meditation is too late and the change unjustified.

As an initial matter, Defendants' argument that Plaintiffs lack standing to challenge the policy change as to mediation is baseless. First, the new Policy communicates a distrust and skepticism of survivors, pushing schools to implement procedures that are more favorable to respondents and less favorable to survivors. *See, e.g.*, SurvJustice Decl. ¶ 8. Allowing mediation for sexual assault contributes to this shift, SurvJustice Decl. ¶¶ 8-9, VRLC Decl. ¶ 8-9, ERA Decl. ¶¶ 9-10, in turn reducing the numbers of survivors who pursue Title IX campus processes, SurvJustice Decl. ¶¶ 11-12, VRLC Decl. ¶¶ 10-12, and thereby injuring Plaintiffs. *See* Order, Dkt. No. 81 at 11-12. Further, mediation following sexual assault "exposes students to the risk of being re-traumatized, coerced, or bullied by their alleged assailant," a risk that makes it more difficult for Plaintiffs to achieve a positive outcome on their clients' behalf (another cognizable organizational injury). *See, e.g.*, SurvJustice Decl. ¶ 9c; Ex. B-1 at 32-33. Defendants' characterization of mediation as entirely voluntary under the new Policy (based solely on the

[10] Further, Defendants' claim that it replaced the sexual history prohibition with an instruction to engage in "adequate, reliable, and impartial *investigations of complaints*," Defs.' Opp. at 23, is wrong because the former governed admission of evidence "at hearings," 2014 Q&A at 31, while the latter governs the pre-hearing *investigation* stage of the proceeding, 2017 Q&A at 3.

terms of the Policy itself), is unavailing in light of Plaintiffs' observations that "students who experience sexual violence often feel unduly pressured into mediation," and that whether mediation is actually voluntary is impacted by factors like the relative age or positions of power of the parties. *See, e.g.*, SurvJustice Decl. ¶ 9c, Ex. B-1 at 32-33. Finally, the new mediation policy is inconsistent with prior policy, and the resulting confusion has created additional work for Plaintiffs. *See, e.g.*, SurvJustice Decl. ¶ 16.

But more to the point, the Department agrees that it "depart[ed] from its prior position [in the 2011 DCL] that mediation was never permissible in sexual assault cases." Defs.' Opp. at 18. Yet the 2017 Policy did not acknowledge this change or explain it. Even now, Defendants can point to nothing except the generic statements in the 2017 DCL that the 2011/2014 Guidance had "imposed … regulatory burdens without affording notice and the opportunity for public comment" and "regulatory compliance has displaced Title IX's goal of educational equity." Defs.' Opp. at 18. These general arguments neither truly acknowledge this change nor justify it, making it arbitrary and capricious under *Fox*.

Furthermore, the Department continues to insist, incorrectly, that the 2017 Policy does not conflict with the 2001 Guidance. But the 2001 Guidance stated: "In some cases, *such as alleged sexual assaults*, mediation will not be appropriate even on a voluntary basis." 2001 Guidance at 21 (emphasis added). The Department now strains to read that statement to mean that mediation would be inappropriate in only "some" cases of alleged sexual assaults. The clearest and most reasonable reading, however, is that cases of alleged sexual assault are one category of cases for which mediation "will not be appropriate even on a voluntary basis." In any event, the 2017 Policy does not prohibit mediation for *any* case of sexual assault, contrary to the Department's own reading of the 2011 Guidance. Thus, the 2017 Policy is also arbitrary and capricious because it conflicts with the 2001 Guidance.

D. The Department still denies that the 2017 Policy changed four other policy areas compared to the 2011 DCL and 2014 Q&A.

