IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ALYSSA REID, Plaintiff, v. JAMES MADISON UNIVERSITY, A public university, and JONATHAN R. ALGER, sued in his official and individual capacities; HEATHER COLTMAN, sued in her official and individual capacities; ROBERT AGUIRRE, sued in his official and individual capacities; and AMY M. SIROCKY-MECK, sued in her official and individual capacities, and JANE or JOHN DOE 1-5, sued in their official and individual capacities, & U.S. DEPARTMENT OF EDUCATION & MIGUEL CARDONA, SECRETARY OF EDUCATION U.S. DEPARTMENT OF EDUCATION, sued in his official capacity, Defendants.	CIVIL ACTION NO.: **5:21cv00032**

PLAINTFF'S RESPONSE TO DEPARTMENT OF EDUCATION'S AND SECRETARY CARDONA'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTRODUCTION

Defendants Department of Education and Secretary Miguel Cardona (collectively referred to below as "the Department," "ED," or "Federal Defendants") seek to prevent Plaintiff Alyssa Reid from challenging **(1)** the 2011 "Dear Colleague Letter" ("2011 DCL") and **(2)** the 2014 "Questions and Answers on Title IX" ("2014 Q&A")—two ED documents that are responsible for wreaking havoc on so many people who have found themselves in recent years caught up in a university Title IX proceeding, including Plaintiff Reid. It was in response to and as required by these two ED policy directives that Defendant James Madison University ("JMU" or "University") adopted the two JMU policies also at issue here (the 2016 and 2018 "Sexual Misconduct" Policy #1340 ("Policy #1340"))—the very policies that the University Defendants applied to strip Plaintiff Reid of due process rights.[1]

Ms. Reid has properly included the Department and Secretary as defendants in this action. She is asking the Court to declare both documents to be vacated as unlawful, and, on that basis, enjoin these Defendants from enforcing such policies or any of a similar ilk in the future. The Federal Defendants should not be permitted to escape their causal role in inflicting harm on Ms. Reid. Reid was injured by the challenged actions of the Defendants here, as their actions were an undeniable link in the chain of injury she suffered. Indeed, the regulatory actions of the Federal Defendants ***kicked off*** the causal chain, for, as a matter of law, those actions were the first-mover trigger of Reid's injuries, coupled with the filing of an accusation by an ex-girlfriend. As explained in further detail below, the ED Defendants adopted unlawful policies and leveraged those regulatory policies to corral universities into compliance. And it was the procedural fruit of that poisonous federal tree that was then deployed by JMU actors against Ms. Reid, to her detriment. Plaintiff's well-pleaded theory is thus that ***both*** the federal and state policies here merged to run roughshod over her constitutional rights.

[1] The 2016 and 2018 versions of Policy #1340 are largely the same and any relevant differences between them are noted below.

Moreover, the Federal Defendants have likely only temporarily abandoned their unlawful policies. These Defendants should not be able to secure a quick dismissal of the claims against them now, only to wait to reimpose those policies if Reid's case is dismissed, forcing Plaintiff Reid to have to re-sue them, potentially, for acting as the genesis of JMU's existing unlawful policies. Universities know the score: One group of Department leaders act first to ratchet down due process rights they disfavor on policy grounds, in the hope that what they have wrought will stick, even if a different group of ED leaders come in temporarily and take a different approach to constitutional protection.

Title IX Plaintiffs like Ms. Reid deserve much better than to be whipsawed by the whims of competing leadership slates at the Department of Education, especially when those whims were not properly promulgated in accord with the notice-and-comment rights afforded the public by the Administrative Procedure Act (APA), or even issued by an agency component possessing valid rulemaking authority in the first place.

STATEMENT OF FACTS

Plaintiff Reid has provided a detailed Statement of Facts and discussion of the history of this action in her Brief in Response to [the University] Defendants' Motion to Dismiss, filed on July 2, 2021 ("Plaintiff's Response to JMU MTD"). *See* ECF 17. In the interest of judicial economy, we will not repeat that information here, but instead incorporate it by reference. The following factual information relates to Plaintiff Reid's claims against the Department, focusing on the 2011 DCL and 2014 Q&A.

On April 4, 2011, the Department's Office of Civil Rights ("OCR"), an agency with no rulemaking authority, published the 2011 DCL. Although styled as a "significant guidance document," and stating that it "does not add requirements to applicable law," it in fact piled numerous requirements on top of those contained in the Department's 2001 Guidance and the law itself. And

the Department certainly did not subject the 2011 DCL to the Administrative Procedure Act notice-and-comment process before promulgating it. Compl. ¶¶ 37-39.

The 2011 DCL directed schools to "take immediate action to eliminate harassment, prevent its recurrence, and address its effects." And, as part of schools' mandated efforts to publish and implement procedures for the "prompt and equitable resolution" of sexual misconduct claims, it expressly required that schools adopt a preponderance of evidence standard of proof in their investigations of allegations of sexual misconduct. It gave schools no leeway in terms of the standard of proof to be employed when addressing Title IX complaints:

> Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school *must use* a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. *Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.* Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

2011 DCL at 11 (emphasis added).

The 2011 DCL gave two possible grounds for imposing the preponderance of the evidence standard upon schools. ***First,*** it noted that OCR uses that standard (a) "when it resolves complaints against recipients," i.e., educational institutions, alleging they have failed to establish a grievance regime which complies with Title IX, and (b) when it conducts "fund termination administrative hearings." But the 2011 DCL never explained why or how the use of that standard in OCR actions related in any way to whether it is the appropriate standard to use in determining whether an accused student, employee or third party engaged in misconduct. ***Second***, the 2011 DCL noted that the preponderance of the evidence standard is "the standard of proof established for violations of the civil rights laws." Similarly, the 2011 DCL never explained why this aspect of federal civil rights lawsuits, but no other aspect of civil rights lawsuits (such as the right to discovery, the right to the protections of the rules

of evidence, or the right to cross-examine other parties), had to be imported into campus sexual misconduct investigations. Compl. ¶¶ 40-47.

As Plaintiff has argued in great detail in her Response to the JMU MTD, the University Defendants refused to allow her to exercise her right to confront her accuser (Kathryn Lese) or cross-examine her during the Title IX proceeding that they pursued against Plaintiff. *See* ECF 17. Their refusal to allow for such cross-examination is one of the primary reasons that Plaintiff Reid filed this lawsuit, as it represented an egregious violation of her constitutional right to due process, depriving her of a fair hearing. *Id.* at 57-59. The University Defendants, however, had not decided purely for their own independent reasons to unilaterally deprive an accused such as Alyssa of her right to confront and cross-examine her accuser. Instead, the ban on allowing cross examination also came down from the Department, ominously backed by the bonus threat of withholding federal funds from those schools that did not comply. ED's 2011 DCL "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing," even though parties to federal civil rights lawsuits enjoy that constitutional right. The 2011 DCL also warned that "[w]hen OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population." The 2011 DCL went on to say that "[w]hen conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding." Compl. ¶¶ 48-50.

