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**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' MOTION FOR SUMMARY
JUDGMENT
HEARING NOTICED: October 17, 2019 at
9:00 a.m.

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1 Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs SurvJustice, Inc., Equal Rights
2 Advocates, and Victim Rights Law Center hereby move this Court for summary judgment.

3 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

4 PLEASE TAKE NOTICE that on October 17, 2019 at 9:00 a.m., before the Honorable
5 Jacqueline Scott Corley, Courtroom F, 15th Floor, 450 Golden Gate Avenue, San Francisco,
6 California, 94102, Plaintiffs SurvJustice, Inc. (“SurvJustice”), Equal Rights Advocates (“ERA”),
7 and Victim Rights Law Center (“VRLC”) will and hereby do move the Court pursuant to Federal
8 Rule of Civil Procedure 56 for an order granting Plaintiffs’ summary judgment as to all their
9 claims.

10 Plaintiffs’ motion is based on this Notice of Motion and Motion, the accompanying
11 Memorandum of Points and Authorities, the accompanying declarations and exhibits, the
12 pleadings filed in this action, any matter that may be judicially noticed, and any other matter
13 raised in oral arguments in support of this motion. Defendants’ response to this motion must be
14 filed with the Court and served on counsel for Plaintiffs by August 22, 2019. *See* Dkt. No. 128.

15 **INTRODUCTION AND STATEMENT OF ISSUES**

16 Sexual harassment, including sexual assault and other forms of sex-based violence,
17 occurs at schools across the United States at alarming rates—with a particularly harmful impact
18 on women and girls—and it impedes a survivor’s equal access to educational opportunities. Title
19 IX of the Education Amendments of 1972 (“Title IX”) prohibits sex discrimination in federally-
20 funded education programs and therefore requires schools to promptly and thoroughly address
21 sexual harassment of students and employees. To protect students’ equal access to educational
22 opportunities, the Office for Civil Rights (“OCR”) at the U.S. Department of Education (the
23 “Department”) has historically enforced Title IX policies that required schools to investigate and
24

1 adjudicate sexual harassment complaints in ways that afforded appropriate substantive and
2 procedural protections to all parties and allowed survivors to feel safe reporting harassment and
3 seeking remedial services.

4 That has all changed. In September 2017, the Department adopted a new Title IX Policy,
5 requiring schools to implement harmful mandates that dissuade survivors from reporting
6 incidents of sexual harassment. That Policy undermines the fundamental antidiscrimination aim
7 of Title IX, makes schools less safe, and impedes women’s and girls’ access to educational
8 opportunities. Yet, in adopting the new Policy, the Department was notably silent about its
9 reasoning, failing to explain or acknowledge the way in which it upends its historic approach to
10 Title IX. For these reasons, the Policy is arbitrary and capricious under the Administrative
11 Procedure Act (“APA”), 5 U.S.C. § 706, and must be vacated.

12 **STATEMENT OF RELEVANT FACTS**

13 Title IX, 20 U.S.C. § 1681, prohibits discrimination on the basis of sex in any federally-
14 funded education program or activity. The Supreme Court has held that sexual harassment is a
15 form of sex discrimination under Title IX. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of*
16 *Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

17 To receive federal funding from the Department, an educational institution must sign
18 “assurance” documents, which formally obligate it to comply with Title IX. 34 C.F.R.
19 § 106.4(a). All applicants for federal funding must sign the Department Assurance of
20 Compliance – Civil Rights Certificate (“Department Assurance”), which commits the applicant
21 to complying with Title IX and “[a]ll regulations, guidelines, and standards issued by the
22 Department” under Title IX “in order to continue receiving Federal financial assistance from the
23 Department.” *See* Ex. A-1. The Assurance specifies that if the applicant fails to comply,

1 “financial assistance can be terminated and the applicant can be declared ineligible to receive
2 further assistance.” *Id.* Some federal funding recipients must also sign the Office of Management
3 & Budget Assurance form (“OMB Assurance”), *see* Ex. A-2. As a condition of funding, the
4 OMB Assurance requires the recipient to agree to comply with Title IX and “all applicable
5 requirements of all other Federal laws, executive orders, regulations, and policies governing this
6 program.” *Id.*

7 **Title IX Guidance from 1975 - 2017.** The Department of Education is the lead agency
8 charged with enforcing Title IX. In 1975, the Department published regulations governing how
9 schools are required to investigate and adjudicate complaints under Title IX. These regulations
10 require schools to “adopt and publish grievance procedures providing for prompt and equitable
11 resolution” of student and employee complaints of sex discrimination. 34 C.F.R. § 106.8(b).
12 Since 1975, the Department has issued a series of policy documents to further articulate the
13 standards that it will use to determine whether a campus grievance procedure complies with Title
14 IX. In 2001, following the Supreme Court’s decisions in *Gebser* and *Davis* holding that sexual
15 harassment of students constitutes sex discrimination under Title IX, the Department, after
16 providing notice in the Federal Register and an opportunity to comment, published a revised
17 guidance document. This guidance, the *Revised Sexual Harassment Guidance: Harassment of*
18 *Students by School Employees, Other Students, or Third Parties* (“2001 Guidance”), Ex. A-3,
19 explains “how the requirements of the Title IX regulations apply to situations involving sexual
20 harassment of a student and outlines measures that schools should take to ensure compliance
21 [with Title IX and its implementing regulations].” *Id.* at 4.

22 In 2011, the Department issued a Dear Colleague Letter further clarifying how schools
23 must treat sexual violence complaints under Title IX. U.S. Dep’t of Educ., Ltr. From Ass’t Sec’y

1 Russlynn Ali (Apr. 4, 2011), AR_2764-82 (“2011 DCL”). Citing “deeply troubling” statistics
2 that roughly 1 in 5 women are victims of completed or attempted sexual assault while in college,
3 the 2011 DCL “supplement[ed] the 2001 Guidance by providing additional guidance and
4 practical examples regarding Title IX requirements as they relate to sexual violence.” *Id.* at 2. In
5 2014, the Department issued a Questions & Answers document to “further clarify the legal
6 requirements and guidance articulated in the DCL and the 2001 Guidance and include examples
7 of proactive efforts schools can take to prevent sexual violence and remedies schools may use to
8 end such conduct, prevent its recurrence, and address its effects.” *See* U.S. Dep’t of Educ., Q&A
9 on Title IX and Sexual Violence (Apr. 29, 2014), AR_325-377 (“2014 Q&A”).