The Department does not dispute that it failed to acknowledge, as *Fox* requires, its changes to policy regarding confidentiality, interim measures, off-campus conduct, or promptness—all of which previously provided important survivor protections. Instead, the Department insists that there was no change from the policies set forth in the 2001, 2011, and 2014 guidance documents. Not so.[11]

1. The Department changed its policy on confidentiality.

Previously, schools were required to "take all reasonable steps *to investigate* and respond to the complaint *consistent with*" a student's request for confidentiality. *See* 2011 DCL at 5 (emphasis added). The 2014 Q&A (at 21) stated that a school could investigate and "pursue disciplinary action in a manner that *may* require disclosure of the student's identity to the alleged perpetrator" (emphasis added), making clear that a school could sometimes pursue disciplinary action in a manner that *would not* require disclosure. *See also id*. (noting that a request for confidentiality "could preclude … potential discipline of the alleged perpetrator," but that it might not if "the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, physical evidence)"). Now, however, the 2017 Policy categorically requires a school to disclose the "identities of the parties involved" whenever it decides to "open an *investigation*." 2017 Q&A at 4 (emphasis added). Before, schools could investigate a complaint of sexual harassment without disclosing the identity of the complainant; now, they cannot. Yet the Department refuses to acknowledge this change.

Even if they had, the change is unsupported by record evidence. Defs.' Opp. at 22. Instead, their record citations speak only to what might constitute fair procedures to be used in a campus tribunal, *see, e.g.*, AR_3422, *not* whether to permit confidentiality during the initial stages of an investigation. Even the cited FACE letter would permit an exception to a disclosure

[11] If the Court agrees with Plaintiffs that the Department changed its position with regards to any of the four policy changes discussed in this section, Plaintiffs are entitled to summary judgment with respect to those issues. *See Hayes v. Idaho Correctional Ctr.*, 849 F.3d 1204, 1213 (9th Cir. 2017).

rule when "there are legitimate, verifiable safety concerns," AR_1330; AR_1354 (same)—an exception that the 2017 Policy, without explanation, does not adopt. What's more, the Department completely ignored the interest that reporting students have in protecting their identity when reporting an incident of rape or sexual violence, and thus did not consider how to balance that interest with the stated interest in fair procedures. *See* AR_54-55 (discussing the importance of confidentiality for students considering whether to report an incident of sexual violence or assault). Indeed, the Department itself *previously* acknowledged the importance of a student's interest in confidentiality, *see* 2014 Q&A at 18 ("OCR strongly supports a student's interest in confidentiality in cases involving sexual violence."), yet it has now backed away from that position with no explanation whatsoever.

The Department also does not acknowledge the inconsistencies between the 2017 Policy and the 2001 Guidance, which states that a school must "take all reasonable steps to *investigate* and respond to the complaint consistent with the student's request [for confidentiality]." 2001 Guidance at 17 (emphasis added); *see also id.* at 18 (school must "investigat[e] the complaint to the extent possible" when complainant requests confidentiality and may counsel a student who is the subject of numerous complaints based on confidential reports). Schools may no longer investigate sexual misconduct allegations without first disclosing the complainant's identity. For these independent reasons, the new confidentiality policy is arbitrary and capricious.

2. The Department changed its policy on interim measures.

The Department has changed its policy as to interim measures in two ways.

First, under the rescinded guidance, schools were required to impose interim measures in such a way as to "minimize the burden on the complainant." 2014 Q&A at 33. The 2017 Policy imposes the opposite mandate: it prohibits schools from relying on "fixed rules or operating assumptions that favor one party over another" or from "mak[ing] such measures available only to one party." 2017 Q&A at 3. The 2017 Policy therefore shifts more of the burden regarding interim measures onto the complainant. Rather than acknowledge this change, Defendants only

insist that a rule requiring schools to consider the educational interests of both the complainant and respondent is not arbitrary and capricious. Defs.' Opp. at 20. But even if this were true, it would not excuse the failure to acknowledge and explain *in 2017* the purportedly good reasons for the change. Furthermore, there is no evidence the Department considered the negative impact of this change on survivors, who are now more likely to be subject to a mutual no-contact order or otherwise have their behavior restricted (e.g. via a schedule change or housing relocation) because they reported sexual violence. This effect has been confirmed by Plaintiffs' own experiences: schools are now refusing to grant requests for unilateral no-contact orders, citing the 2017 Policy's prohibition on interim measures being made "available only to one party." *See* SurvJustice Decl., Ex. B ¶ 14; ERA Decl., Ex. C ¶ 14. Because this change was unacknowledged, unreasoned, and failed to consider an important aspect of the issue, it is arbitrary and capricious.

