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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO DIVISION

SURVJUSTICE, INC., EQUAL RIGHTS ADVOCATES, and VICTIM RIGHTS LAW CENTER,

Plaintiffs,

v.

ELISABETH D. DEVOS, *in her official capacity as Secretary of Education*, KENNETH L. MARCUS, *in his official capacity as Assistant Secretary for Civil Rights*, and U.S. DEPARTMENT OF EDUCATION,

Defendants.

Case No. 18-cv-0535-JSC

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hon. Jacqueline Scott Corley
Hearing: October 17, 2019

Phillip Burton Federal Building & United States Courthouse, Courtroom F, 15th Fl., 450 Golden Gate Ave., San Francisco, CA 94102

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I. Introduction

Defendants Secretary of Education Elisabeth D. DeVos, Assistant Secretary for Civil Rights Kenneth L. Marcus, and the U.S. Department of Education (ED), are entitled to summary judgment for two simple reasons. First, the challenged guidance documents issued by ED's Office for Civil Rights (OCR)—the 2017 Dear Colleague Letter (2017 DCL) and the 2017 Q&A on Campus Sexual Misconduct (2017 Q&A) (collectively, 2017 Guidance)—are not final agency action. Second, even if they were, Defendants exceeded their limited obligations under the Administrative Procedure Act (APA) to provide a reasoned basis for those guidance documents. Nothing in Plaintiffs' opposition to Defendants' motion for summary judgment changes those conclusions. Plaintiffs are entitled to disagree with Defendants' reading of Title IX, but they are not entitled to judicial relief under the APA.

II. Argument

A. The 2017 Guidance Is Not Final Agency Action.

1. The Existing Record Makes Clear That The 2017 Guidance Is Not Final Agency Action.

Over a year ago, the Court held that the 2017 Guidance was not final agency action because it produced no legal consequences of its own force. Oct. 1, 2018 Order 18, ECF No. 81. This holding was correct, and nothing in the Court's narrow order granting reconsideration, *see* Mar. 29, 2019 Order, ECF No. 121, indicated that the Court was questioning that holding. Instead, Plaintiffs resuscitated their APA claim based on the narrow theory that (1) an assurance of compliance, which recipients of ED funds sign, requires those recipients to comply with ED "guidelines," and (2) the 2017 Guidance is one of those "guidelines." *See id.* at 6–7.

Although the Court would not allow Defendants to rebut this theory through their memorandum in opposition to Plaintiffs' motion for reconsideration, it observed that "a more fulsome record may establish that the 2017 Guidance is not encompassed by the [OCR] Assurance." *See* ECF No. 121 at 8. Defendants have now presented the Court with a declaration from a senior official at OCR, William E. Trachman, which definitively sets forth the Department's position: neither the Assurance of Compliance nor a similar OMB Assurance requires recipients of ED funds to comply with the 2017 Guidance, as opposed to compliance with Title IX and its implementing regulations. *See* Trachman Decl. ¶¶ 21, 23,

ECF No. 140-1. Accordingly, any recipient of ED funds who signs these documents may rest assured that OCR will not use them as a back door to enforce the 2017 Guidance.

Plaintiffs suggest that the Court should not rely on Mr. Trachman's declaration because Mr. Trachman has been "employed for less than two years" and because he "provides no foundation for his conclusory assertions." *See* Pls.' Opp'n 2 (emphasis omitted). That is incorrect. First, as Senior Counsel to the Office for Civil Rights, Mr. Trachman has authority to present OCR's understanding of how the 2017 Guidance interacts with the assurance forms. *See* Trachman Decl. ¶ 3. Second, Mr. Trachman *has* supplied a foundation for his assertions; his declaration is "based on [his] personal knowledge and information made available to [him] in the course of [his] official duties." *Id.* ¶ 3. Nor are his assertions conclusory; he has explained why OCR does not treat the 2017 Guidance as "guidelines" under the assurances. *See id.* ¶ 20 (explaining that OCR treats "certain notices or appendices that [ED] published in the Federal Register or Code of Federal Regulations" as "guidelines"). More fundamentally, Plaintiffs imply that "conclusory" statements cannot support OCR's contention that the 2017 Guidance falls outside the assurances, but the relevant question is *whether* OCR treats the 2017 Guidance as falling outside the assurances, not *why*.[1]

Plaintiffs' other counterargument is that under general principles of contract law, it is possible to read the assurance forms to encompass the 2017 Guidance, and so there is a risk that OCR could change its enforcement position in the future. That argument is wrong for at least three reasons.

First, Plaintiffs' invocation of general contract principles is irrelevant because enforcement actions are premised on noncompliance with Title IX and its implementing regulations, not the assurance documents. It is true that recipients of ED funds agree to comply with "[a]ll regulations, guidelines, and standards issued by the Department under [certain] statutes," Assurance of Compliance—Civil Rights Certificate, ECF No. 136-2, and "all applicable requirements of [certain] Federal laws, executive orders, regulations, and policies governing [the applicable] program," *id.* at 17. But if a recipient fails to comply

[1] *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495 (9th Cir. 2015), which Plaintiffs cite in support of their argument, has nothing to do with this case. *Nigro* concerned an "uncorroborated and self-serving" declaration that a party submitted to establish a genuine dispute of material fact in an employment dispute (which, ironically, the court accepted). *See id.* at 497–98. Here, by contrast, Defendants submit Mr. Trachman's declaration to state OCR's legal position that the 2017 Guidance is not "guidelines" or "policies" under certain assurance forms. Plaintiffs do not dispute that OCR holds this position.

with such guidelines or policies, enforcement is based on noncompliance with the statute or regulations, not the assurance. *See* Trachman Decl. ¶¶ 7–13. And the 2017 Guidance makes clear on its face that it cannot be directly enforced. *See* 2017 DCL 2 (A.R. 3), ECF No. 134.

Second, even if contract law principles applied, Plaintiffs are still misreading the assurances. Plaintiffs point to past examples of the Department of Justice (DOJ) and Government Accountability Office (GAO) referring to certain documents as "guidelines" and "policies." *See* Pls.' Resp. Defs.' Mot. Summ. J. 3 & nn.3–4, ECF No. 141 [hereinafter Pls.' Opp'n]. But the question here is whether *ED*, not DOJ or the GAO, considers the *2017 Guidance*, not other documents, to be "guidelines" or "policies." Plaintiffs also claim that Defendants have described a non-Federal Register document as "guidelines." *See id.* at 3 & n.5. This is false. Plaintiffs cite certain decades-old district court opinions that refer to a guidance document as "*Lau* Guidelines." But they do not point to any instance where Defendants have legally treated the 2017 Guidance as "guidelines."