The 2014 Q&A, like the 2011 DCL, styled itself as a "significant guidance document." On that basis, ED did not subject the 2014 Q&A to the APA notice-and-comment process before promulgating it. Such APA processes were not used despite the fact that the 2014 Q&A confirmed that OCR considered the schools' use of a preponderance of the evidence standard to be mandatory.

In a section entitled "Title IX Procedural Requirements," the 2014 Q&A identifies preponderance of the evidence as "the evidentiary standard that *must* be used … in resolving a complaint[.]" (Emphasis added). The 2014 Q&A argued that OCR could require the use of the preponderance of the evidence standard based on Title IX's requirement that grievance procedures provide for "prompt and equitable resolution" of allegations, saying that "any procedures used for sexual violence complaints, including disciplinary procedures, ***must*** meet the Title IX requirement of affording a complainant a prompt and equitable resolution … ***including applying the preponderance of the evidence standard of review***." (Emphases added). The 2014 Q&A says that schools have no "flexibility" concerning the evidentiary standard: "***The school must use a preponderance-of-the-evidence (i.e., more likely than not) standard in any Title IX proceedings***, including any factfinding and hearings." (Emphasis added). The 2014 Q&A applied all of these same standards to "employee-on-student sexual violence" and "[s]exual harassment."

In fact, the 2014 Q&A said, "[a] school's Title IX obligations regarding sexual harassment by employees can, in some instances, be greater than those described in this document and the [2011] DCL." The 2014 Q&A continued, "[i]n cases involving a student who meets the legal age of consent in his or her state, there will still be a ***strong presumption*** that sexual activity between an adult school employee and a student is unwelcome and nonconsensual." (Emphasis added). The 2014 Q&A also warned that "even if a school was not on notice [of misconduct], the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when the employee engaged in the sexual activity in the context of the employee's provision of aid, benefits, or services to students[.]" Compl. ¶¶ 51-61.

The Department took unprecedented steps to ensure that schools would adopt the mandatory requirements imposed by the 2011 DCL and the 2014 Q&A, even though OCR does not have rulemaking authority and even though those requirements were never subjected to notice-and-

comment rulemaking under the APA and thus do not carry the force of law. The Department's OCR enforcement became so aggressive that most schools adopted even those elements of the 2011 DCL that were not expressly styled as mandatory but for which OCR expressed a clear preference. Compl. ¶¶ 62-63.

Just days after issuing the 2014 Q&A, OCR publicly identified colleges and universities it was then investigating for potential violations of their obligation to comply with Title IX in the implementation of prompt and equitable sexual misconduct grievance procedures. When OCR first published its list, there were 55 colleges and universities on it. ***On June 4, 2014, OCR added JMU to the list.*** By October 2014, the number of colleges and universities on OCR's public list had grown to 85 schools. In January 2015, the number reached 94 schools. Compl. ¶¶ 64-68. It is the most natural of causal inference, which Plaintiff is entitled to at this stage of the litigation, that a school placed on a warning list that is the equivalent of a financial chopping block will sit up and take notice. Purse-strings control is power.

At the time of the 2011 DCL, JMU used a "preponderance of probative, reliable and substantial evidence" standard of proof. Consistent with its dictate that only a preponderance of the evidence standard (and nothing more demanding) could allow "prompt and equitable resolution" of sexual misconduct claims, OCR has forced numerous schools that did not immediately comply with the 2011 DCL's mandate to replace more stringent standards with a bare preponderance of the evidence standard. Compl. ¶¶ 69-70.

On September 7, 2017, in a prepared speech, surveying the consequences of the 2011 DCL and the 2014 Q&A, then Secretary of Education Betsy DeVos said, "One person denied due process is one too many," and that "the system established by the prior administration has failed too many students." Secretary DeVos's criticisms were directed at the 2011 DCL and 2014 Q&A. Secretary DeVos explained the "current reality" of Title IX adjudications were "kangaroo courts" where "a

school administrator [] will act as the judge and jury." According to Secretary DeVos, "[t]he accused may or may not be told of the allegations before a decision is rendered. If there is a hearing, both the survivor and the accused may or may not be allowed legal representation." DeVos continued, "Whatever evidence is presented may or may not be shown to all parties. Whatever witnesses—if allowed to be called—may or may not be cross-examined. And Washington dictated that schools must use the lowest standard of proof." Secretary DeVos explained that OCR had "terrified" schools and "run amok" by "weaponiz[ing] the Office of Civil Rights to work against schools and against students." Secretary DeVos said that OCR had "exert[ed] improper pressure upon universities to adopt procedures that do not afford fundamental fairness." Secretary DeVos added, "The failed system imposed policy by political letter, without even the most basic safeguards to test new ideas with those who know this issue all too well." Compl. ¶¶ 71-78.

On September 22, 2017, Secretary DeVos withdrew the 2011 DCL and the 2014 Q&A. In a press release, the ED said, "[t]he withdrawn documents ignored notice and comment requirements, created a system that lacked basic elements of due process and failed to ensure fundamental fairness." Defendant ED, by and through its previous Secretary, has thus admitted that the 2011 DCL and the 2014 Q&A violated the due process rights of individuals involved with college Tile IX proceedings. The damage, however, had already been done to those like Ms. Reid, as the University Defendants ignored the Department's and Secretary DeVos's September 2017 conclusions and pronouncements, instead continuing to implement the 2011 DCL and 2014 Q&A requirements through JMU's Title IX procedures. Compl. ¶¶ 80-85.

Through the 2011 DCL and the 2014 Q&A, the ED Defendants coerced Defendant JMU to revise its campus disciplinary policies, and in particular its policies for adjudicating complaints of sexual discrimination, sexual harassment, and sexual misconduct. Defendant JMU cited to the 2011 DCL as a reason that it amended its Policy #1324 and as support for adopting the 2016/2018 Policy

#1340. Through its aggressive enforcement actions against schools that chose to provide appropriate and necessary constitutional procedural protections in campus disciplinary proceedings, the ED Defendants coerced the University Defendants to remove such due process protections to avoid facing a Title IX enforcement action and the loss of federal funding. Defendant JMU adopted/amended these policies in part to avoid an enforcement action by the Department. Defendant JMU thus denied Plaintiff Reid her due process rights as protected by the United States and Virginia Constitutions in part to avoid being subject to an enforcement action by the Department. Compl. ¶¶128-132.