Second, under the rescinded Guidance, schools were "require[d]" to impose interim measures "to ensure equal access to [the school's] education programs and activities." 2014 Q&A at 32. Even if Defendants are correct, Defs.' Opp. at 20, that the 2014 Q&A did not say "interim measures are always required," it certainly required them in certain instances, 2014 Q&A at 14 ("[A] school should be mindful of its *obligation* to provide interim measures to protect the complainant in the educational setting."); *id*. at 28 ("[I]t is important for a school to understand that during this brief delay in the Title IX investigation, it *must* take interim measures to protect the complainant in the educational setting." (emphasis added)). The 2017 Policy now only "encourages," or "recommends," that schools impose interim measures where appropriate. *See* 2017 Q&A at 3 (stating that interim measures "may be appropriate"); *see also* Defs.' Opp. at 19. Yet the Department failed to acknowledge this change or explain the reason for it.

3. The Department changed, or introduced significant uncertainty about, its policy on off-campus conduct.

Previously, schools had to investigate allegations of off-campus conduct in three situations: (1) where the misconduct occurred "in the context of an education program or activity," (2) where the conduct did not occur in the context of an on-campus education program or activity but creates a "hostile environment … in an off-campus education program or activity," or (3) where the conduct *does not involve* an education program or activity but nonetheless creates a "hostile environment on campus." 2014 Q&A at 29. The 2017 Policy, however, creates confusion regarding the third scenario by stating that "[a] university *does not have a duty* under Title IX to address an incident of alleged harassment where the incident occurs off campus *and does not involve a program or activity of the recipient*." 2017 Q&A at 1 n.3 (emphasis added). While it *also* states that that schools are "responsible for redressing a hostile environment on campus even if it relates to off-campus activities," *id.*, read in context, that statement most naturally is understood to mean only that schools have a duty to investigate off-campus conduct that causes a hostile environment on-campus *if* the conduct occurred in the context of an education program or activity—a reading Defendants confirm: "off-campus incidents entirely unconnected to a school program or activity" are not covered by Title IX. Defs.' Opp. at 21-22. That is an unacknowledged and unexplained change in policy. In any event, the 2017 Policy on off-campus conduct is at the very least internally inconsistent—likewise rendering it arbitrary and capricious. *Nat'l Parks Conservation Ass'n*, 788 F.3d at 1141.

Defendants insist the 2017 Policy—whatever it is—is required under the Supreme Court's decision in *Davis v. Monroe County Board of Education*. Defs.' Opp. at 21-22. That is incorrect. *Davis* sets forth the standard for liability under Title IX for monetary damages. *Davis*, 526 U.S. 629, 644 (1999). The Department's longstanding position, in a guidance it purports to embrace, has been that it may "'promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,' even in circumstances that would not give rise to a claim for money damages." 2001 Guidance at ii (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)). The Department's reliance on *Davis* therefore either misreads that case or is an

unacknowledged and unexplained change in the Department's view. Either way, the change in policy is arbitrary and capricious. Moreover, Defendants' argument is simply irrelevant because, even if *Davis*, which was decided two years before the 2001 Guidance, truly required the change, the Department was still under an obligation, per *Fox*, to acknowledge and explain that change. Accordingly, at issue here is not a quarrel with Supreme Court jurisprudence, as Defendants contend, Defs.' Opp. at 21, but rather Defendants' disregard of reasoned decision-making as required by the APA.

4. The Department changed its policy on promptness.

Defendants mischaracterize the issue of promptness. Plaintiffs do not argue that the prior policy imposed a firm sixty day deadline for completing sexual misconduct investigations. Rather, the 2017 Policy no longer sets a benchmark timeframe or objective factors to determine whether an investigation is prompt. *Compare* 2014 Q&A at 32 (considering "the complexity of the investigation and the severity and extent of the alleged conduct" when determining promptness) *with* 2017 Q&A at 3 (considering a school's "good faith effort").[12] The rescinded Guidance provided meaningful guidance on timing, even though it was not an absolute requirement. *See*, *e.g.* SurvJustice Decl., Ex. B ¶ 15; VRLC Decl., Ex. D ¶ 14 (discussing representation of clients at schools, which under the prior policy would consistently adhere to the 60-day benchmark but, under the new policy, are taking much longer). Again, the Department fails to acknowledge this change or explain why there was a good reason for it. Furthermore, the unexplained change has predictably resulted in more leeway on promptness for schools, *see id*., to the detriment of survivors, an important aspect of the problem that the Department again failed to consider.