Third, and most fundamentally, Plaintiffs are asking the wrong question. Their essential theory of finality is that even if the 2017 Guidance is not itself final agency action, it might become final agency action because OCR could enforce it through the back door by way of the assurances. Yet regardless of how OCR *could* interpret the language of the assurances, any enforcement would come from OCR alone.[2] The relevant question is therefore not the theoretical maximum of OCR's enforcement authority, but rather what enforcement authority OCR actually understands itself to possess and is prepared to exercise.

[2] Plaintiffs suggest that third parties could sue for noncompliance with the assurance, citing a 1976 proposed rule by ED's predecessor, the Department of Health, Education, and Welfare (HEW), regarding a different assurance. *See* Pls.' Opp'n 4. First, however, HEW's position in that proposed rule actually is consistent with ED's position here: the assurance "has the effect of giving aggrieved persons who are beneficiaries of federally assisted programs or activities the right to seek judicial enforcement of *the regulation*." Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. 29,548, 29,552 (proposed July 16, 1976) (emphasis added). HEW did not state then that third parties may sue for noncompliance with the assurance itself. And it certainly does not state that signing such assurances binds OCR to treat what would otherwise be unenforceable guidance as having the force of law. Second, to the extent that Plaintiffs' injury arises from third parties suing schools for noncompliance with the assurance, any such injury would be caused by those third parties, not Defendants. If Plaintiffs' standing theory has been reduced to this point, Defendants reiterate their arguments that Plaintiffs lack standing, *see* ECF No. 40 at 4–16, and that they have another adequate alternative remedy against those third parties, *see id.* at 18–19. Relatedly, to the extent that Plaintiffs' injury derives from enforcement of the assurances by DOJ, it bears underscoring that OCR is responsible for referring noncompliance allegations to DOJ, *see* Trachman Decl. ¶ 10, but as set out in the Trachman Declaration, OCR would not make such referrals on the basis of noncompliance with the 2017 Guidance as opposed to the underlying statute and regulations.

Because OCR has definitively stated that it does not consider the 2017 Guidance to be enforceable "guidelines" or "policies" under the assurances, Plaintiffs can point to no legal consequences that would flow from noncompliance with the 2017 Guidance, as any enforcement action would proceed from a violation of the statute and implementing regulations.

Plaintiffs nevertheless contend that there are legal consequences because OCR could change its mind about the meaning of the assurances at some unspecified time in the future. *See* Pls.' Opp'n 4–5. Plaintiffs' speculation that legal consequences *might* flow from a document because the agency *could* change its position at some point in the future does not support judicial review *now*. *See Dietary Supplemental Coal., Inc. v. Sullivan*, 978 F.2d 560, 564 (9th Cir. 1992) (holding that the risk of future final agency action was "too speculative to warrant judicial intervention"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (observing that "'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990))). To the contrary, the law is clear that a promise not to enforce is sufficient to remove any risk of Article III injury. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 93 (2013) (holding that a covenant not to sue had extinguished the case or controversy); *cf., e.g. Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (finding Article III injury because the "Government has not argued . . . that plaintiffs will not be prosecuted if they do what they say they wish to do"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) ("[T]he State has not disavowed any intention of invoking the criminal penalty provision," and therefore plaintiffs are "not without some reason in fearing prosecution."). Here, unlike in *Holder* and *Babbitt*, the government *has* disavowed the theory on which Plaintiffs rely. Plaintiffs' theory of final agency action accordingly fails.[3]

[3] Plaintiffs' reliance on *Gill v. DOJ*, 913 F.3d 1179 (9th Cir. 2019), is misplaced. There, the agency agreed that it could take certain actions that would produce legal consequences. *See* 913 F.3d at 1185 ("But, as [DOJ] conceded below, once an agency decides to participate, the eGuardian User Agreement permits [DOJ] to revoke agency membership for violating various policies, including the Functional Standard."). Here, in contrast, the agency has definitively stated that it will *not* take actions that would produce legal consequences (i.e., enforce the 2017 Guidance through the assurances) because it is not legally able to do so. Plaintiffs' speculation is even greater in light of the forthcoming Final Rule under Title IX, which will supplant the 2017 Guidance. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018). Put simply, once the Final Rule is issued, the question whether the 2017 Guidance may be enforced through the assurances will be moot. Plaintiffs also contend that agency staff are obliged to follow the 2017 Guidance. *See* Pls.' Opp'n n.6. But while the 2017 Guidance assists OCR enforcement staff in

2. The Court Should Not Consider Any Request For Relief Under Rule 56(d).

Plaintiffs halfheartedly request that the Court permit them "the opportunity to submit a request for limited discovery" under Rule 56(d) if "the Court is inclined to rely on the Trachman Declaration." Pls.' Opp'n 2 n.2. Plaintiffs are not actually making such a request at this time; they have filed neither a motion nor a declaration in support of such a request, as Rule 56(d) requires. Defendants will respond to any future request for discovery in compliance with this Court's local rules and therefore make only the following observations at this time:

First, any future request for discovery under Rule 56(d) would be procedurally improper. Rule 56(d) applies where a party demonstrates that it "cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Plaintiffs, however, have *already filed* their opposition. Their response to Defendants' motion for summary judgment was due September 19, 2019, and nothing in Rule 56(d) permits Plaintiffs to submit a second response to Defendants' motion in the event that the Court finds Plaintiffs' first response inadequate.

Second, even if Plaintiffs had requested relief under Rule 56(d) on the day that their opposition was due, that request would have been improper. Plaintiffs have known since the Court granted their motion for reconsideration that the 2017 Guidance's status as final agency action would turn on the contents of a "more fulsome record," ECF No. 121 at 8, and they have known for nearly as long that Defendants intended to contribute to that record through an agency declaration, *see* ECF No. 124 at 3. Yet Plaintiffs never asked the Court to authorize discovery. Instead, they were eager to address the merits as soon as possible, telling the Court in the parties' April 2019 joint case management statement that "delay would prejudice Plaintiffs because it would further delay the relief they seek—vacating the 2017 Title IX Policy." *Id.* at 2. Plus, Plaintiffs thought they already had everything they needed on final agency action, believing that the Court had "already found that the new allegations included in Plaintiffs' Third Amended Complaint would be sufficient to state a claim on final agency action." *Id.* Plaintiffs therefore urged the Court to enter a schedule under which Defendants would promptly produce the administrative record and

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assessing compliance, ultimately OCR must determine whether a recipient has complied with Title IX and the implementing regulations, not agency guidance.

Plaintiffs would file a motion for summary judgment on all issues shortly thereafter—all without the benefit of any discovery. *See id.* at 2, 6.