In August 2014, and in further response to the 2011 DCL, JMU created a fourteen-member "Title IX Task Force," originally charging it with "conducting a comprehensive review of university policies and procedures designed to prevent ***and adjudicate*** cases of sexual assault." (Emphasis added). JMU's Title IX Task Force reviewed a variety of documents to "assure university compliance." Such materials included the following documents issued by the ED:

a. "The report of The White House Task Force to Protect Students from Sexual Assault" (issued in April 2014);

b. "The guidelines issued by the Office for Civil Rights at the Department of Education"; and

c. "***The OCR's [2011] 'Dear Colleague' letter***." (emphasis added).

"As a result of the [Task Force's] comprehensive review, university policy 1324, 'Discrimination and Sexual Misconduct,' [underwent] significant revisions." The Title IX Task Force continued its activities throughout 2015, reporting that they had undertaken the following actions (among others): (a) "Reviewed the new guidance documents from the Office of Civil Rights ***for compliance***;" (b) "Created new Policy 1340, Title IX, incorporating all current laws and guidance;" and (c) "Expanded the number of Title IX officers." Compl. ¶¶ 173-176 (emphasis added).

Based upon and in response to the Department's 2011 DCL, the 2014 Q&A, and its threats of enforcement actions and withholding of federal funds, the University Defendants adopted the 2016/2018 Policy #1340—the one that they used against Plaintiff Reid. There is thus a direct and unbroken causal line between ED's 2011 DCL and 2014 Q&A on the one hand, and JMUs actions in depriving Plaintiff of her constitutional right to due process and confrontation on the other. Plaintiff Reid has challenged the Department's involvement in that deprivation, and the manner in which the mandates and requirements of the 2011 DCL and 2014 Q&A were applied against her specifically (i.e., by lowering the burden of proof, and prohibiting her from confronting and cross-examining her accuser). She seeks a declaration that such Department policies violate the APA (5 U.S.C. § 706(2)(A), (D) and (C)) and the Spending Clause of the United States Constitution by coercing colleges and universities to water down their campus disciplinary proceedings and by complying with the 2011 DCL and 2014 Q&A or else lose federal funding.

DEFENDANTS' CLAIMS

These Defendants have filed a motion to dismiss claiming that Plaintiff Reid lacks Article III standing, that this Court lacks jurisdiction, and that her claims are time-barred. Plaintiff Reid addresses each of these arguments below.

STANDARD OF REVIEW

In *Doe v. Virginia Polytechnic Institute and State University*, 400 F. Supp. 3d 479 (W.D. Va. 2019), this Court summarized the standard of review for motions filed pursuant to both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In deciding a Rule 12(b)(1) motion, "'the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'" *Id.* at 487 (quoting *Evans v. F.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999)). "It must, however, 'view[] the alleged facts in the light most favorable to

the plaintiff, similar to an evaluation pursuant to Rule 12(b)((6).'" *Id.* (quoting *Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999)). "Dismissal under Rule 12(b)(1) is proper 'only if the material jurisdictional questions ***are not in dispute*** and the moving party is entitled to prevail as a matter of law.'" *Id.* (quoting *Evans*, 166 F.3d at 645) (emphasis added).

"To survive a Rule 12(b)(6) motion to dismiss, a plaintiff's allegations must 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "This standard 'requires the plaintiff to articulate facts, when accepted as true, that "'show"' that the plaintiff has stated a claim entitling him to relief, *i.e.*, the "plausibility of entitlement to relief. *Id.* (quoting *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009)) (cleaned up). "The plausibility standard requires more than 'a sheer possibility that a defendant has acted unlawfully.'" *Id.* at 488 (quoting *Iqbal*, 556 U.S. at 678). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Watson v. Shenandoah University*, 2015WL5674887 at *8 (W.D. Va. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. at 678).

"In determining whether the plaintiff has met this plausibility standard, the court must accept as true all well-pleaded facts in the complaint and any documents incorporated into or attached to it." *Doe v. Virginia Tech*, 400 F.Supp.3d at 488. The court must also "draw[] all reasonable factual inferences from those facts in the plaintiff's favor…." *Id.* (internal quotations omitted). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Keith v. Virginia Dept. of Corrections*, 2010WL2555110 at *2 (W.D. Va. 2010). "'The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Id.* at *1 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

"'A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Jones v. Sun Pharm. Indus., Inc.*, 2020WL2501439 at *2 (E.D. Va. 2020) (quoting *Republican Party of N.C. v. Marti*, 980 F.2d 943, 952 (4th Cir. 1992)). "To survive a 12(b)(6) motion to dismiss, [the plaintiff] need not plead facts that constitute a prima facie case…." *Watson v. Shenandoah Univ.*, 2015WL5674887 at *9. "Furthermore, when as here, a Rule 12(b)(6) motion is testing the sufficiency of a civil rights complaint, we must be especially solicitous of the wrongs alleged, and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief ***under any legal theory which might plausibly be suggested by the facts alleged***." *Newberry v. Wolfe*, 2019 WL 2407758 at *3 (S.D. W. Va. 2019) (quoting *Edwards v. City of Goldboro*, 178 F.3d 231, 244 (4th Cir. 1999) (internal quotation marks omitted) (emphasis in original).

ARGUMENT

I. PLAINTIFF REID HAS STANDING TO OBTAIN DECLARATORY RELIEF AGAINST THE DEPARTMENT OF EDUCATION

Article III of the Constitution permits courts to hear "Cases" and "Controversies." U.S. Const. Art. III, § 2. A "case" or "controversy" is one where the plaintiff has standing to sue each defendant concerning each cause of action relevant to that defendant. Standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "confines the federal courts to a properly judicial role." *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 136 S. Ct. 1540, 1547 (2016)). The doctrine generally requires that the plaintiff show (1) an actual injury (2) that is "fairly traceable" to the defendant's challenged actions and (3) is redressable by the relief sought. *Dep't of Comm.*, 139 S. Ct. at 2565 (quoting *Davis v. FEC*, 554 U.S. 724, 733 (2008)).

These Defendants have moved to dismiss based in part on Plaintiff's alleged lack of standing. They first contend that Plaintiff Reid lacks standing to challenge the 2011 DCL and the 2014 Q&A because those documents were withdrawn and replaced before JMU's Title IX proceedings against her, so any injury resulting from said proceedings could not be attributed to them or cured by the declaratory judgment sought. *See* Defendants' Brief at 7. They also assert that Plaintiff lacks standing with respect to prospective relief designed to bar the Department from promulgating substantially similar guidance or rules because Plaintiff has not claimed that she will be subject to additional Title IX proceedings, or that the Department is likely to adopt similar regulations in the future. *Id.* at 12.