[12] The Department's argument regarding the failure to label the prior promptness measure as "objective" versus the current "subjective" measure is unpersuasive. Defs.' Opp. at 21 n.10. Neither courts nor regulated entities need such a label to understand that precisely articulated factors impose a more specific and rigorous standard than does "good faith effort." In any event, the Department's failure to describe its current promptness standard as subjective only reinforces the conclusion that it reversed course without adequate acknowledgement or consideration.

* * * * * * *

In sum, while the Department is entitled to reconsider its policies, it may not do so without careful and serious consideration that both acknowledges the changes and considers their impacts. *Fox*; *Organized Village of Kake*, 795 F.3d at 967 ("*State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."); *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 8 (D.D.C. 2017) ("Elections have consequences. But when it comes to federal agencies, the [APA] shapes the contours of those consequences."). This is because, as the Supreme Court explained, "the policies committed [to an agency] by Congress … will be carried out best if [a] settled rule is adhered to." *State Farm*, 463 U.S. at 41-42. The Department's manifest failures render the 2017 Policy arbitrary and capricious.

III. Vacatur as the Appropriate Remedy.

The APA requires that arbitrary and capricious agency action be held unlawful and set aside. 5 U.S.C. § 706(2). Defendants' proposed alternate remedy of remand without vacatur "is the exception rather than the rule." *Ctr. for Envtl. Health v. Vilsack*, No. 15-CV-01690-JSC, 2016 WL 3383954, at *10 (N.D. Cal. June 20, 2016) (collecting cases). Courts leave an invalid agency action in place only where "equity demands" that they do so, a finding that requires weighing the seriousness of the agency's errors against the disruptive consequences of vacatur. *Pollinator Stewardship Council v. EPA*, 806 F. 3d 520, 532 (9th Cir. 2015). Neither of these factors warrants deviating from the typical APA remedy of vacatur in this case.

First, as discussed above, the 2017 Policy is rife with legal error. The possibility that the Department could better explain its reasoning on remand does not warrant leaving the arbitrary and capricious Policy in place. *See, e.g.*, *Local Joint Exec. Bd. of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578, 586 (9th Cir. 2002) (vacating NLRB rule and remanding so that NLRB could articulate a reasoned explanation for the rule). The Department's assertion that it could simply re-promulgate the Policy is incorrect as the record does not support

the policy changes it acknowledges (e.g. standard of proof or appeals), much less those it ignored. The Department identifies no meaningful record evidence as to mediation, interim measures, promptness, off-campus conduct, confidentiality, and sexual history evidence, which would be required to re-promulgate the Policy. Nor can the Department simply re-promulgate the Policy given the conflicts with the still operative 2001 Guidance, which was the product of a notice and comment process.

Second, Defendants identify *no* record evidence to support their assertion that vacatur would be disruptive. Vacatur would return the Department's Title IX guidance to the pre-2017 status quo, namely reinstating the 2011/2014 Guidance.[13] Defendants' implication that schools would be left without guidance therefore is plainly incorrect, and the Department makes no showing that returning to the status quo from two years ago would cause negative disruptions. The minimal potential disruption here stands in stark contrast to cases where such effects were sufficiently dire to make vacatur inappropriate. *See, e.g.*, *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (vacatur likely to cause regional power blackouts and "economically disastrous" results); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (vacatur could contribute to "potential extinction of an animal species").

Nor is there any basis to vacate only portions of the Policy. Severance is appropriate when (1) it will not impair the functioning of the rule as a whole, and (2) "there is no indication that the regulation would not have been passed but for [the severed portion's] inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). First, the entire Policy is unlawful based on its failure to take the reliance interests of survivors into account. Second, it is not feasible to vacate only the Policy's numerous arbitrary and capricious changes in position (which resulted in the

[13] Plaintiffs request vacatur of both the 2017 DCL and the 2017 Q&A. Dkt. No. 123 at 51. The 2017 DCL explicitly withdrew the 2011 DCL and the 2014 Q&A. 2017 DCL at 2. Vacatur of the 2017 DCL would therefore reinstate the prior status quo, namely the rescinded 2011/2014 Guidance. *Oceana, Inc. v. Ross*, 359 F. Supp. 3d 821, 828 (N.D. Cal. 2019) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect." (citation omitted)).