Under Ninth Circuit precedent, a party is not entitled to discovery under Rule 56(d) "if it fails diligently to pursue discovery before summary judgment." *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (citations omitted); *accord, e.g.*, *Chance v. Pac-Tel. Teletrac Inc.*, 242 F.3d 1151, 1161 (9th Cir. 2001) (no relief under former Rule 56(f) where party "failed diligently to pursue discovery"); *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995) (observing that "[t]he district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past" (quoting *Cal. Union Ins. Co. v. Am. Diversified Sav. Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990))); *Brocade Commc'ns Sys., Inc. v. A10 Nets., Inc.*, 843 F. Supp. 2d 1018, 1027 (N.D. Cal. 2012) (party seeking relief under Rule 56(d) must show that it "'diligently pursued its previous discovery opportunities" (quoting *Bank of Am., NT & SA v. PENGWIN*, 175 F.3d 1109, 1118 (9th Cir. 1999))). It was Plaintiffs' choice to prioritize speed over attempting to obtain discovery, and Plaintiffs cannot be heard to contend that they were prejudiced by their own litigation strategy.

B. The 2017 Guidance Is Not Arbitrary or Capricious.

In deciding an arbitrary-and-capricious claim, the sole question for the Court is whether the agency's decision "was the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). "This standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1173 (9th Cir. 2016) (citation omitted). "That requirement is satisfied when the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quoting *Bowman Transp., Inc. v. Ark-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

Of particular note, the APA provides that when an agency is issuing a *legislative* rule pursuant to 5 U.S.C. § 553, it "shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). As interpreted by the Supreme Court, this requires that an agency "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Because Plaintiffs do not contend that the 2017 Guidance

is a legislative rule subject to 5 U.S.C. § 553, these requirements are not at issue. The only requirement is that imposed by the APA's arbitrary-and-capricious review provision (i.e., that there be a "reasonable basis" for the decision). *See Pac. Dawn LLC*, 831 F.3d at 1173. OCR exceeded this standard.

1. The Record Reflected Overwhelming Criticism of The 2011 and 2014 Guidance.

The 2011 and 2014 guidance documents received widespread criticism from legal groups like the American Bar Association (ABA) and the American College of Trial Lawyers (ACTL); university professors[4] and administrators; civil liberties groups and advocates for the accused; advocates for survivors; and federal courts. *See* Defs.' Mem. P. & A. Supp. Mot. Summ. J. 4–7, ECF No. 140 [hereinafter Defs.' Mem.]. Plaintiffs nevertheless accuse Defendants of "mischaracteriz[ing] the record and provid[ing] an inaccurate picture of the public's response to the 2011/2014 Guidance." Pls.' Opp'n 7. That accusation is baseless.

First, Plaintiffs point to a poll conducted on behalf of the National Women's Law Center (among the counsel for Plaintiffs here) that, in their view, "show[s] that the vast majority of voters supported policies in the 2011 DCL." Pls.' Opp'n 7. APA review is not a popularity contest, however: "an agency is not obligated to base its rulemaking purely on a tally of the number of letters it receives," especially where the letters cut against "the agency's own expertise" and "the data presented to the agency during the course of the rulemaking." *Thomas v. Lujan*, 791 F. Supp. 321, 322–23 (D.D.C. 1992), *aff'd*, No. 92-5240, 1993 WL 32329 (D.C. Cir. Jan. 29, 1993). And courts have been especially wary of opinion polls. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Dole*, 802 F.2d 474, 489 (D.C. Cir. 1986) ("[W]e cannot say that the Secretary's refusal to give determinative weight to the survey championed by New York descended to the depths of arbitrary and capricious action.").[5]

[4] Plaintiffs dismiss criticism by Professor Laura Kipnis on the grounds that she "promotes the stereotype that women lie about sexual assault." Pls.' Opp'n 7 n.7. What Professor Kipnis actually said is that it is false that accusers never lie, a point that this Court has itself made. *Compare* ECF No. 96 at 18 ("[T]he premise that accusers don't lie turns out to be mythical."), *with* Tr. of July 19, 2018 Hr'g, at 74 ("THE COURT: . . . Certainly there are—there are very rare, very rare occasions when people have been falsely accused, right? You're not going to stand up and tell me that every single time it's true.").

[5] That wariness makes sense: depending on how questions are framed, opinion polls can provide quite different pictures of public opinion. *See* Leighton Walter Kille, *Polling Fundamentals and Concepts: An Overview for Journalists*, Harvard Kennedy School (Nov. 10, 2016), https://journalistsresource.org/tip-

Plaintiffs also discount the analysis of the ACTL and the ABA Task Force, contending that these "organizations have expertise in *criminal* trials and procedure, which is different from school sexual harassment proceedings." Pls.' Opp'n 8. At the outset, ACTL has expertise beyond criminal proceedings: it "maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission." A.R. 258. And while it is true that the ABA task force report was issued by its criminal justice task force, that task force included a wide spectrum of lawyers and law professors, including SurvJustice's founder and then-Executive Director, Laura Dunn. Plaintiffs cannot seriously contend that it was error for Defendants to consider it.

Of course, the administrative record does contain some material supporting the 2011 and 2014 guidance. *See, e.g.*, A.R. 2044–58 (letter signed by various law professors); A.R. 1885–87 (letter from The Leadership Conference on Civil and Human Rights and related organizations); A.R. 1149–51 (letter from three U.S. Senators), A.R. 2620–21 (letter from Senator Murray); A.R. 1152–58 (letter from Members of U.S. House of Representatives); A.R. 1159–60 (same); A.R. 2590–93 (letter from state attorneys general).[6] With only rare exceptions, however, these documents consist of a bottom-line request that OCR leave the 2011 and 2014 guidance in place, with little actual analysis. While OCR considered these perspectives, it rejected them for the reasons provided in the 2017 Guidance.

Last, Plaintiffs decry as "flatly misleading" Defendants' citation to a statement by the Rape, Abuse, and Incest National Network (RAINN). *See* Pls.' Opp'n. 9 n.9. Yet the letter submitted by RAINN is entirely consistent with how Defendants portrayed it: it indicates that the "crime of rape just does not fit

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sheets/reporting/polling-fundamentals-journalists. For example, in the poll on which Plaintiffs rely, respondents were asked how much they agreed or disagreed that students should be disciplined if it was more likely than not that they had committed sexual assault, but the question did not present the clear-and-convincing standard as an alternative choice. *See* Public Policy Polling, *National Survey Results* Q4, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/05/NationalResults.pdf (last visited Oct. 3, 2019). As the Pew Research Center has explained, to avoid the "acquiescence bias," instead of using the "agree-disagree format," the "better practice is to offer respondents a choice between alternative statements." *Questionnaire Design*, Pew Research Center, https://www.pewresearch.org/methods/u-s-survey-research/questionnaire-design. The question also did not ask whether the federal government should require any particular standard of proof, making the results irrelevant to the specific question here.