10 **The 2017 Title IX Policy.** In 2017, the Department began actively soliciting the views of
11 individuals and groups that oppose robust Title IX protections and question the veracity of
12 survivors’ experiences of sexual assault.¹ This effort culminated in September 2017, when the
13 Department issued a Dear Colleague Letter and a Questions & Answers document (collectively
14 the “2017 Title IX Policy” or “Policy”) that rescinded the 2011 DCL and 2014 Q&A, and
15 imposed new, weaker standards governing campus grievance procedures under Title IX. U.S.
16 Dep’t of Educ., Ltr. from Ass’n Sec’y Candice Jackson (Sept. 22, 2017), AR_2-3 (“2017 DCL”);
17 U.S. Dep’t of Educ., Q&A on Campus Sexual Misconduct (Sept. 22, 2017), AR_4-10 (“2017
18 Q&A”). The Department also stated that it “will continue to rely on” the 2001 Guidance for
19

20 ¹ *See, e.g.*, AR_1674 (email from then- Acting Assistant Secretary Candice Jackson forwarding
21 email from FIRE); AR_1862 (email from FACE Co-President to Jackson discussing “comparing
22 the fairness and due process recommendations” presented to her); AR_1959-63 (email from
23 Jackson stating, “Everyone needs to read for tomorrow AM meeting[,]” attaching a letter from
24 SAVE advocating for “the Department of Education to endorse ... a justice-centered approach
25 over a victim-centered approach”); AR_3030 (email from Jackson calling a National Review
article a “good piece” in which the Obama Administration OCR is said to have “seemed to take
the side of the loudest and most hysterical campus activists”).

1 “how [it] will assess a school’s compliance with Title IX.” 2017 DCL at 2; 2017 Q&A at 1 &
2 n.1.

3 The 2017 standards depart from those in place under the prior guidance documents in
4 eight critical ways, each of which disfavors complainants:

- 5 1. **Standard of proof:** Schools had been required to use a “preponderance of the
6 evidence” standard in Title IX proceedings for sexual harassment complaints. *See*
7 2014 Q&A at 13; 2011 DCL at 10. Now schools may impose the more burdensome
8 clear-and-convincing evidence standard. 2017 DCL at 1; 2017 Q&A at 5.
- 9 2. **Appeals:** Schools that had offered an appeals process were required to offer equal
10 appellate rights to both the complainant and respondent. 2014 Q&A at 26; 2011 DCL
11 at 12. Now a school may offer the right to appeal only to the respondent. 2017 DCL
12 at 1; 2017 Q&A at 5.
- 13 3. **Mediation:** Schools had been prohibited from allowing students to resolve sexual
14 violence complaints through an informal mediation process. 2011 DCL at 8; Ex. A-3
15 at 21. Now mediation is seemingly permissible under the 2017 Policy, 2017 Q&A at
16 4, despite the conflicting prohibition that remains in effect under the 2001 Guidance.
- 17 4. **Interim measures:** Schools had been required to provide interim measures to
18 accommodate the educational and safety needs of the complainant during the
19 pendency of an investigation and to “minimize the burden on the complainant” when
20 adopting such measures. 2014 Q&A at 33; 2011 DCL at 15. Now schools are not
21 required to provide interim measures at all, and if they do so, they must provide the
22 interim measures to “both the reporting and responding parties involved in an alleged
23 incident” and “may not rely on fixed rules or operating assumptions that favor one
24 party over another.” 2017 Q&A at 2-3.
- 25 5. **Promptness:** The Department had employed an objective test to determine whether a
school handled a complaint in a “prompt” manner, as required by regulations. The
Department set a 60-day benchmark and explained that the promptness determination
would be made on a case-by-case consideration of circumstances such as “the
complexity of the investigation and the severity and extent of the alleged conduct.”
2014 Q&A at 31-32. Now the test for promptness is subjective: the Department will
consider whether a school engaged in a “good faith effort to conduct a fair, impartial
investigation in a timely manner.” 2017 Q&A at 3.
6. **Off-campus conduct:** Schools had been obligated to investigate all allegations of
sexual harassment “regardless of where the conduct occurred” and “[e]ven if the
misconduct did not occur in the context of an education program or activity” in order
to determine whether the misconduct resulted in a hostile educational environment.
2014 Q&A at 29. Now the Department appears to point in the opposite direction:

1 stating that schools “do[] not have a duty under Title IX to address an incident of
 2 alleged harassment where the incident occurs off-campus and does not involve a
 3 program or activity of the recipient,” despite, in the very same footnote, also stating
 that schools “are responsible for redressing a hostile environment that occurs on
 campus even if it relates to off-campus activities.” 2017 Q&A at 1 n.3.

- 4 7. **Confidentiality:** Schools had been required to “take all reasonable steps to
 5 investigate and respond to the complaint consistent with the request for
 6 confidentiality” if the complainant so requested. 2011 DCL at 5; 2014 Q&A at 18-20;
 7 Ex. A-3 at 17. Now schools are required to disclose to a respondent “the identities of
 the parties involved,” once “it decides to open an investigation that may lead to
 disciplinary action,” 2017 Q&A at 4, despite the conflicting provision that remains in
 effect under the 2001 Guidance.
- 8 8. **Sexual history of complainant:** The Department had prohibited “[q]uestioning about
 9 the complainant’s sexual history with anyone other than the alleged perpetrator.”
 2014 Q&A at 31. Now such questioning is permitted.