rescission of the old Guidance as well as the issuance of the new Policy) and leave a coherent guidance regime in place. Finally, the arbitrary and capricious policy changes, especially the standard of proof and other enhanced protections for respondents, were the central focus of Department policymakers, *see, e.g.* 2017 DCL at 1; Dkt. 136-2, Ex. A-9, making it unlikely that the Department would have promulgated the Policy without them. *See Ctr. for Biological Diversity v. Jewell*, No. CV-16-00094-TUC-JGZ, 2018 WL 1586651, at *22 (D. Ariz. Mar. 31, 2018) (citing *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F. 3d 13, 22 (D.C. Cir. 2001) (refusing to sever invalid portions of rule where doing so would be contrary to agency's purpose in promulgating the rule)).

Third, Defendants' argument that the scope of the relief is overbroad is unavailing. A remedy "is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled." *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)). Here, nationwide relief is necessary to remedy Plaintiffs' injuries. Plaintiffs are three geographically diverse organizations. The unlawful Policy injured them by: (1) making it more difficult to obtain successful results in Title IX proceedings; (2) causing fewer students to seek their legal and counseling services; and (3) causing confusion about Title IX protections. Pls.' Br. at 8-10.

Adequate relief for these injuries requires complete vacatur of the Policy. First, it would be profoundly difficult, if not impossible, for vacatur only to apply to Plaintiffs in their Title IX work. Defendants do not attempt to explain how to do so. For example, a school that had adopted unequal appeal rights or the clear and convincing standard of proof could be required to provide different procedures to students represented by Plaintiffs or that receive other assistance from Plaintiffs, such as through ERA's new and expansive pro bono initiative. ERA Decl. ¶¶ 17-20, 22-23. Such an outcome would be profoundly difficult for a school to make operational and

would create at least the appearance of unfairness for its student body which are accorded different standards of treatment depending on the identity of their counsel. Second, as for the observed chill in reporting, it is impossible to remedy these injuries without nationwide relief. A limited injunction would not reach those students who chose not to pursue Title IX proceedings as a result of the Policy (but would have done so with Plaintiffs' assistance otherwise). Third, a limited injunction could not remedy the widespread confusion about survivors' rights which Plaintiffs have expended resources to correct.

CONCLUSION

Plaintiffs respectfully request that the Court grant Plaintiffs' summary judgment as to all claims raised in Plaintiffs' Third Amended Complaint, Dkt. No. 123, declare the Dear Colleague Letter and Q&A issued in September 2017 to be unlawful, set aside and vacate those documents, and reinstate the Dear Colleague Letter issued in 2011 and the Q&A issued in 2014. Plaintiffs further request that the Court deny Defendants' Motion for Summary Judgment, Dkt. No. 140.

Respectfully submitted, Date: September 19, 2019

/s/ Karianne M. Jones

Leecia Welch (CA Bar No. 208741)
Alice Y. Abrokwa*
Seth Galanter*
National Center for Youth Law
405 14th Street, 15th Floor
Oakland, CA 94612, *and*
1313 L Street, NW, Suite 130
Washington, DC 20005
Ph: (510) 835-8098
Fax: (510) 835-8099
Emails: lwelch@youthlaw.org,
sgalanter@youthlaw.org,
aabrokwa@youthlaw.org

Jennifer A. Reisch (CA Bar No. 223671)
Equal Rights Advocates
1170 Market Street, Suite 700
San Francisco, CA 94102
Ph: (415) 621-0672
Fax: (415) 621-6744
Email: jreish@equalrights.org

**Pro Hac Vice*
Counsel for Plaintiffs

Javier M. Guzman*
Robin Thurston*
Karianne M. Jones*
Democracy Forward Foundation
1333 H St. NW
Washington, DC 20005
Ph: (202) 448-9090
Fax: (202) 701-1775
Emails: jguzman@democracyforward.org,
rthurston@democracyforward.org,
kjones@democracyforward.org

Emily Martin*
Neena Chaudhry*
Sunu Chandy*
Elizabeth Tang*
National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
Ph: (202) 588-5180
Fax: (202) 588-5185
Emails: emartin@nwlc.org,
nchaudhry@nwlc.org,
schandy@nwlc.org,
etang@nwlc.org