[6] Plaintiffs suggest that the Association of Big Ten Student Governments supported leaving the 2011 and 2014 guidance in place. *See* Pls' Opp'n at 9. In actuality, this group opposed "the complete erasure of Title IX policies regarding sexual misconduct." A.R. 1209–10.

the capabilities of [college disciplinary] boards," which "offer the worst of both worlds: they lack protections for the accused while often tormenting victims." Letter from RAINN to White House Task Force to Protect Students from Sexual Assault 9 (Feb. 28, 2014), https://www.rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf. Thus, RAINN said, "[w]e urge the federal government to explore ways to ensure that college and universities treat allegations of sexual assault as they would murder and other violent felonies." *Id.* at 10. It hardly needs explaining that if colleges and universities "treat[ed] allegations of sexual assault as they would murder and other violent felonies," *id*., schools could not use the preponderance standard, *see In re Winship*, 397 U.S. 358, 362–64 (1970); could not permit appeals of not guilty verdicts, *see Ball v. United States*, 163 U.S. 662, 671 (1896); and would require the accused to be told who he or she is accused of assaulting, *see, e.g.*, Fed. R. Crim. P. 7.

2. Standard of Proof: OCR Provided a Reasoned Explanation for Advising that Schools May Use a Clear and Convincing Standard if They So Choose.

OCR provided numerous reasons for rescinding the absolute requirement that schools use the preponderance of the evidence standard in all cases: the 2011 and 2014 guidance documents had (1) "place[d] 'improper pressure upon universities to adopt procedures that do not afford fundamental fairness,'" 2017 DCL 1 (A.R. 2); (2) "led to the deprivation of rights for many students," *id.* at 2 (A.R. 3); (3) "not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires," *id.*, and (4) "imposed these regulatory burdens without affording notice and the opportunity for public comment," *id.* Those reasons provide more than sufficient support to survive the limited review created by the APA.

i. OCR Reasonably Explained That The Requirement To Use The Preponderance Standard Led To Inequitable Campus Proceedings.

OCR clearly explained that the rescinded guidance documents' position on the appropriate standard of proof had contributed to fundamentally unfair proceedings. *See* Defs.' Mem. 13; 2017 DCL 1–2 (A.R. 2–3). While Plaintiffs dismiss this argument as "broad restatements of the Department's view of the prior guidance generally," Pls.' Opp'n 11, the 2017 Guidance specifically observed that the "2011 Dear Colleague Letter required schools to adopt a minimal standard of proof," and it was referring to this feature of the 2011 DCL (among others) when it observed that "[l]egal commentators have criticized the

2011 Letter and the 2014 Questions and Answers for placing 'improper pressure upon universities to adopt procedures that do not afford fundamental fairness,'" 2017 DCL 1 (A.R. 2) (quoting Penn Law faculty), and are "overwhelmingly stacked against the accused," *id.* (quoting Harvard Law Faculty). Those are reasoned explanations for Defendants' actions, not "conclusory" statements, *see* Pls.' Opp'n 11. Nothing in the APA prevents an agency from discussing flaws in related policy in the same breath.

Plaintiffs nevertheless erroneously contend that OCR failed "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.'" Pls.' Opp'n 12. In reality, OCR (1) recognized that it previously understood the regulation's requirement of equitable procedures to require the preponderance standard, *see* 2017 DCL 1 (A.R. 2) ("The 2011 Dear Colleague letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard."); (2) reiterated that "equitable" remained the appropriate standard, *see id.* at 2 (A.R. 3) (referring to OCR's "mission under Title IX to protect fair and equitable access to education"); and (3) explained that it agreed with the numerous commentators who believed that the 2011 DCL had led universities to "adopt procedures that do not afford fundamental fairness" and "are overwhelmingly stacked against the accused," *id.* at 1 (A.R. 2). OCR thus made clear that it was departing from the 2011 DCL and explained why, satisfying the APA. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966–67 (9th Cir. 2015).

Plaintiffs further contend that OCR failed to explain why it "no longer considers it important to align the standard of proof in Title IX proceedings with that used by OCR and courts under Title VII and other civil rights laws." Pls.' Opp'n 12. At the outset, OCR was not obligated to address this specific question at all: in light of the considerable leeway afforded to agencies on arbitrary-and-capricious review, an agency "need not address every aspect of a plaintiff's claims at length and in detail." *Accrediting Council for Indep. Colls. & Sch. v. DeVos*, 303 F. Supp. 3d 77, 104 (D.D.C. 2018) (quoting *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013)); *accord, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 999 (9th Cir. 2014) (even very brief explanation was adequate); *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997) (observing that an "agency's decision [need not] be a model of analytic precision to survive a challenge"). In any event, OCR made clear that it was relying on ACTL's criticism

of the preponderance standard, *see* 2017 DCL 1 n.2 (A.R. 2 n.2), and ACTL specifically explained that "the absence of virtually all of the procedural rights provided in civil lawsuits, such as voir dire, trial by judge or jury, or full cross-examination, compels an accompanying call for a higher standard of proof." A.R. 274; *accord id.* at 731 (former federal judge Nancy Gertner) (observing that "civil trials . . . follow months if not years of discovery—where each side finds out about the other's case, knows the evidence and the accusations, and has lawyers to ask the right questions"). OCR's "path" on this issue is unquestionably discernable. *See Encino Motorcars*, 136 S. Ct. at 2125.

Plaintiffs respond that the Department cannot rely on "the record" or "post hoc arguments made in briefing." Pls.' Opp'n 12. To be sure, courts review an agency action based on the record compiled by the agency when issuing its decision, not on "some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). But Defendants are not asking the Court to rely on a record being made for the first time in this Court; they are asking the Court to review the reasons that the agency provided in the 2017 Guidance and the materials that the agency relied on in issuing that Guidance. OCR did not "ignore its obligation under the APA to conduct an independent and critical analysis of the prior policy," Pls.' Opp'n 12; rather, as part of that analysis, it considered the views of experts in this field—*including SurvJustice's own founder Ms. Dunn*, who recommended a standard of proof more demanding than preponderance so that schools "would be really sure when they made this decision," A.R. 3364.

Finally, Plaintiffs suggest that OCR failed to adequately "acknowledge[] the cost of th[e] trade off" between "fewer findings of responsibility for sexual violence and enhanced protections for respondents." Pls.' Opp'n 13. Yet the 2017 Guidance rejected the notion of a "trade off," explaining that the 2011 and 2014 guidance documents "led to the deprivation of rights" for "*both* accused students denied fair process *and* victims denied an adequate resolution of their complaints." 2017 DCL 2 (A.R. 3) (emphasis added). Plaintiffs may disagree and see respondents and complainants locked in zero-sum combat, but that is not how OCR sees it. Nor is it how Ms. Dunn, then of SurvJustice, saw it: she told OCR that "both parties, accuser and accused, have similar interests in a fair process on campus and should not be set up to oppose each other." A.R. 387; *see also id.* at 2064 (advocate Alexandra Brodsky: "A popular public narrative suggests that advocates for victims' rights and for accused students are locked in an intractable conflict . . . . The story is wrong."). Nonetheless, even if the Court concludes that OCR

could have been clearer on this (or any other) point, it still should not vacate the 2017 Guidance: again, a court hearing an APA case "should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Fox Television Stations*, 556 U.S. at 513–14 (quoting *Bowman Transp., Inc.*, 419 U.S. at 286). OCR easily satisfied that standard here.

ii. OCR Reasonably Explained The 2011 And 2014 Guidance Imposed New Obligations Beyond Those Contained In The Statute And Regulations.