10 **Procedural History.** Plaintiffs brought the present lawsuit challenging the 2017 Title IX
 11 Policy as arbitrary and capricious under the APA, 5 U.S.C. § 706. After briefing on several
 12 preliminary motions, this Court held that (1) Plaintiffs had alleged facts sufficient to establish
 13 standing to pursue their APA claims, Dkt. 81 at 14, and (2) Plaintiffs could plausibly allege that
 14 the 2017 Title IX Policy was final agency action, as required by the APA, Dkt. 121 at 10.

15 **STANDARD OF REVIEW**

16 At summary judgment, plaintiffs must “set forth by affidavit or other evidence specific
 17 facts” that support a finding of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555 (1992).
 18 “These facts are presumed to be true at the summary judgment stage.” *California v. Ross*, 362 F.
 19 Supp. 3d 749, 753 (N.D. Cal. 2018).

20 Under the APA, a court must “hold unlawful and set aside agency action, findings, [or]
 21 conclusions[,]” if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in
 22 accordance with law[.]” 5 U.S.C. § 706(2). “[S]ummary judgment is an appropriate mechanism”
 23

1 for determining whether an agency action violated that standard. *Ctr. for Env't'l Health v.*
2 *McCarthy*, 192 F. Supp. 3d 1036, 1040 (N.D. Cal. 2016).

3 ARGUMENT

4 **I. Plaintiffs have standing to pursue their claims.**

5 To demonstrate Article III standing a “plaintiff must have (1) suffered an injury in fact,
6 (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
7 redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 1136 S. Ct. 1540, 1547
8 (2016). An organization has standing to sue in its own right when “it show[s] a drain on its
9 resources from both a diversion of its resources and frustration of its mission.” *Valle del Sol Inc.*
10 *v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (internal citations omitted); *Havens Realty Corp.*
11 *v. Coleman*, 455 U.S. 363, 379 (1982). Although only one plaintiff need have standing, *Town of*
12 *Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), each Plaintiff here has
13 standing.

14 Work on behalf of sexual harassment survivors is central to each Plaintiff’s mission.
15 SurvJustice’s mission is to increase the prospect of justice for survivors of sexual violence.
16 SurvJustice Decl. ¶¶ 4-7. ERA’s mission is to protect and expand access to economic and
17 educational opportunities for women and girls. ERA Decl. ¶ 4. And VRLC’s mission is to
18 provide legal representation to victims of rape and sexual assault. VRLC Decl. ¶¶ 4-6. Each
19 organization works to help student-survivors navigate the Title IX process, for example, through
20 providing counseling, consultation, referral, and legal services. VRLC Decl. ¶¶ 4-6. In addition,
21 SurvJustice and ERA each provide training to educational institutions, lawmakers, and fellow
22 advocates. SurvJustice Decl. ¶¶ 6-7; ERA Decl. ¶ 6. The 2017 Title IX Policy impedes Plaintiffs’
23 missions and activities in at least three ways.

1 *First*, the Policy makes it more difficult for Plaintiffs to achieve successful results for
2 their clients in Title IX proceedings because it allows—and in some cases, requires—schools to
3 impose policies and procedures that make it more difficult for students to prove their complaints
4 and obtain prompt relief through the campus grievance process. *See* SurvJustice Decl. ¶¶ 11, 13-
5 14; ERA Decl. ¶¶ 13-14; VRLC Decl. ¶¶ 10, 12. For example, the Policy allows schools to
6 impose on complainants the more burdensome clear-and-convincing standard of proof, allows
7 schools to provide appeal rights only to the respondent, and frees schools of the prior objective
8 60-day benchmark for a prompt investigation. The 2017 Policy thus increases barriers to redress,
9 and thereby injures plaintiff, whose organizational missions include the provision of direct
10 assistance and referral services to survivors of sexual violence. *See El Rescate Legal Servs., Inc.*
11 *v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 748 (9th Cir. 1991) (legal services groups had
12 standing to challenge policy limiting language interpretation in immigration proceedings because
13 policy frustrated groups’ efforts to obtain asylum and withholding of deportation for their
14 clients).

15 *Second*, the Policy makes it more difficult for SurvJustice and VRLC to achieve their
16 mission because, since the Policy’s release, fewer students have sought their legal and
17 counseling services. *See* SurvJustice Decl. ¶¶ 11-12; VRLC Decl. ¶¶ 10-11. The chilling effect
18 SurvJustice and VRLC have observed is a result, in large part, of students’ increasing concerns
19 that they will be less likely to obtain a successful outcome under the Policy. *See* SurvJustice
20 Decl. ¶ 12; VRLC Decl. ¶¶ 12-13. Additionally, Plaintiffs have observed that students are
21 deterred from pursuing complaints because the Policy allows schools to impose practices and
22 procedures that put survivors at risk of re-traumatization and retaliation. *Id.* For example, schools
23 may now allow a respondent to ask about the complainant’s sexual history and are no longer
24

1 required to give weight to a complainant’s request for confidentiality. Furthermore, the Policy
2 generally communicates a distrust and skepticism of survivors. SurvJustice ¶¶ 8-9; VRLC Decl.
3 ¶¶ 8-9. As a result, SurvJustice and VRLC have represented fewer students since the Policy was
4 issued—an injury sufficient to establish organizational standing. *See East Bay Sanctuary*
5 *Covenant v. Trump*, 909 F.3d 1219, 1242 (9th Cir. 2018) (organizations had standing because the
6 challenged rule “frustrated their mission of providing legal aid ... because the Rule significantly
7 discourages a large number of those individuals” from seeking the organizations’ services);
8 *Whiting*, 732 F.3d at 1018 (organizations had standing because they “reasonably fear[ed] that
9 [their] volunteers w[ould] be deterred from participating in light of” the contested law).