A. Plaintiff Was Injured by JMU's Faulty Title IX Procedure, which was Directly Traceable to the Department, and the Relief Sought Would Likely Induce JMU to Reconsider its Findings and Punishment

Plaintiff seeks a declaratory judgment that the Department violated the APA in issuing the 2011 DCL and the 2014 Q&A. The Department challenges Plaintiff's standing to bring such claim based on rescission of both documents prior to JMU's Title IX proceeding against her and prior to the filing of this suit. Defendants' Brief at 7. *First***,** these Defendants claim that the rescission breaks the chain of causation because the University Defendants made an "independent, voluntary" decision with respect to their Title IX procedures that cannot be traced back to ED. *Id.* at 7-8. *Second***,** these Defendants assert that because the 2011 DCL and the 2014 Q&A are no longer in effect and the damage—an allegedly unfair Title IX proceeding—has already been done, the court has no way of redressing the injury through declaratory judgment. *Id.* at 10. Thus, two of the three elements of standing are at issue here: traceability (often called causation) and redressability.

Defendants' arguments are wrong. Plaintiff has standing to challenge the 2011 DCL and the 2014 Q&A for two reasons. ***First*****,** the 2011 DCL and 2014 Q&A were designed to coerce universities, including JMU, to adopt what are clearly unlawful and unconstitutional procedural standards for responding to Title IX complaints, thereby preserving the chain of causation with respect to Plaintiff's

injury. ***Second,*** Plaintiff is challenging the procedural problems associated with the 2011 DCL and 2014 Q&A, thereby lessening the redressability requirement of standing such that the relief sought need not directly resolve the injury.

1. *Plaintiff's Injury is Traceable to the Actions of These Defendants; JMU's Title IX Procedures are Not the Isolated Decisions of a Third Party, but Directly Attributable to the Coercive 2011 DCL and 2014 Q&A*

To have standing to sue, Plaintiff's injury must be "fairly traceable to the defendant's challenged behavior." *Lujan*, 504 U.S. at 560. This inquiry calls for an examination of the chain of causation, especially when the actions of a third party are involved. *Id.* Standing may be found when third parties react to "determinative or coercive" government action "in predictable ways," even when such reaction is unlawful or illogical. *See Dep't of Com.* 139 S. Ct. at 2565-66 (holding that, in a suit challenging a citizenship question in the 2020 Census, plaintiffs had standing because they alleged that noncitizens would avoid responding to the Census for fear of retaliation, even though their answers would be kept confidential); *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997) (finding that the plaintiffs had standing to challenge an "advisory" document from the Fish and Wildlife Service because it had a "coercive effect" on another agency). Indeed, standing "requires no more than *de facto* causality." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (holding that the irrational "false impressions" of the public in response to the government's labeling of the plaintiff's films as "political propaganda" did not sever the chain of causation). The defendant's action or actions need not be the last step in the chain of causation to be "fairly traceable" to the injury.

Here, the Department denies that the 2011 DCL and the 2014 Q&A were coercive and asserts that JMU "should have known" that they were no longer in effect. Defendants' Brief at 8 n.3. That argument is without merit. The Department did not require JMU (or any other college or university) to repeal Title IX policies they had adopted in response to the 2011 DCL and/or 2014 Q&A. It is also important to note that the Department did not issue new Title IX regulations until much later

(long after Plaintiff Reid had been subjected to JMU's unconstitutional proceedings). It defies logic to argue that coercing someone to do something, and then much later instructing them that they no longer have to comply, automatically redresses ***intervening injury***. The coercion still happened and to argue otherwise makes no sense. The circuit of injury to Plaintiff Reid that began with the Federal Defendants throwing a new policy switch was fully completed when JMU applied its newfangled ED-induced policies against her. The actions of the Federal Defendants are undeniably one none in that circuit. Taking that node away ***after*** electrocution (the Title IX discipline) has already happened helps future students and faculty but not Plaintiff Reid and that action certainly does not change that the node was switched on and was during that period that Plaintiff suffered her injury.

Regardless of whether these documents could be considered "applicable law," that is not the determinative factor in assessing whether they were coercive in leveraging policy changes at JMU that became part of the mix of causal factors injuring Ms. Reid. In *Bennett*, the Fish and Wildlife Service released a Biological Opinion that advised another agency how to avoid jeopardizing endangered species in its operations. 520 U.S. at 158. This document, though technically "advisory," was intended to "play a central role" in the agency's decision-making process to generate a complete administrative record with respect to endangered species impacts. *Id.* at 169. The agency was free to disregard the guidance, but was required to justify its deviation and faced penalties if its decision turned out to be wrong. *Id.* at 169-70. The Supreme Court noted that the Biological Opinion had a "virtually determinative effect" on the acting agency such that the injury sustained by the plaintiff through the agency's compliance with the Opinion was traceable to the Fish and Wildlife Service. *Id.* at 170.

Similarly, the 2011 DCL and the 2014 Q&A, though labeled as guidance (since the Department never undertook a proper rulemaking under the APA), induced JMU to adopt the preponderance of the evidence standard (a lower standard of proof than the existing 2012 Policy #1324 "preponderance of probative, reliable and substantial evidence" standard) in Title IX proceedings. This action injured

Plaintiff. *See* Compl. at 9-12. Even more significantly in relation to Plaintiff Reid's claims, however, is the fact that the Department issued the 2011 DCL and the 2014 Q&A to instruct and warn universities (such as JMU) that their funding and whether they would be subjected to future Title IX compliance actions depended on their adoption of a policy prohibiting the accused in a Title IX proceeding from confronting or cross-examining the accuser. *Id.* Those requirements, and JMU's adherence to them, is one of the primary reasons why we are here today.[2] The University Defendants' policy barred Plaintiff Reid from confronting and cross-examining Lese over the allegations that she made were adopted in response to and compliance with the Department's 2011 DCL and 2014 Q&A. The University Defendants' policy was a violation of Reid's most fundamental constitutional right to due process and confrontation. Contrary to the Department's argument, there is a direct and unbroken line between the 2011 DCL, the 2014 Q&A, and JMU's 2016/2018 Policy #1340.