OCR further explained that the 2011 and 2014 guidance's position on the standard of proof imposed new "regulatory burdens without affording notice and the opportunity for public comment," even though "many schools had traditionally employed a higher clear-and-convincing-evidence standard." 2017 DCL 1–2 (A.R. 2–3). Plaintiffs respond that if Defendants believed "that the 2011 DCL or 2014 Q&A required notice and comment," then "the only permitted response would have been to rescind those documents through notice-and-comment rulemaking." Pls.' Opp'n 10. Plaintiffs' argument gets the point backwards: the 2011 DCL and 2014 Q&A did not go through notice and comment rulemaking, which means that they were not actually legislative rules. But even though these documents were not legislative rules, they *purported* to recite new legal obligations that did not appear in existing law. Those flaws in the 2011 and 2014 guidance documents provided ample support for withdrawing them. *See* 2017 DCL 2 (A.R. 3).

Plaintiffs' cases holding that legislative rules may only be replaced by new legislative rules, *see* Pls.' Opp'n 10 (citing *D.H. Blattner & Sons, Inc. v. Sec'y of Labor, Mine Safety & Health Admin.*, 152 F.3d 1102, 1109 (9th Cir. 1998) and *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017)), are therefore inapplicable. The relevant case is instead the Supreme Court's decision in *Perez v. Mortgage Bankers*, which unequivocally holds that an agency may rescind a non-legislative rule *without* engaging in notice and comment. *See* 135 S. Ct. at 1206 ("Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."). OCR in 2017 was not "issuing a full replacement policy that imposes new requirements and standards," as Plaintiffs argue, Pls.' Opp'n 11; rather, as the Court has observed, the 2017 Guidance does not "create[] new obligations for schools" because "[t]he language is instead discretionary, and largely *relieves* schools of previous obligations under the Rescinded Guidance."

ECF No. 81 at 18.

It therefore bears underscoring that, prior to 2011, OCR had never issued a nationwide requirement that schools always use the preponderance standard. *See* Defs.' Mem. 15. To be sure, as Plaintiffs observe, *see* Pls.' Opp'n 11, the record reflects two specific cases prior to 2011 in which OCR regional offices informed specific schools that Title IX required the use of the preponderance standard. *See* Letter from Gary D. Jackson, Reg'l Civil Rights Dir., Office for Civil Rights, ED, to Jane Jervis, President, The Evergreen State Coll. 8 (Apr. 4, 1995), https://www.ncherm.org/documents/193-EvergreenStateCollege10922064.pdf, *cited in* A.R 2053 n.70, 2080 n.86; Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, Office for Civil Rights, ED, to Ms. Jane E. Genster, Vice President & Gen. Counsel, Georgetown Univ. (Oct. 16, 2003), *cited in* A.R. 2053 n.73, 2080 n.86. Yet while in these two instances regional offices entered into voluntary resolution agreements with these two schools, OCR had never issued binding, nationwide instructions to that effect. If OCR had in fact required all schools to use the preponderance standard prior to 2011, then (1) Plaintiffs would surely have cited that requirement, and (2) it is inconceivable that numerous schools would have operated in flagrant violation of OCR's requirements.[7]

3. Appeal: OCR Reasonably Explained That It Was Returning to Its Pre-2011 Interpretation Pending Issuance of a Final Rule.

Defendants' position on appeals is simple: because OCR had not prohibited respondent-only appeals through its legislative rulemaking authority prior to 2011, it should not have used the 2011 DCL to tell recipients that Title IX already prohibited respondent-only appeals. *See* Defs.' Mem. 17–18. As the 2017 Q&A observes, OCR had repeatedly informed schools prior to 2011 that it was permissible to offer appeals exclusively to respondents. *See* 2017 Q&A 7 n.30 (A.R. 10 n.30).

By proposing to amend its Title IX regulations to require reciprocal appeal rights in the future, the

[7] Plaintiffs contend that "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.'" Pls.' Opp'n 12 (quoting A.R. 2051). That many schools were using the preponderance standard, however, is beside the point; these schools may continue to do so under the 2017 Guidance. The key point is that a meaningful number of schools were also using the clear-and-convincing standard, reflecting (1) their understanding that it was legally permissible to do so, and (2) their judgment that such a standard of proof was appropriate for their communities. *See* Defs.' Mem. 15.

Department is not "acknowledg[ing] its error," as Plaintiffs argue, Pls.' Opp'n 13. Rather, legislative rules and guidance documents have different functions: legislative rules may impose new legal obligations, *see, e.g.*, *L.A. Closeout, Inc. v. DHS*, 513 F.3d 940, 942 (9th Cir. 2008), whereas guidance is "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers," *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)). OCR's view that its Title IX regulations *should* require reciprocal access to appeals does not mean that the regulations *already* required reciprocal access to appeals in 2017.

4. Mediation: Plaintiffs Lack Standing and OCR Explained Its Action.

The Court should reject Plaintiffs' challenge to the 2017 Guidance's position on mediation, both because Plaintiffs lack standing to bring this challenge and because it fails on the merits.

i. Plaintiffs Lack Standing To Challenge OCR's Position On Mediation.

Plaintiffs' motion for summary judgment advanced a single theory for why the optional availability of mediation injures them: that it has caused confusion about how the 2017 Guidance interacts with the 2001 guidance:

> And for mediation: the 2017 Policy's instruction conflicts with the still-effective 2001 Guidance. See supra 5; ERA Decl. ¶ 15. The result is confusion about students' rights under Title IX that impedes Plaintiffs' mission of helping student survivors access those rights.

Pls.' Mem. Supp. Mot. Summ. J. 9, ECF No. 136. The cited declaration, in turn, states that "ERA's mission is . . . frustrated by the confusion bred by the 2017 Title IX policy," including "instructions on mediation that conflict with the still-effective 2001 Guidance." Farrell Decl. ¶ 15, ECF No. 136-2 Ex. C.

Plaintiffs' confusion-as-injury theory fails. Even if there were confusion about whether mediation is ever *permitted*, the 2017 Guidance makes clear that it is never *required*: it is permissible only "[i]f all parties voluntarily agree . . . after receiving a full disclosure of the allegations and their options for formal resolution and if a school determines that the particular Title IX complaint is appropriate for such a process." 2017 Q&A 5 (A.R. 7).[8] While Plaintiffs may have an idle curiosity about whether mediation is

[8] Plaintiffs complain that Defendants rely "solely on the terms of the Policy itself" to characterize mediation as voluntary, *see* Pls' Opp'n 15-16, but this case is an APA challenge to the 2017 Guidance; i.e., the text of the Guidance is what is at issue. If mediation proceeds where it is involuntary, any injury would be because schools are disregarding the 2017 Guidance, not because of the 2017 Guidance.

available to those who prefer it, the answer does not legally affect Plaintiffs because they would decline mediation whether it was available or not. *See Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."). Just as a vegetarian is not injured by confusion about the price of steak—he'll pass, thanks, no matter how good the deal—Plaintiffs are not injured by their alleged confusion about the optional availability of voluntary mediation.