10 *Third*, the Policy sows confusion among students, schools, and advocates. *See*
11 SurvJustice Decl. ¶¶ 15-16; ERA Decl. ¶¶ 12, 15; VRLC Decl. ¶ 15. For example, the Policy no
12 longer provides an objective benchmark for what qualifies as a prompt investigation, yet still
13 purports to require promptness—thus causing uncertainty as to whether a grievance process is
14 proceeding promptly under the new subjective standard. *Id.* Similarly, under the Policy, a
15 school’s obligation with regards to off-campus conduct is governed by two contradictory
16 standards, *see supra* 5-6—thus causing uncertainty as to whether a survivor can raise a complaint
17 under Title IX involving off-campus conduct. *Id.* And for mediation: the 2017 Policy’s
18 instruction conflicts with the still-effective 2001 Guidance. *See supra* 5; ERA Decl. ¶ 15. The
19 result is confusion about students’ rights under Title IX that impedes Plaintiffs’ mission of
20 helping student survivors access those rights. *See Fair Hous. Council of San Fernando Valley v.*
21 *Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (holding that nonprofit organizations
22 have standing because defendant’s violation of Fair Housing Act necessitated “new education
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1 and outreach campaigns targeted at discriminatory roommate advertising[,]” which caused them
2 “to divert resources independent of litigation costs and frustrated their central mission”).

3 Because the Policy has caused the injuries outlined above, Plaintiffs have been forced to
4 divert resources from other activities. For example, SurvJustice and VRLC have diverted
5 significant staff resources to analyzing, understanding, and providing lengthier consultations on
6 the confusing, and at times conflicting, Policy. SurvJustice Decl. ¶¶ 15-17, 19; VRLC Decl.
7 ¶¶ 13-15, 17. SurvJustice has also expended resources to provide more campus trainings at free
8 or reduced cost. SurvJustice Decl. ¶ 16. And ERA has worked to streamline its own processes, as
9 well as developed a new initiative designed to broaden the community of advocates available to
10 assist student-survivors in a pro bono capacity; it has also offered more trainings on the Policy to
11 student communities and advocates. ERA Decl. ¶¶ 17-20, 22-23.

12 In sum, the 2017 Policy has impeded Plaintiffs’ missions and caused them to divert
13 resources, establishing Article III injuries; Defendants caused these harms because schools have
14 modified their policies and practices in response to the Policy, *see infra* 13 n.3; SurvJustice Decl.
15 ¶¶ 14-15; ERA Decl. ¶¶ 13-14; VRLC Decl. ¶ 14; and the Court could redress the harms by
16 vacating the Policy and declaring it unlawful because such “schools would have no reason to
17 continue implementing the injurious and unlawful policies.” Dkt. 120 at 11.

18 **II. The 2017 Title IX Policy is final agency action.**

19 The 2017 Title IX Policy is reviewable final agency action. An agency action is “final”
20 when it marks the “consummation of the agency’s decisionmaking process” and is one “by
21 which ‘rights or obligations have been determined,’ or from which ‘legal consequences will
22 flow[.]” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The inquiry is a “pragmatic” and
23 “flexible” one, not beholden to an agency’s labels or boilerplate disclaimers. *Gill v. DOJ*, 913
24

1 F.3d 1179, 1184 (9th Cir. 2019); *see also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S.
2 Ct. 1807, 1815 (2016).

3 As to the first element of *Bennett*, the Court correctly held as a matter of law that the
4 Policy marks the consummation of the agency's decision-making process. Dkt. 81 at 17. As to
5 the second element, the Court held that if, by signing an assurance form, schools agree to comply
6 with the 2017 Guidance, then "the Guidance produces legal consequences; specifically, the
7 potential termination of financial assistance for failure to comply." Dkt. 121 at 7 (citing *Gill*).
8 Both assurance forms contain an agreement to comply with the Policy.²

9 **A. The Department Assurance encompasses the 2017 Title IX Policy.**

10 The Department Assurance requires schools to agree to comply with Title IX and "[a]ll
11 regulations, guidelines and standards issued by the Department." Ex. A-1 at 1. A "guideline" is
12 "a standard or principle by which to make a judgment or determine a policy or course of action."
13 *Webster's New World Coll. Dictionary*, 4th ed. (2010), [https://www.collinsdictionary](https://www.collinsdictionary.com/us/dictionary/english/guideline)
14 [.com/us/dictionary/english/guideline](https://www.collinsdictionary.com/us/dictionary/english/guideline); *see also Merriam-Webster*, [https://www.merriam-](https://www.merriam-webster.com/dictionary/guideline)
15 [webster.com/dictionary/guideline](https://www.merriam-webster.com/dictionary/guideline) (defining "guidelines" as "an indication or outline of policy or
16 conduct"); *Cambridge Dictionary*, [https://dictionary.cambridge.org/us/dictionary/english/](https://dictionary.cambridge.org/us/dictionary/english/guideline)
17 [guideline](https://dictionary.cambridge.org/us/dictionary/english/guideline) (defining "guidelines" as "a piece of information that suggests how something should
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20 ² Signing the assurance form "contractually obligate[s]" a recipient to abide by its terms
21 in exchange for federal funding. *United States v. Phoenix Union High Sch. Dist.*, 681 F.2d 1235,
22 1237 (9th Cir. 1982). The meaning of these forms is therefore determined pursuant to federal
23 common law, with guidance from "general principles for interpreting contracts[.]" including the
24 Restatement (Second) of Contracts. *Klamath Water Users Protective Ass'n v. Patterson*, 204
25 F.3d 1206, 1210 (9th Cir. 1999).

1 be done”). That definition surely encompasses the 2017 Policy, which “provide[s] information
2 about how OCR will assess a school’s compliance with Title IX.” 2017 Q&A at 1.