Just like in *Bennett,* where the Fish and Wildlife Service used a Biological Opinion to steer the separate acting agency in a certain direction, threatening it with penalties should it fail to knuckle under (520 U.S. at 158), the 2011 DCL and the 2014 Q&A expressly state that they should be used to "inform recipients about how [the Department's Office of Civil Rights] evaluates whether covered entities are complying with their legal obligations." *See* Defendants' Brief at 3-5. By the Department's own admission, in other words, these two documents laid out the examples and standards by which schools would be judged should they ever be subject to an OCR investigation. *Id.* Further, the 2011 DCL and

[2] Even if JMU could have amended its policies quickly in response to Secretary DeVos's change in regulatory course, Plaintiff is entitled, at the very least, to explore the facts behind why JMU persisted in implementing its stripped-down, due-process-deficient policies. For instance, if evidence emerges that JMU feared that the Federal Defendants' anti-due process policies could be put back in place, thereby threatening JMU's federal funding, then ED's causal role in Ms. Reid's injuries is undeniable. In that scenario, which Ms. Reid is entitled to uncover if such discovery bears out, ED's actions were not just a ***contributing factor*** in causing injury but a ***but-for*** cause of injury—the proverbial snowball placed at the top of the hill and left to continue rolling downwards.

the 2014 Q&A were characterized as "significant" in ensuring "prompt and equitable resolution" of sexual assault proceedings. Compl. ¶¶ 38, 41, 52, 56

These documents were therefore ***not*** a mere guideline for the internal operations of the Department; they were intended to dictate how third-party Universities conducted Title IX investigations and proceedings. They were designed to be coercive, making clear to JMU that compliance was mandatory. The D.C. Circuit's observation in a seminal case vacating an improper guidance document fits this case like a glove:

> At any rate, the entire Guidance, from beginning to end—except the last paragraph—reads like a ***ukase. It commands, it requires, it orders, it dictates***. Through the Guidance, EPA has given the States their "marching orders" and EPA expects the States to fall in line, as all have done, save perhaps Florida and Texas.

Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (emphasis added).

The University Defendants' continued compliance with the 2011 DCL and 2014 Q&A after the Department rescinded them did not sever the chain of causation; such adherence was not only predictable (albeit unlawful) but was effectuated by the issuance of the guidance in the first place. In *Department of Commerce*, the plaintiffs challenged a Census question that asked respondents to confirm their citizenship. 139 S. Ct. at 2562-63. The plaintiffs alleged that the question would deter noncitizen immigrants from filling out the Census, which would lead to a decrease in congressional representation, loss of federal funds, and diversion of resources. *Id.* at 2556. The government argued that the decision of the noncitizen immigrants to avoid the Census for fear of retaliation broke the chain of causation. *Id.* at 2565. The government also asserted that participation in the Census is a legal duty, with responses being kept confidential, and that the choice to avoid it was both unlawful and illogical. *Id.* at 2566. According to the government, this unreasonable intervening behavior by a third party cannot form the basis for conferring standing to bring a lawsuit against the government. *Id.* The Supreme Court disagreed, finding that the plaintiffs had standing because of the "predictable effect of Government action" on the decisions—however illogical—of the noncitizen immigrants. *Id.* The

Court then held that the harm was sufficiently traceable to the government to bestow standing despite third-party intervention.

Then-Judge Scalia, writing for the DC Circuit in *Block v. Meese,* 793 F.2d at 1309, echoed this proposition that injuries caused by third parties in reaction to a government action can form the basis for standing. That case involved a lawsuit filed by filmmakers against the government for its decision to label the plaintiffs' films as "political propaganda," claiming that the designation affected sales. *Id.* at 1308. The government claimed that standing cannot rest on the "false impression[s]" of the public regarding the meaning of political propaganda that could deter them from purchasing the films. *Id.* at 1309. Then-Judge Scalia noted that, regardless of the reasonableness of this reaction, it could nonetheless be traced back to the government's actions. *Id.* This simple causality is all that is needed for the traceability prong of standing. *Id.*

The same can be said about the University Defendants' response to Lese's accusations against Plaintiff Reid. JMU's unlawful continued use and enforcement of the 2011 DCL and 2014 Q&A through implementation of Policy #1340 was an entirely predictable effect of the Department's using the threat of withholding funding and pursuing enforcement actions unless universities reduced the due process protections afforded to the accused in Title IX proceedings. This is especially true in light of the fact that the Department's 2017 action was not only admittedly temporary, but had no similar enforcement hammer behind it. Again, the Department did not require colleges and universities to withdraw any of their policies based on the 2011 DCL and/or 2014 Q&A.

A lawsuit like the current one is the only countervailing weight that could potentially induce a university like JMU to change course. Otherwise, what it knows for sure is that all it takes is a group of leaders of one stripe to take over the Department's key offices and a university's funding is placed in serious jeopardy. A rational university might thus ask itself, why incur the risk of losing funding when, by merely lessening the due-process protections afforded to those who stand accused in a Title

IX proceeding, such funding is kept safe? Stated simply, the facts as pleaded in the Complaint show that ***both*** the Department and the University Defendants caused injury to Plaintiff Reid, with ED being responsible for the injury associated with adoption and implementation of the 2011/2014 policy, and the University Defendants being responsible for the enforcement of Policy #1340 against Plaintiff (for more on all of the problems with JMU's actions that form part of Ms. Reid's full chain of injury, see Plaintiff's Brief in Response to their Motion to Dismiss (ECF 17)).

Similar to the situation in *Meese*, the Department was responsible for the injury Plaintiff suffered by issuance of the 2011 DCL and the 2014 Q&A in the first place, which ordered universities to toe the new line. The intended effect of the Department's actions was to lower the due process standards for university Title IX proceedings. JMU's reaction was an entirely predictable way of avoiding future retaliation from the Department, while also avoiding retribution in the public square. *See Dep't of Comm.*, 139 S. Ct. at 2565. The Department's 2011 DCL and 2014 Q&A effectively deterred institutions from protecting the rights of the accused in favor of a more quick and painless resolution for the alleged victim. *See* Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, THE NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault/ (last visited July 30, 2021). It is thus entirely foreseeable that JMU would retain policies from the rescinded guidance in order to stay on the right side of public opinion, especially on such a sensitive topic.

Plaintiff's injury is traceable to the Department's actions because it was the Department that lit the first match in the fire that caused JMU to make the predictable decision to fan the flames b adopting, retaining and enforcing the policies included in the 2011 DCL and the 2014 Q&A.

2. *A Declaratory Judgment That the 2011 DCL and the 2014 Q&A Violated the APA would Redress Plaintiff's Injury, Help to Restore Her Good Reputation, and Confirm that JMU's Title IX Proceeding was Fundamentally and Constitutionally Flawed*

To satisfy the redressability prong of standing, Plaintiff must merely show that the injury is "likely to be redressed by a favorable judicial decision." *Lujan*, 504 U.S. at 560-61. Complete redressability, however, is not required—only a showing that the requested relief would alleviate Plaintiff's problem ***to some degree***. *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). Further, standing should not be construed to require an "explicit guarantee of redress" to Plaintiff. *Equity in Athletics, Inc. v. Dep't. of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011) (holding that a challenge to Title IX regulations that caused a reduction in men's sports based on proportionality to women's sports was redressable, despite the possibility that JMU would decline to restore the eliminated teams for lack of interest).