In addition to the confusion-as-injury theory, Plaintiffs now also contend that the 2017 Guidance "communicates a distrust and skepticism of survivors," which "in turn reduc[es] the numbers of survivors who pursue Title IX campus processes." Pls' Opp'n 15. Putting aside the fact that the optional availability of mediation does not communicate distrust or skepticism of anybody, this theory sweeps too far. While the Court has accepted the proposition that Plaintiffs may be injured by a "decrease in student-filed complaints," ECF No. 81 at 11, none of Plaintiffs' declarations contains a specific statement that students are not seeking Plaintiffs' services *specifically because of the optional availability of mediation*. Rather, the paragraphs that Plaintiffs cite consist of boilerplate criticism of mediation, *see* McGerald Decl. ¶ 9(c), ECF No. 136-2 Ex. B; Farrell Decl. ¶ 9(c), ECF No. 136-2 Ex. C; Malone Decl. ¶ 8(c), ECF No. 136-2 Ex. D, coupled with a global assertion that the 2017 Guidance frustrates their organizational mission or has led to a decrease in student complaints. None of the declarations directly links any injury to the 2017 Guidance's treatment of voluntary mediation.

ii. OCR Adequately Explained Its Position on Mediation.

Even if Plaintiffs had standing to challenge OCR's position on mediation, their claims fail. The blanket prohibition on mediation arose from the 2011 DCL, and OCR explained that it was withdrawing the 2011 DCL because it purported to impose legal requirements absent notice and comment. *See* Defs.' Mem. 18–19. As described above, that rationale satisfies the APA's requirements.

Plaintiffs maintain that the 2017 Guidance's position on mediation conflicts not only with the 2011 DCL, but also with the 2001 Guidance. Thus, Plaintiffs say, the 2017 Guidance was bound to acknowledge that it was also departing from the 2001 Guidance. That is incorrect, for only the 2011 DCL purported to bar voluntary mediation in all cases of sexual assault. *Compare* 2011 DCL 8 (A.R. 229) ("[I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.") *with* 2001

Guidance 21 (A.R. 306) ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."). Because only the 2011 DCL purported to ban mediation in all cases of sexual assault, OCR satisfied its APA obligations by providing its reasons for withdrawing the 2011 DCL.[9]

Finally, Plaintiffs fail to address—or even acknowledge—the irony in their insistence that complainants be forced into adversarial campus proceedings even if they would prefer mediation. Many advocates for survivors are opposed to "mandatory reporting" laws that would require schools to report complaints of sexual assault to the police. *See, e.g.*, A.R. 2085 ("[V]ictims overwhelmingly say that, faced with the prospect of their schools forwarding their reports to law enforcement, they simply would not report to anyone at all."). Plaintiffs fall among them; their complaint describes required police reporting as a "dangerous policy that would discourage reporting by victims." 3d Am. Compl. ¶ 93, ECF No. 123. Yet while Plaintiffs are adamant that complainants not be forced into criminal proceedings, they simultaneously assert that it is arbitrary and capricious to give complainants an option for avoiding campus proceedings. Those positions are, at a minimum, in some tension.

5. Interim Measures: OCR Continues to Encourage Schools to Provide Them Where Appropriate.

Plaintiffs' motion for summary judgment advanced one narrow theory for why the 2017 Guidance's position on interim measures is arbitrary and capricious: that the 2017 Guidance departs from the 2014 Q&A without acknowledging that it is doing so. ECF No. 136 at 17. That is wrong.

First, Plaintiffs argue that the 2017 Guidance "shifts more of the burden regarding interim measures onto the complainant." Pls.' Opp'n 18. According to Plaintiffs, schools previously were required to minimize the burden on the complainant, but they are now prohibited from relying on fixed rules that favor one party over another. *Id.* At the outset, it bears emphasis that the 2014 Q&A contained no *requirement* with respect to complainant burden; rather, it stated, "*In general*, when taking interim measures, schools should minimize the burden on the complainant." 2014 Q&A 33 (A.R. 364) (emphasis added). This is no requirement at all, but rather a general recommendation, as illustrated by that section's

[9] Of course, even if the 2017 Guidance's position on mediation conflicted with the 2001 Guidance's position, that would still not amount to an APA violation. The 2001 Guidance received public comments, but it was not a legislative rule. The 2017 Guidance could thus supersede the 2001 Guidance without engaging in notice and comment rulemaking. *See Mortg. Bankers*, 135 S. Ct. at 1206.

preface: "The specific interim measures implemented and the process for implementing those measures will vary depending on the facts of the case," *id.* The 2014 Q&A is thus entirely consistent with the 2017 Guidance, which likewise contains no requirements regarding interim measures. In any case, OCR's current position is justified by (1) its decision to withdraw the 2011 and 2014 Guidance based on its numerous flaws, and (2) the record material describing the potential for abuse of interim measures. *See* Defs.' Mem. 20.[10]

Second, Plaintiffs argue that the 2017 Guidance conflicts with the 2014 Q&A because OCR no longer requires interim measures. Plaintiffs apparently now acknowledge, however, that the 2014 Q&A did not require interim measures for every Title IX complaint, either. *See* Pls.' Opp'n 19. The 2014 Q&A (like the 2017 Guidance) clearly stated that interim measures were *context specific*. *See* 2014 Q&A 33 (A.R. 364). And in response to the question, "Is a school required to take any interim measures before the completion of its investigation," OCR answered, "Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant *as necessary*, including taking interim measures before the final outcome of an investigation." *Id.* at 32 (A.R. 363) (emphasis added). Thus, OCR clearly indicated that interim measures should be taken as necessary, rather than as a matter of course. "The administrative process . . . is not an exercise in hair splitting," *CTS Corp. v. EPA*, 759 F.3d 52, 65 (D.C. Cir. 2014), and the Court should reject Plaintiffs' attempts to find a change in position where none exists.