3 Moreover, the Department describes the document as “guidance,” which is, of course,
4 synonymous with “guidelines.” *See Roget’s 21st Century Thesaurus*, 3d ed. (2013), [https://www](https://www.thesaurus.com/browse/guideline)
5 [.thesaurus.com/browse/guideline](https://www.thesaurus.com/browse/guideline); Press Release, U.S. Dep’t of Educ., Department of Education
6 Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), Ex. A-9; *see also*
7 *In re Horry Cty. Sch. Dist.*, 1969 WL 26192, at *13 (U.S. Dep’t of Health, Educ. & Welfare
8 Civil Rights Reviewing Authority, June 25, 1969) (predecessor agency defining “[g]uidelines” as
9 “statements of policy to provide assistance and *guidance* to recipients to help them comply
10 voluntarily with the legal requirements of Title VI of the Civil Rights Act” (emphasis added)); *In*
11 *re Smith Cty. Bd. of Ed.*, 1967 WL 21744, at *1, *6 & n.10 (HEW Commissioner of Education,
12 May 2, 1967) (same). Even Secretary DeVos described the prior guidance documents as
13 “guidelines” in announcing her intention to rescind them. *See* U.S. Dep’t of Educ. Betsy DeVos,
14 Sec’y of Educ., Prepared Remarks on Title IX Enforcement, Sept. 7, 2017, Ex. A-10; *see also*
15 AR_2272 (Department Press Secretary describes 2017 Policy as “interim guidelines”).

16 The Department thus far has insisted that the term “guidelines” in the Department
17 Assurance only means documents published in the Federal Register. *See* Dkt. 115 at 6-7. But
18 nothing in the plain language of the Assurance suggests that qualification. To the contrary, the
19 Assurance by its own terms extends to “all” guidelines “issued by the Department.” Use of the
20 prefatory “all” indicates that “guidelines” should be read broadly. *See United States v. Wealth &*
21 *Tax Advisory Servs., Inc.*, 526 F.3d 528, 531 (9th Cir. 2008) (holding that use of the term “all” in
22 the phrase “all opinions or memorandum” meant the phrase referred to “any type of opinion or
23 memorandum”). And the qualifier “issued by the Department” means any guideline made public.

1 *See Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1167 (9th Cir. 2003) (holding that the verb
 2 “issue” contemplates “some form of public notice”). The Department has many ways to “issue”
 3 or provide public notice of, documents including sending letters to every educational institution
 4 in the country. *Cf.* 2014 Q&A at i (“On April 4, 2011, ... the U.S. Department of Education
 5 issued a Dear Colleague Letter on student-on-student sexual harassment and sexual violence”).
 6 Had the Department intended to exclude documents issued in this fashion from the Department
 7 Assurance, it could have done so by explicitly stating that schools are required to comply *only*
 8 with “regulations, guidelines and standards *published in the Federal Register*.” It did not do so,
 9 and this Court must reject the government’s attempt to rewrite the Assurance post-hoc. *See*
 10 *Hyundai Am., Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217, 1219 (N.D. Cal.
 11 1998) (“Courts interpret contracts as made by the parties and do not make new ones for them.”).
 12 Because the Policy is encompassed by the Department Assurance, it has the legal effect of
 13 forcing compliance with its terms. *See* Dkt. 121 at 7.³

14 **B. The OMB Assurance encompasses the 2017 Title IX Policy.**

15 This Court previously did not consider the OMB Assurance because, by its terms, it
 16 expired on September 30, 2017 under the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*
 17 However, the Department received an “extension without change” until September 30, 2020.
 18 OMB Office of Information and Regulatory Affairs, Conclusion, Ex. A-7. The form is therefore

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 20 ³ The Policy also has practical effects that support a finding of finality. *See Gill*, 913 F.3d
 21 at 1185. As the Plaintiffs have experienced while working with students, *see* SurvJustice Decl.
 22 ¶¶ 14-15; ERA Decl. ¶¶ 13-14; VRLC Decl. ¶ 14, schools across the U.S. have changed their
 23 own policies and practices to comply with the Policy, *see, e.g.*, Exs. A-4 to A-6. The Department
 24 has confirmed this practical effect of the Policy, explaining that it “takes into account the views
 25 that it expressed in the 2017 Guidance when making enforcement decisions[,]” as it did with the
 University of North Carolina. Dkt. 115 at 7.

1 still legally effective, as it was when the Department issued the Policy on September 22, 2017.
2 Because it encompasses the Policy, the OMB Assurance also has the legal and practical effect of
3 requiring schools to comply with its terms or risk losing federal funding.

4 The OMB Assurance requires certain educational institutions to agree to comply with
5 Title IX and “all applicable requirements of all other Federal laws, executive orders, regulations,
6 and policies governing this program.” Ex. A-2 at 6-7 ¶¶ 6, 18. The Department does not dispute
7 that the 2017 Policy is in fact a “policy,” but argues that it “does not impose requirements,” and
8 thus is not encompassed by the OMB Assurance. Dkt. 70 at 10. That is incorrect.

9 The 2017 Policy changes how schools must conduct campus grievance processes for
10 complaints of sexual harassment. *See supra* 5-6. For example, the Policy requires schools to
11 provide the respondent with the complainant’s name. 2017 Q&A at 4. It further requires that,
12 before disciplining a student found responsible for sexual harassment, schools must consider “the
13 impact of separating [that] student from her or his education.” *Id.* at 6. And it requires that any
14 interim measures be made available equally to “both the reporting and responding parties
15 involved in an alleged incident[.]” *Id.* at 2-3 (“[A] school may not rely on fixed rules or
16 operating assumptions that favor one party over another, nor may a school make such measures
17 available only to one party.”). If a school violates these or other requirements in the Policy, it has
18 likewise violated the OMB Assurance, potentially leading to the termination of financial
19 assistance. Such legal consequence renders the 2017 Title IX Policy final agency action. *See* Dkt.
20 121 at 7.

21 **III. The 2017 Title IX Policy is arbitrary and capricious.**

22 An agency’s action is arbitrary and capricious when it “relie[s] on facts which Congress
23 has not intended it to consider, entirely fail[s] to consider an important aspect of the problem,
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1 offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is
2 so implausible that it could not be ascribed to a difference in view or the product of agency
3 expertise.” *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.
4 29, 43 (1983). Under the APA, an agency must examine “relevant data and articulate a
5 satisfactory explanation for its action including a rational connection between the facts found and
6 the choice made.” *Id.* (internal quotation marks omitted).