The redressability requirement is relaxed when the plaintiff is vindicating a procedural right. *Lujan*, 504 U.S. at 572 n. 7; *Massachusetts*, 549 U.S. at 518-17, 525-26 (holding that issuing a declaratory judgment against the EPA, who had violated a congressional mandate, would likely prompt them to promulgate the regulations in question). In those cases, redressability may be found if there is some possibility that the relief would induce the injury-causing party to reconsider the decision that harmed the plaintiff. *Id.*

Plaintiff seeks a declaratory judgment stating that the 2011 DCL and the 2014 Q&A violated the APA by failing to follow proper notice and comment procedures. Compl. at 112. The Department argues that this requested relief would not redress Plaintiff's injury because it has already withdrawn the guidance, so this order by the Court would have no effect on Plaintiff's injury—there is nothing left to set aside. Defendants' Brief at 10-11. But Plaintiff alleges that she is continually harmed by JMU's faulty Title IX proceeding because of the damage done to her reputation. Compl. ¶ 544. JMU's flawed Title IX proceeding was built brick-by-brick upon the foundation of the Department's 2011 DCL and 2014 Q&A, again, with there being a direct connection between them. Having this Court declare that the 2011 DCL and 2014 Q&A were legally flawed and should not have been enforced against universities such as JMU will provide Plaintiff Reid with immediate relief from the reputational

damage that she has suffered—she can then point to this Court's decision as proof that the University Defendants failed to provide her with the due process to which she was entitled to defend against Lese's accusations so that she could restore her good name.

This Court may also find redressability under the procedural injury doctrine because (a) Plaintiff seeks an order to JMU to remove the reprimand; and (b) at the very least, it is foreseeable that such decision would prompt JMU to *sua sponte* reconsider Plaintiff's Title IX status. In *Massachusetts*, the plaintiffs alleged that EPA improperly denied an APA rulemaking petition to take steps to reduce auto pollution, where misconstruing the Clean Air Act was one of the grounds cited by EPA to deny the petition. 549 U.S at 510-15. Because Congress had defined a procedural right in the APA to aggrieved parties to file rulemaking petitions and challenge their improper denial, the redressability standard was relaxed, and the Court found standing because "[t]here is, moreover, a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce [a] risk [of pollution]." *Id.* at 520, *quoting Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 79 (1978).

Here, Plaintiff has a right under the APA to challenge agency actions for procedural defects and part of Plaintiff's suit here involves a claim that the Department did not provide proper notice-and-comment procedures. 5 U.S.C. §§ 704, 706(2)(D) (courts can hold agency actions unlawful if they are found to be "without observance of procedure required by law"). Because JMU adopted its Title IX policies (specifically, the 2016/2018 Policy #1340) in response to the Department's actions, an order from the Court invalidating the Department's unlawful genesis acts will force JMU to right the wrong that it inflicted on Plaintiff, reverse its finding that she engaged in a non-consensual relationship with Lese, and remove the letter of reprimand from her file. *Supra* 2-5. Thus, under the relaxed redressability standard with respect to procedural violations, Plaintiff clearly has standing to bring this action against the Department.

B. Plaintiff Has Standing to Obtain a Declaratory Judgment and Injunction Against the Department Barring it from Promulgating Similar Rules or Guidance in the Future Because the Issue is Sufficiently Relevant to Plaintiff's Legal Rights

Plaintiff also seeks prospective relief through a declaratory judgment and injunction prohibiting the ED from issuing guidance or rules in the future that are substantially similar to the 2011 DCL and the 2014 Q&A. The Defendants argue in response that Plaintiff lacks standing to request this relief because she has not alleged that she is likely to undergo another Title IX proceeding, nor has she shown that the Department will adopt similar regulations in the future. *See* Defendants' Brief at 12-13. The Defendants also claim that the declaratory judgment sought is too vague to redress Plaintiff's injury. *Id.*

According to the Declaratory Judgment Act, "any Court of the United States … may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Jurisdiction is proper in declaratory actions when three elements are met: (1) the complaint alleges a controversy of "sufficient immediacy and reality" to justify the issuance of a declaratory judgment, (2) there is an independent basis for jurisdiction (like federal question or diversity), and (3) the court does not abuse its discretion in deciding to exercise jurisdiction. *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004).

To evaluate the first prong, the Court should consider (1) whether "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue," and (2) whether the judgment "will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Atlantic Coast Pipeline v. Nelson Co. Board of Supervisors*, No. 3:18-cv-00115, 2019 WL 2570530, *4 (W.D. Va. 2019) (quoting *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996)) (holding that a suit seeking a declaratory judgment against future enforcement of zoning ordinances presents a "clean-cut and concrete" controversy about the legality of the regulations because it "raises

purely legal questions" regardless of whether enforcement comes into fruition in the future). Indeed, standing in a declaratory action cannot rely on past injury alone; the likelihood that the plaintiff will be harmed again can form the basis for standing. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *Mejico v. Alba Web Designs*, LLC, No. 7:20CV00039, 2021 WL 280065, *5 (W.D. Va. 2021) (finding that a plaintiff who sued over an inaccessible website had standing because she planned to utilize the website in the future). *See* NBC News, *Biden Administration Announces Next Steps in Overhauling Title IX Campus Sexual Assault Rules*, https://www.nbcnews.com/news/us-news/biden-administration-announces-next-steps-overhauling-title-ix-campus-sexual-n1263113 (last visited July 30, 2021). But the Court must accept factual allegations contained in the complaint as true to evaluate a motion to dismiss. *Daniels v. Arcade, L.P.*, 477 Fed. App'x 125, 130 (4th Cir. 2012).

Future repercussions need not be certain to occur for the Court to issue equitable relief. In *Atlantic Coast Pipeline*, the plaintiff sought an order precluding the government defendant from enforcing similar zoning ordinances in the future. 2019 WL 2570530 at *3. The government argued that the enforcement was not certain to occur in the future because the requisite permits had not been obtained, so there was no true case or controversy for adjudication. *Id.* at *4. The District Court ruled that the question of the validity of the ordinances was an appropriate question for the Court to decide, even if permits were never obtained and the zoning was never enforced. *Id.*

Similarly, Plaintiff Reid's case against the Department concerns the legality of the 2011 DCL and 2014 Q&A. She has not alleged that she will necessarily participate in a Title IX proceeding in the future, but the constitutional deprivations inherent in the Department's actions have created a legitimate concern that she will be, and this is clearly a controversy that needs resolving by the courts. Even if Plaintiff is never confronted with a similar dispute again, she has an interest in proper Title IX procedural protections as a member of both the academic and LGBTQ+ communities. Therefore,

this case presents a valid case or controversy that can shed light on the parties' rights and responsibilities under the law.