6. Promptness: OCR Continues to Advise Schools to Conduct Prompt Investigations without Fixed Timelines.

Plaintiffs acknowledge that OCR has never required recipients to complete investigations within

[10] Plaintiffs argue that, as a result of this different language, there has been an increase in the number of mutual no-contact orders. If that is true, it is a result of decisions made by individual schools attempting to offer interim measures that are "individualized and appropriate based on the information gathered by the Title IX Coordinator." 2017 Q&A 3 (A.R. 6). Although the 2017 Guidance advises that interim measures should be made *available* to both parties, it nowhere advises that the *same* interim measures should be applied to both parties. *See id.* ("In fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party."). Thus, the 2017 Guidance does not prohibit unilateral no-contact orders or require mutual no-contact orders, as Plaintiffs suggest. Such orders continue to be appropriate, or not, depending on the facts and circumstances of the case. *See* 2017 Q&A 2–3 (A.R. 5–6); 2014 Q&A 32 (A.R. 363).

a fixed timeframe. *See* Pls.' Opp'n 21. Instead, they take issue with the fact that the 2017 Guidance no longer provides an example of a typical time frame. But while the APA requires that agencies acknowledge changes in *policy*, *see Fox Television Stations*, 556 U.S. at 515 (agency may not "depart from prior policy *sub silentio* or simply disregard rules that are still on the books"), there has been no change in policy here. Rather, Plaintiffs nitpick that the 2017 Guidance no longer contains an *observation* that "typical cases" conclude investigations after sixty days, 2014 Q&A 31 (A.R. 362). The 2014 Q&A was explicit that it "does not require a school to complete investigations within 60 days," *id.* at 32 (A.R. 363), and the 2017 Guidance does not either. There is no departure from a prior policy to explain.

7. Off-Campus Conduct: OCR Continues to Advise Schools to Address the On-Campus Effects of Off-Campus Conduct.

Plaintiffs are also wrong to contend that the 2017 Guidance departed from the 2014 Q&A regarding schools' obligation to respond to off-campus sexual misconduct. According to Plaintiffs, Defendants have "create[d] confusion" about whether schools are obligated to respond to off-campus conduct that does not involve a school program or activity but nevertheless creates a hostile environment on campus. Pls.' Opp'n 20. The 2017 Q&A, however, could not be clearer that schools do have such an obligation: "Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities." 2017 Q&A 1 n.3 (A.R. 4 n.3). That advice is both clear and consistent with the 2014 Q&A.

Plaintiffs' argument hinges on the 2017 Guidance's separate observation 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 1 n.3 (A.R. 4 n.3); *see also* Defs.' Mem. 22 (reiterating that "off-campus incidents entirely unconnected to a school program or activity" do not implicate Title IX). The key point is that when there is a hostile environment on campus (whatever its ultimate source), then by definition there is an incident of alleged harassment that *does* relate to a program or activity of the respondent, and a school must respond. The 2014 Q&A and 2017 Q&A are thus entirely consistent. As with the promptness section, there is no "depart[ure] from a prior policy" that

the agency must explain. *See Fox Television Stations, Inc.*, 556 U.S. at 515.[11]

8. Confidentiality: OCR Continues to Recognize That Respondents Are Entitled to Know the Identity of Their Accusers in Formal Disciplinary Proceedings.

Plaintiffs argued in their motion for summary judgment that the 2017 Guidance's confidentiality section was arbitrary and capricious because it conflicted with the 2001 Guidance. *See* Pls.' Mem. 18. Defendants have explained that there are no such conflicts and that the 2017 Guidance is reasonable and supported by the record. *See* Defs.' Mem. 22. Specifically, the 2001 Guidance, like the 2017 Guidance, made clear that schools are not expected to impose discipline without telling a respondent who he or she is accused of harassing or assaulting. *See id.*

Plaintiffs maintain that there is an inconsistency between the 2001 and 2017 Guidance because the 2001 Guidance advised schools to "take all reasonable steps to investigate and respond to the complaint consistent with the student's request" for confidentiality. *See* Pls.' Opp'n 18 (quoting 2001 Guidance 17 (A.R. 302)). That final phrase, "consistent with the student's request for confidentiality," plainly recognizes that a request for confidentiality may limit schools' ability to investigate and respond. *See also* 2001 Guidance 17 (A.R. 302) ("The school should inform the student that a confidentiality request may limit the school's ability to respond."). Most significantly, "if a student, who was the only student harassed, insists that his or her name not be revealed, and the alleged harasser could not respond to the charges of sexual harassment without that information, in evaluating the school's response, *OCR would not expect disciplinary action against an alleged harasser*." *Id.* (emphasis added).

According to Plaintiffs, while the 2001 Guidance permitted some degree of investigation on the basis of a confidential complaint, under the 2017 Guidance "[s]chools may no longer investigate sexual misconduct allegations without first disclosing the complainant's identity." Pls.' Opp'n 18. Yet that is simply not what the 2017 Guidance says. Rather, under the 2017 Guidance, schools may investigate allegations of sexual misconduct for any number of purposes without disclosing the identity of the

[11] Plaintiffs also incorrectly characterize Defendants' view of *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). *See* Pls.' Opp'n 20. Defendants cited it to note that the Supreme Court has held, consistent with the 2017 Guidance, that Title IX is limited to "conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." *See* Defs.' Mem. 21 (quoting *Davis*, 526 U.S. at 644).

complainant: getting an initial grip on the facts, counseling the offender, ensuring the safety of the campus community, improving campus policies, etc. Schools are only advised to provide the "identities of the parties involved" when conducting *disciplinary* investigations. *See* 2017 Q&A 4 (A.R. 7) (advising a school to provide "identities of the parties involved" "[o]nce it decides to open an investigation *that may lead to disciplinary action against the responding party*" (emphasis added)). Disciplinary investigations are formal proceedings, not initial factfinding, as evidenced by the use of the term "responding party" and the fact that schools are also advised to tell respondents "the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident." 2017 Q&A 4 (A.R. 7). This advice simply does not apply to preliminary factfinding.[12]

Thus, absolutely nothing in the 2017 Guidance precludes schools from conducting thorough investigations of alleged assaults, even on the basis of a confidential complaint. Properly read, the 2017 Guidance simply says that if schools are going to take the step of conducting formal investigations *for the purpose of discipline*, then they should tell respondents who they are accused of harassing or assaulting, among other facts that they would need to contest the allegation. By contrast, if schools do not provide respondents with the identities of the parties involved, then they should not impose discipline. That is exactly what the 2001 Guidance says. *See* 2001 Guidance 17 (A.R. 302).

In addition to their arguments concerning inconsistency with the 2001 Guidance, Plaintiffs now argue for the first time that the 2017 Guidance's confidentiality section is inconsistent with the 2011 DCL and 2014 Q&A. Pls.' Opp'n 18. At the outset, because such arguments were not presented in Plaintiffs' motion for summary judgment, they are waived. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009). And in any event, the arguments fail on their own terms. Like the 2001 Guidance, the 2011 and 2014 Guidance documents are consistent with the 2017 Guidance in their observations that requests for confidentiality may preclude schools from imposing discipline. *See* 2011 DCL 5 (A.R. 226)

[12] Because schools are not required to conduct hearings, OCR has historically used the term "investigation" to refer to procedures that a school uses to process sexual misconduct complaints, which may include a hearing. *See, e.g.*, 2011 DCL 11 (A.R. 232) ("Throughout a school's Title IX investigation, *including at any hearing*, the parties must have an equal opportunity to present relevant witnesses and other evidence." (emphasis added)).