7 Although an agency may change a policy or statutory interpretation in appropriate
8 circumstances, it must provide a “reasoned explanation” for the change. *FCC v. Fox Television*
9 *Stations, Inc.*, 556 U.S. 502, 515 (2009). Specifically, an agency must (1) “display[] awareness
10 that it is changing position,” (2) “show[] that the new policy is permissible under the statute,”
11 (3) “believe[] the new policy is better,” and (4) “provide[] good reasons for the new policy[.]”
12 *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc)
13 (internal quotation marks omitted) (quoting *Fox*). An agency must also supply a “more detailed
14 justification” for a policy change that “disregard[s] facts and circumstances that underlay or were
15 engendered by the prior policy.” *Fox*, 556 U.S. at 515-16.

16 The 2017 Title IX Policy fails in all respects. In six areas addressed in the 2017 Title IX
17 Policy—mediation, interim measures, promptness, off-campus conduct, confidentiality, and
18 sexual history evidence—the Department changed positions without displaying awareness that it
19 was doing so, and without showing that there are good reasons for the changes. In addition, the
20 Department imposed standards on some of those subjects—mediation, promptness, and
21 confidentiality—that conflict with the still-operative 2001 Guidance. And even for the two areas
22 where the Department did acknowledge that it was changing policy—standard of proof and
23 appeals—the decision to do so is not supported by a reasoned explanation, let alone an
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1 explanation sufficient to meet *Fox*'s "heightened standard" required when an agency disregards
2 prior factual findings. Finally, the Policy wholly disregards the reliance interests of, and effect
3 on, survivors. For all these reasons, the Policy is unlawful.

4 **A. The Department reversed its prior policies *sub silentio* and enacted
5 policies that conflict with rules still in effect.**

6 "An agency may not ... depart from a prior policy *sub silentio*["] *Fox*, 556 U.S. at 515;
7 *Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010) ("Courts will not assume
8 [an agency] has engaged in reasoned decision making when it implicitly departs from prior
9 precedent and provides no explanation for doing so." (internal quotation marks omitted)). Nor
10 may it "simply disregard rules that are still on the books." *Fox*, 556 U.S. at 515. But that is
11 precisely what the Department did here—violating the APA.

12 **Mediation.** Until 2017, the Department had consistently prohibited mediation as a means
13 of resolving complaints of sexual assault. *See* 2011 DCL at 8 ("[I]n cases involving allegations
14 of sexual assault, mediation is not appropriate even on a voluntary basis."); Ex. A-3 at 21 ("In
15 some cases, such as alleged sexual assaults, mediation will not be appropriate even on a
16 voluntary basis."). The Department now states—reversing course *sub silentio* and in conflict
17 with the still-operative 2001 Guidance—that "[i]f all parties voluntarily agree ... , [a] school
18 may facilitate an informal resolution, including mediation, to assist the parties in reaching a
19 voluntary resolution." 2017 Q&A at 4.

20 **Interim measures.** The Department previously required schools to take interim measures
21 to protect a complainant: "Title IX requires a school to take steps to ensure equal access to its
22 education programs and activities and protect the complainant as necessary, including taking
23 interim measures before the final outcome of an investigation." 2014 Q&A at 32. To effectuate
24 Title IX's mandate, the Department further required schools to impose interim measures in a way

1 that “minimize[s] the burden on the *complainant*.” *Id.* at 33 (emphasis added). The 2017 Policy
2 reverses both positions without acknowledgment, now stating that interim measures “*may* be
3 appropriate,” rather than requiring them, and prohibiting schools from making decisions based
4 on “fixed rules or operating assumptions that favor one party over another,” or from “mak[ing]
5 such measures available only to one party.” 2017 Q&A at 3 (emphasis added).

6 **Promptness.** The Department previously used an *objective* test to determine whether a
7 school had conducted a “prompt” investigation of sexual harassment complaints, as required by
8 Title IX regulations. Prior guidance noted that the “typical” investigation would take
9 approximately 60 days, 2014 Q&A, at 31; 2011 DCL at 12, and explained that the Department’s
10 promptness determination would be based on reasonableness, taking into account “the
11 complexity of the investigation and the severity and extent of the alleged conduct.” 2014 Q&A at
12 32; Ex. A-3 at 20. Without explanation or acknowledgment, the new Policy shifts to a far less
13 rigorous *subjective* test: “OCR will evaluate a school’s *good faith effort* to conduct a fair,
14 impartial investigation in a timely manner[.]” 2017 Q&A at 3 (emphasis added).

15 **Off-campus conduct.** The Department’s prior policy required schools to “process all
16 complaints of sexual violence, regardless of where the conduct occurred.” 2014 Q&A at 29.
17 Under the prior guidance, “[e]ven if the misconduct did not occur in the context of an education
18 program or activity, a school must consider the effects of the off-campus misconduct when
19 evaluating whether there is a hostile environment on campus or in an off-campus education
20 program or activity[.]” *Id.* But the 2017 Policy confuses the matter: in the same footnote, the
21 Policy states both that “[a] university *does not have a duty* under Title IX to address an incident
22 of alleged harassment where the incident occurs off campus and does not involve a program or
23 activity of the recipient” and that schools “*are responsible* for redressing a hostile environment
24

1 that occurs on campus even if it relates to off-campus activities.” 2017 Q&A at 1 n.3 (internal
2 citation omitted) (emphasis added). The Policy thus either eliminates the requirement to
3 investigate off-campus conduct that causes a hostile environment on campus, or, at the very
4 least, provides conflicting instructions on a school’s duties with regards to off-campus conduct.
5 Either way, the change is unacknowledged and unreasoned.