Plaintiff is also entitled to vindicate procedural rights without an immediate threat of having a Title IX proceeding brought against her. In *Sugar Cane Growers*, the plaintiff sought a declaratory judgment regarding a regulation that violated notice-and-comment procedures of the APA. 289 F. 3d 89, 94-95 (D.C. Cir. 2002). The government contended that the plaintiff could not prove that the substantive result would have changed if the government had followed proper procedures. *Id.* The District Court disagreed and clarified that all that is necessary to vindicate such procedural rights is evidence that the procedural step was connected to the result. *Id.* Here, Plaintiff alleges that the Department violated the APA by issuing the 2011 DCL and the 2014 Q&A by failing to conduct notice and comment procedures. Compl. ¶¶ 653, 665. These are the documents that induced (mandated) JMU to adopt the faulty Title IX procedures that harmed Plaintiff. *Supra* 2-5. Thus, the procedural protection was substantively connected to the result and standing may be found without allegations of immediacy.

These Defendants claim that Plaintiff is speculating that the Department will promulgate similarly unlawful guidance in the future. Plaintiff, however, only seeks to enjoin their promulgation of regulations and/or guidance that violate due process rights—something it has threatened to do. Compl. ¶¶ 664, 675. This has been a fluid situation since the change of Presidential administrations, with the current Administration broadcasting its intent to return to the standards of the 2011 DCL and the 2014 Q&A, most specifically the very standards that force universities to violate the due process rights of the accused in a Title IX proceeding. This Court must take all factual allegations included in the Complaint as true at this stage of the litigation. Plaintiff has alleged in Paragraph 662 of her Complaint that "Defendants ED and Cardona have publicly stated an intent to return to requiring schools to follow the procedures, mandates and requirements set forth in the 2011 DCL

related to Title IX complaints." At this motion to dismiss stage of the proceedings that is a statement of fact that must be taken as true.

Defendants' argument that Plaintiff's request that the Court enjoin the Department from adopting "substantially similar" regulations in the future is too vague is also easily refuted by the allegations in the Complaint. Plaintiff has pled in detail what aspects of the 2011 DCL and the 2014 Q&A are unlawful, including the preponderance of the evidence standard (which is not the same standard that JMU applied in the 2012 Policy #1324) and the failure to allow parties to confront and cross-examine the accuser and her witnesses. Compl. ¶¶ 42, 48. *See also*, Plaintiff Alyssa Reid's Brief in Response to [the University] Defendants' Motion to Dismiss (ECF 17) at 57-59. Plaintiff seeks to prevent the Department from adopting similar guidance or regulations and has described in detail how the implementation of the 2011 DCL and 2014 Q&A deprived her of her right to due process. She has provided more than enough detail regarding how the Department set in motion a catastrophic chain of events that culminated in the University Defendants' reaching an absurd conclusion that she had engaged in a non-consensual relationship in the first six months of her 2 ½ year relationship with her long-term, live-in girlfriend. There is no legitimate question as to what Plaintiff is alleging, or what offending acts she seeks to enjoin—including the use of the wrong burden of proof and the denial of an accused's right to confront and cross-examine her accuser.

Plaintiff's request, like the declaratory judgment in *Massachusetts*, satisfies the lowered redressability standards regarding procedural rights by requiring JMU to revisit the outcome of Plaintiff's Title IX dispute. 549 U.S. at 518. Any claim that Plaintiff's request in that regard is vague is simply a misrepresentation of what she has requested and the relief that she seeks.

II. THIS COURT HAS SUBJECT MATTER JURISDICTION TO ADDRESS PLAINTIFF'S APA CLAIMS AND THE 2011 DCL AND 2014 Q&A WERE FINAL AGENCY ACTION

The APA permits a plaintiff to challenge "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "The term 'action' as used in the APA is a term of art that does not include all conduct" on the part of the government. *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013). *See also Hearst Radio v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948). The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). "Rule[s]," are, in turn, is defined in § 551(4) as "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law."

Defendants cite *Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426 (4th Cir. 2010), for the proposition that "neither the 2011 DCL nor the 2014 Q&A" were final agency action, since neither document "determine[d] the law or the consequences of not following it," but were merely informative in nature. Defendants' Brief at 16 (citations omitted). While couched as an argument that the documents were not *final* agency action, this is better understood as a claim that neither document constituted agency action *whatsoever*—at least as far as 5 U.S.C. § 551 is concerned—because they neither "implement[ed]," "interpret[ed]" or "prescrib[ed] law, § 551(4), but just informed recipients of federal funds, such as universities, of already-existing obligations. And agency action that merely reiterates a previously stated position in a communication to regulated parties does not implement, interpret, or prescribe law and is thus not a rule for the purposes of §551(4). Defendants' invocation of *Domenech* here lacks merit.

In *Domenech*, the Court held that an ATF FAQ was not agency action because the agency's reference guide had "reiterated [the same position] over 13 times during the course of over 40 years." *Id.* at 432. The challenged FAQ did not "impose new legal requirements," but rather consisted of "restate[ments] or report[s] of what already exist[ed] in the relevant body of statutes, regulations, and rulings." *Id.* To hold that these informative agency releases were reviewable agency action would

"quickly muzzle any informal communications between agencies and their regulated communities." *Id*; *see also Independent Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 426-27 (D.C. Cir. 2004) (Roberts, J.) ("Because the January 2003 EPA letter does not reflect any change in the EPA's regulations[,] the letter did not promulgate or revise any regulation"; "[t]he Letter was purely informational in nature; it imposed no obligations and denied no relief" as it "merely restated in an abstract setting—for the umpteenth time—EPA's longstanding interpretation"); *General Motors Corp. v. EPA*, 363 F.3d 442, 447 (D.C. Cir. 2004) (holding that a letter which clarified that the "EPA continues to stand by its 1997 determination" did not promulgate, revise or interpret a rule).

Neither the 2011 DCL nor the 2014 Q&A could be described as "merely reiterating" a previously stated department policy for the purposes of informing regulated parties. ***First,*** the 2011 DCL set off a firestorm of national media coverage, which itself belies the notion that the document did not impose new requirements on colleges. The media rarely sees a stir being caused by what, for a federal agency, is just old hat. ***Second***, the document explicitly states that "this letter ***supplements*** the 2001 guidance by providing ***additional*** guidance and practical examples." DCL at 2 (emphasis added).

Several other provisions of the 2011 DCL show that the directives the Department was promulgating were anything but preexisting. In discussing the preponderance of the evidence standard, for instance, the Department noted that schools using the "clear and convincing" standard were employing policies that were "inconsistent with the standard of proof established for violations of the civil rights laws, and ... thus not equitable under Title IX." 2011 DCL at 11; ("OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties. Schools must maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings.") *id.* at 12; ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each

other during the hearing.") *Id.* The 2011 DCL is clearly not comprised of workaday informational agency communications, and there is thus no threat that Plaintiff's lawsuit would "muzzle" communications between "agencies and their regulated communities." *Domenech*, 599 F.3d at 432.