("If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited."); 2014 Q&A 19 (A.R. 350) ("For Title IX purposes, if a student requests that his or her name not be revealed to the alleged perpetrator or asks that the school not investigate or seek action against the alleged perpetrator, the school should inform the student that honoring the request may limit its ability to respond fully to the incident, including pursuing disciplinary action against the alleged perpetrator."). The 2017 Guidance is consistent with these statements.

Finally, there is ample support in the record for OCR's longstanding position that respondents should be told who they are accused of assaulting before being subject to potentially life-changing discipline. *See* Defs.' Mem. 22. Plaintiffs quibble with this record evidence, arguing that some documents recommend disclosure of identities for tribunals, not for investigations, or that other documents in the record raised points in favor of confidentiality. *See* Pls.' Opp'n 17–18. Once again, Plaintiffs imply an inappropriately searching standard of review; rather, the Court "should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned,'" *Fox Television Stations, Inc.*, 556 U.S. at 513–14 (quoting *Bowman Transp., Inc.*, 419 U.S. at 286). *See supra* Part II.B.2.i.[13] Most fundamentally, because OCR has not changed its policy, no explanation was required.

9. Evidence of Complainant's Sexual History: It Is Reasonable to Recommend "Adequate, Reliable, and Impartial Investigations of Complaints."

Plaintiffs fail to establish that it was arbitrary and capricious for OCR to withdraw the blanket prohibition on evidence of a complainant's sexual history. At the outset, OCR made clear that it was withdrawing this mandate (and others) because they were not issued pursuant to notice-and-comment rulemaking, *see* 2017 DCL 2 (A.R. 3), and as set out above that rationale satisfies the APA's deferential standard. *See supra*, Part II.B.2.ii.

Plaintiffs also challenge Defendants' observation that OCR relied on extensive criticism of the

[13] Furthermore, it is absurd to suggest, as Plaintiffs do, that OCR would require the disclosure of a complainant's identity if such disclosure would put that person in danger. *See* Pls.' Opp'n 18. Plaintiffs point to no portion of the 2017 Guidance that contains such a requirement because there is none. Rather, OCR has simply advised that a recipient should not take disciplinary action against the responding party without providing certain details, including the identities of the parties involved. Absolutely nothing in the 2017 Guidance requires the disclosure of information that would endanger a complainant.

evidentiary mandates contained in the 2011 and 2014 guidance documents. While Plaintiffs point to certain policy arguments in favor of the withdrawn guidance, under the APA's "narrow" standard of review, courts insist only "that an agency 'examine the relevant data and articulate a satisfactory explanation for its action.'" *Fox Television Stations, Inc.*, 556 U.S. at 513 (quoting *State Farm*, 463 U.S. at 43). Defendants have done more than enough to meet the APA's narrow standard. First, OCR pointed to extensive criticism of the evidentiary restrictions in the 2011 DCL and 2014 Q&A. *See supra*, Part II.B.1. And second, the criticism calling for more robust procedures supports OCR's final position, which Plaintiffs largely do not address,[14] that "a trained investigator . . . analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case." 2017 Q&A 4 (A.R. 7).

C. Remand without Vacatur Would Be the Only Appropriate Remedy

If the Court enters some form of relief in favor of Plaintiffs, that relief should be narrowly tailored:

No vacatur or injunctive relief. As the Ninth Circuit has explained, "[a] flawed rule need not be vacated." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). Whether an agency action should be vacated depends on the seriousness of the agency's errors and the disruptive consequence of an interim change. *See id.*; *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). Courts may also look to whether the agency is likely to adopt the same rule, or a similar rule, on remand. *Pollinator Stewardship Council*, 806 F.3d at 532. Here, Plaintiffs do not contend that the 2017 Guidance is inconsistent with Title IX or its implementing regulations; any errors going to how thoroughly OCR explained its reasoning may be cured on remand. Vacating the 2017 Guidance while OCR further describes the reasons supporting the 2017 Guidance would be an exercise in formalism that would simply cause further confusion among the regulated community.

Plaintiffs respond the Court could reinstate the 2011 DCL and 2014 Q&A in the interim. *See* Pls.' Opp'n 23. Such an order would be inappropriate, however, given the flaws in those documents described

[14] Plaintiffs' only response to this point—that the 2017 Guidance refers to "investigations," whereas the 2014 Q&A refers to "hearings"—is irrelevant. It also incorrectly assumes that there is a difference between the two. *See supra* n.12.

above. Moreover, even if the Court could reinstate the 2011 DCL and 2014 Q&A, OCR is on record having expressed its profound disagreement with many aspects of these documents. If the Court ordered Defendants to reinstate the 2011 DCL and 2014 Q&A, no school administrator would reasonably believe that they actually state ED's understanding of what Title IX requires. The whiplash for regulated parties would be untenable.

Any vacatur should be limited to the challenged aspects of the guidance. Even if the Court vacated some portion of the 2017 Guidance, there is no basis for vacating it in its entirety. Under Plaintiffs' own authority, a flawed portion of a regulation is severable where the flawed provision "will not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). If, for example, the Court held that OCR failed to adequately explain its position as to mediation, invalidating OCR's position on that single issue would not impair or affect the 2017 Guidance's position addressing appeals. Treating a single error as a basis for vacating an entire guidance document would incentivize agencies to issue piecemeal guidance, to the detriment of recipients and the public.

Relief limited to the parties. Finally, the scope of any relief, if granted, should be narrow. While Plaintiffs point to the oddity of different legal standards governing different parties, it is not unusual for agencies to follow different legal regimes either in certain jurisdictions, or for certain parties. For example, the Social Security Administration regularly issues "acquiescence rulings" in which it announces its intention to comply with a court of appeals ruling only in a particular circuit. *See, e.g.*, *McNabb v. Barnhart*, 340 F.3d 943, 944 (9th Cir. 2003). In contrast, when district courts issue rulings with nationwide sweep, it "take[s] a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see also, e.g., Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.").

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Plaintiffs have good-faith policy disagreements with OCR about how the federal government should advise schools to respond to allegations of sexual assault. Plaintiffs are entitled to press their case before OCR, before Congress, and before the electorate. But while the APA permits Plaintiffs to press a narrow set of procedural claims before a federal court, the APA does not permit this Court to substitute its judgment—or Plaintiffs'—"for that of the agency." *State Farm*, 463 U.S. at 43. "'The court's responsibility is narrower: to determine whether the' agency complied with the *procedural* requirements of the APA." *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 994 (emphasis added) (quoting *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010)). OCR did so here.

III. Conclusion

The Court should grant Defendants' summary judgment motion and deny Plaintiffs' summary judgment motion.

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