6 **Confidentiality.** The 2001 Guidance says that if complainants insist their identity not be
7 disclosed to a respondent, schools must “take all reasonable steps to investigate and respond to
8 the complaint consistent with the student’s request.” Ex. A-3 at 17. The 2001 Guidance gives a
9 specific example of how an investigation can proceed against an individual respondent even
10 without revealing the identity of any complainant: “In instances affecting a number of students
11 ... , an individual can be put on notice of allegations of harassing behavior and counseled
12 appropriately without revealing, even indirectly, the identity of the student who notified the
13 school.” *Id.* at 18. By contrast, the 2017 Policy mandates that schools provide a respondent with
14 “the identities of the parties involved” “[o]nce it decides to open an investigation that may lead
15 to disciplinary action[s].” 2017 Q&A at 4. The Department cannot simply disregard the 2001
16 Guidance, which was reaffirmed on this matter in both of the rescinded policies. *See* 2011 DCL
17 at 5; 2014 Q&A at 20, 22.

18 **Evidence of complainant’s sexual history.** Prior policy stated that “[q]uestioning about
19 the complainant’s sexual history with anyone other than the alleged perpetrator should not be
20 permitted” and “the mere fact of a current or previous consensual dating or sexual relationship
21 between the two parties does not itself imply consent[.]” 2014 Q&A at 31. The new Policy
22 eliminated these restrictions. Yet, the Department neither acknowledged nor explained this
23 change.

1 In sum, the Department's many policy reversals, without acknowledgment or
2 explanation, and at times in blatant conflict with rules still in effect, renders the new Policy
3 arbitrary and capricious. *See Fox*, 556 U.S. at 515.

4 **B. The Department failed to provide a reasoned explanation for
5 changing its positions as to the standard of proof and appeals.**

6 Even where the Department did acknowledge changes in position, it did not give "good
7 reasons" to justify them. *Fox*, 556 U.S. at 515. The Department stated that it was withdrawing
8 requirements in the prior guidance that schools "adopt a minimal standard of proof," *i.e.*, a
9 preponderance of the evidence, and "allow complainants to appeal not-guilty findings[.]" 2017
10 DCL at 1. But its reasons were insufficient, particularly as the Department was required to
11 supply "a more detailed justification" in "disregard[ing] facts and circumstances that underlay or
12 were engendered by the prior policy." *Id.* The changes are therefore arbitrary and capricious.

13 **Standard of proof.** Under the prior guidance, the Department required schools to apply a
14 preponderance of the evidence standard in adjudicating sexual harassment complaints. *See* 2014
15 Q&A at 26 ("The school must use a preponderance-of-the-evidence (*i.e.*, more likely than not)
16 standard in any Title IX proceedings, including any fact-finding and hearings."); 2011 DCL at
17 10-11 ("[P]reponderance of the evidence is the appropriate standard for investigating allegations
18 of sexual harassment or violence."). The Department adopted this policy to align the standard of
19 proof used in campus grievance proceedings involving sexual harassment with the standard used
20 in civil cases to enforce other civil rights statutes, and the standard used by OCR to enforce Title
21 IX against funding recipients. *Id.* at 10-11. The Department found that because "grievance
22 procedures that use" the more burdensome clear and convincing standard are "inconsistent with
23 the standard of proof established for violations of the civil rights laws," they "are thus not
24 equitable under Title IX." *Id.* at 11.

1 The Department has now reversed course, permitting schools to use “either a
2 preponderance of the evidence standard or a clear and convincing standard.” 2017 Q&A at 5. Its
3 only explanations for this change were (1) “many schools had traditionally employed a higher
4 clear-and-convincing-evidence standard” prior to the guidance in 2011, 2017 DCL at 1, and
5 (2) “[t]he standard of evidence for evaluating a claim of sexual misconduct should be consistent
6 with the standard the school applies in other student misconduct cases,” 2017 Q&A at 5 n.19.

7 Neither is sufficient.

8 As to the first reason, the Department cited no evidence, nor does any appear to exist in
9 the administrative record, to support the factual claim that “many schools” used the clear-and-
10 convincing standard before 2011. To the contrary, evidence before the agency explained that a
11 “substantial majority of colleges and universities were already using the preponderance standard
12 before OCR issued the 2011 DCL.” AR_2051; *see also* AR_2080 (“A number of studies
13 demonstrate that the vast majority of schools used the preponderance standard for all disciplinary
14 proceedings, gender-based or not, *before the Dear Colleague Letter.*”); AR_1886 (80 percent of
15 surveyed schools used preponderance standard prior to 2011). And there is no evidence in the
16 record that addresses what elementary and secondary school districts (which vastly outnumber
17 colleges and universities) were doing prior to 2011. But even if the observation were true, the
18 Department does not explain why the number of schools using a certain standard of proof
19 governs whether the use of that standard to resolve complaints of sexual harassment is consistent
20 with Title IX, particularly given its prior finding that use of the clear and convincing standard
21 was “not equitable under Title IX.” 2011 DCL at 11. *See Organized Vill. of Kake*, 795 F.3d at
22 969 (agency’s change in position concluding that a risk it previously found “prohibitive” is now
23 “merely a ‘minor’ one” required a more detailed justification).

1 As to the second reason, the Department stated that the standard for evaluating sexual
2 misconduct complaints should be consistent with the standard used in other student misconduct
3 cases. 2017 Q&A at 5 n.19. This rationale cannot explain the rule the Department adopted.
4 Followed to its logical conclusion, it would permit a school to use *any* standard of proof—be it
5 substantial evidence or beyond-a-reasonable-doubt—so long as the school used that same
6 standard in other student misconduct cases. But under the 2017 Policy, a school is limited to only
7 two choices—preponderance or clear and convincing. So the Department cannot be relying on
8 the rationale that sexual misconduct cases be judged by the same standard as other misconduct
9 cases. And even if it were, the Department’s assertion that use of the preponderance standard in
10 Title IX cases is a “special procedure[.]” suggestive of “a discriminatory purpose” contradicts its
11 prior finding that it would be “inequitable” to allow schools to use a more burdensome standard
12 of proof for sexual harassment complaints than what the Department itself uses to enforce Title
13 IX—the preponderance standard. 2017 Q&A at 5 n.19. The Department cannot “simply discard
14 [this] prior factual finding[.] without a reasoned explanation.” *Organized Vill. of Kake*, 795 F.3d
15 at 968.

16 In any event, the more relevant comparison is not between the standards a school
17 employs to adjudicate different types of student misconduct cases, but rather between the
18 standard by which the Department measures schools’ compliance with Title IX, a statute which
19 applies only to sex discrimination, and the standard the Department requires for other kinds of
20 discrimination cases. The record indicates that OCR has long required schools to apply the
21 *preponderance* standard when investigating complaints of racial harassment. *See* AR_2048.
22 Establishing a higher standard for sex discrimination “would not only have made sexual violence
23 the only *civil rights* violation not proven by preponderance of the evidence, but would have
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1 required sexual violence victims to reach a standard of proof that the vast majority of other
2 complainants in other administrative and civil justice systems do not have to reach.” AR_2047.
3 These unexplained inconsistencies render the change arbitrary and capricious.

4 **Appeal.** The Department also failed to provide a reasoned explanation for changing its
5 policy about whether a school must provide a right to appeal to both parties. Previously, the
6 Department required that if a school provides an appeals process, “it must do so equally for both
7 parties.” *See* 2014 Q&A at 26, 37, 38; 2011 DCL at 12. But under the 2017 Title IX Policy, a
8 school is now permitted to provide an appeal to *only* the respondent upon a finding of
9 responsibility or the imposition of disciplinary sanctions. 2017 Q&A at 7 & n.30. The
10 Department’s reasons were: (1) “many schools had previously followed procedures reserving
11 appeal for accused students,” 2017 DCL at 1; (2) there were three letters from OCR regional
12 offices that, prior to 2011, had indicated that one-sided appeals were permissible, 2017 Q&A at 7
13 n.30; and (3) a respondent “should not be made to be tried twice for the same allegation,” *id.*

14 Again, none of these reasons suffices under *Fox*. The everybody-was-doing-it rationale
15 fails for the same reason as discussed above: the Department did not provide any evidence, nor
16 could Plaintiffs find any in the record, to support this factual assertion. Nor did the Department
17 explain, in any event, why this reason would warrant the policy change.

18 Likewise, for the second stated reason: the Department did not explain why letters in
19 three individual cases issued by regional offices prior to 2011 were relevant to whether the
20 Department should change the policy that it had adopted in 2011. Nor is there anything in the
21 administrative record that says that every decision issued by regional offices prior to 2011 had
22 reached that same result or that these three cases were representative of the Department’s
23 enforcement actions. Indeed, there is no indication whatsoever that the Department itself did a

1 thorough canvass of its pre-2011 letters to determine what its regional offices had previously said
2 about appeals. To the contrary, the record shows that a private individual repeatedly brought
3 those three letters to the Department’s attention, *see* AR_931, 933, 942, 947, 958, 1643, 2048,
4 2215, 2612, and received the personal thanks of the then-Acting Assistant Secretary, AR_942.

5 As to the third rationale—that a respondent “should not be made to be tried twice for the
6 same allegation”—the Department ignores the distinction that it previously recognized between
7 *civil* Title IX proceedings and *criminal* investigations—namely that, “[b]y contrast [to a criminal
8 investigation], a Title IX investigation will never result in incarceration of an individual”—and it
9 ignores its own prior conclusion that, “therefore, the same procedural protections and legal
10 standards are not required.” 2014 Q&A at 27. Nor does the Department acknowledge or provide
11 any reasoning with respect to an important aspect of the problem: complainants stand to suffer
12 from an institution’s failure to appropriately address misconduct. *State Farm*, 463 U.S. at 43.
13 Even if campus grievance proceedings were to be analogized to criminal proceedings, the 2017
14 DCL permits a school to establish a system where a respondent may challenge the sanction
15 received but a complainant may not, even though in criminal cases the government is permitted
16 to challenge a sentence as too short. *See, e.g., Monge v. California*, 524 U.S. 721, 730 (1998).

17 In sum, for the Department’s change in position with respect to standard of evidence and
18 appeals, the stated rationales simply do not hold water, rendering them arbitrary and capricious.

19 **C. The Department failed to consider the 2017 Title IX Policy’s effect on**
20 **survivors.**

21 The 2017 Title IX Policy is arbitrary and capricious for all the reasons discussed above.
22 And one more: the Department’s new policy lacks any reference to, consideration of, or care for,
23 the rights and needs of survivors of sexual assault. *See State Farm*, 463 U.S. at 43 (agency action
24 is arbitrary and capricious if the agency failed to consider an important aspect of the problem).

1 About one in five women are victims of completed or attempted sexual assault while in college,
2 and surveys indicate that the number is similar for girls in elementary and secondary schools.⁴
3 These statistics are “both deeply troubling and a call to action for the nation.” 2011 DCL at 2.
4 Yet, the Department has now erased them and the reality they represent from Title IX policy.
5 Instead, the Department chooses to focus its attention and regulatory efforts to protect those
6 accused of sexual assault (predominantly men), at the expense of those who survive sexual
7 assault (predominantly women). In so doing, the Department ignores Title IX’s fundamental
8 purpose to eradicate discrimination on the basis of sex and has made schools less safe by
9 imposing mandates that will dissuade many student-survivors from reporting incidents of sexual
10 assault. For this independent, and all too important reason, the Policy is arbitrary and capricious.

11 **CONCLUSION**

12 Plaintiffs respectfully request that the Court grant summary judgment as to all claims
13 raised in Plaintiffs’ Third Amended Complaint, Dkt. No. 123, declare the Dear Colleague Letter
14 and Q&A issued in September 2017 to be unlawful, set aside and vacate those documents, and
15 reinstate the Dear Colleague Letter issued in 2011 and the Q&A issued in 2014.

16 Respectfully submitted,

Date: July 25, 2019

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23 ⁴ National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who*
24 *Have Suffered Harassment and Sexual Violence* 3 (2017), Ex. A-8.

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