Another requirement of agency action—which applies to all the terms comprising § 551(13)'s definition, including "rules"—is that they be "circumscribed" and "discrete." *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 62 (2004). This limitation avoids "broad programmatic attack[s]" that would entangle Federal Courts in day-to-day superintendence of agency operations. *Id.* at 64; *See also Vill. of Bald Head Island*, 714 F.3d at 194 (holding that the plaintiffs' challenge to the Army Corps' implementation of a dredging program was not agency action as defined in 5 U.S.C. § 551(13), because it was not "circumscribed and discrete," and allowing the action to go forward would entangle Federal Courts in "day-to-day managerial role[s] over agency operations."); *National Veterans Legal Servs. Program v. Department of Defense*, 990 F.3d 834, 839 (4th Cir. 2021) (holding that a challenge to the swiftness of the DOD's compliance with a statutory mandate was not discrete agency action, as it called for a "broad programmatic attack"); *City of New York v. Department of Defense*, 913 F.3d 423, 433 (4th Cir. 2019) (observing that because the DOD's undertaking to provide states with certain information would necessitate "expertise in information technology and deep knowledge of how military needs to intersect with data collection," it called for intrusive federal court monitoring of agency operations); *PETA v. U.S. Fish and Wildlife Serv.*, 130 F. Supp. 3d 999, 1001 (E.D. Va. 2015) (where the plaintiff challenged an agency's permitting practices but "did not identify a formal regulation, [] guidance document, or even a memorandum evidencing [an alleged] 'Pay–to–Play' policy," the plaintiff had not challenged discrete agency action).

In contrast to the *PETA* case, the Fourth Circuit in *Cline v. Hawke*, 51 Fed.Appx. 392 (4th Cir. 2002), clearly confronted a discrete action by the Office of the Comptroller of the Currency that resulted in leveraging other states to knuckle under to preemption of their contrary insurance law in

favor of the banks. According to the Court: "In the instant case, the Preemption Letter causes banks to change their business plans and business practices and therefore conflict with the West Virginia laws. West Virginia therefore suffers because it cannot enforce certain provisions of its insurance laws against national banks." *Id.* at 395. The dissent, which argued that the Preemption Opinion did not represent final agency action because the states could have ignored the Preemption Opinion, failed to convince the other judges on the panel.

Moreover, Plaintiff's Prayer for Relief (Complaint at 111-114), does not call for any "broad programmatic attack" on the Department's daily operations. The Plaintiff is instead seeking a declaratory judgement that the Department violated the APA—by failing to follow notice and comment and exceeding its statutory authority—and the Spending Clause. *Id.* The only Federal Court relief that she seeks is an injunction prohibiting the Department from issuing "substantially similar guidance or rules" again. *Id.* This form of relief narrowly targets a limited set of discrete rules and would not require constant, overweening, day-to-day supervisory federal court involvement in the Department's activities, or any significant limitations on the Department's proper span of discretion.

A "final" agency action both (1) "mark[s] the consummation of the agency's decisionmaking process—[i.e.:] it must not be of a merely tentative or interlocutory nature"; and (2) is an action from which "rights or obligations have been determined or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (citing *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The Supreme Court has instructed that courts should apply the finality requirement in a "flexible" and "pragmatic" way. *Abbott Labs v. Gardner*, 387 U.S. 136, 149-50 (1967).

A. The 2011 DCL and 2014 Q&A Marked the Consummation of the Department's Decisionmaking

The Department does not argue that the 2011 DCL or 2014 Q&A do not meet the first test set forth above, as they obviously represent the "consummation of the agency's decisionmaking process." Defendants' Brief at 15 ("Neither the 2011 DCL nor the 2014 Q&A satisfied the second element of the finality test"). When examining the first part of the first *Bennett* test, Courts often examine "the way in which the agency subsequently treats the challenged action." *Sw. Airlines Co. v. U.S. Dep't. of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). For instance, where an agency issues a decision without sending follow-up communication indicating that the decision is "tentative or interlocutory," or where the agency fails to institute an appeals process for a decision, the decision likely consummates the process. *American Bar Ass'n v. Department of Educ.*, 370 F.Supp.3d 1, 21 (D.D.C. 2019). Moreover, where a decision is not "informal," and where it does not emanate from the "ruling of a subordinate official," but rather emerges from the agency's "authoritative source" with the "last word" on its policies, then it likely consummates the decision-making process. *Mayor and City Council of Baltimore v. Trump*, 416 F. Supp. 3d 452, 499 (D. Md. 2019) (holding that the State Department's revisions to its Foreign Affairs Manual marked the consummation of the agency's decision-making process because the manual was the agency's "authoritative source" on "policies[ ] and procedures," and the "last word on the criteria consular officers should consider when making public charge determinations").

In this case, both factors point towards the 2011 DCL and the 2014 Q&A marking the consummation of the Department's decisionmaking process on campus sexual assault and misconduct policies. First and foremost, in subsequent actions, the department initiated multiple enforcement proceedings against schools for violating the 2011 DCL and entered into multiple Resolution Agreements in which schools agreed to implement policies outlined in the letter. *See SurvJustice Inc. v. DeVos*, 2019WL5684522, *13 (Slip Copy) (N.D. CA 2019) (noting that "the Resolution Agreements concern the rescinded [2011 and 2014] guidance"). And both documents emanated from an

"authoritative source" rather than an inferior agency official: each is designated a "significant guidance document," 2011 DCL at n.1; 2014 Q&A at n.1, which means they "represent the Department of Education's (ED) current thinking on [the] topic." https://www2.ed.gov/policy/gen/guid/significant-guidance.html.

B. Rights and Obligations Were Determined and Legal Consequences Flowed from the 2011 DCL and 2014 Q&A

The Supreme Court has instructed that a "pragmatic approach" should be taken in determining whether an agency action is one from which "rights or obligations have been determined or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016); *Bennett*, U.S. 154 at 177-78. Indeed, even a nonlegislative rule—not subject to notice and comment requirements—can be final "if an agency acts as if [it is] ... controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, [and] if it leads private parties or State permitting authorities to believe that it will [take adverse actions against them] unless they comply with [its] terms." *Appalachian Power Co.,* 208 F.3d at 1021.

One thing is well settled: self-serving, "boilerplate language" in a document indicating that it is nonbinding cannot, alone, "dictate whether the ... Guidance is a final agency action fit for review." *Philip Morris USA Inc. v. FDA*, 202 F.Supp.3d 31, 46 (D.C.D.C. 2016). For instance, in *Appalachian Power Co.* the D.C. Circuit found that a challenged agency document determined obligations and legal consequences even though it stated that the "policies set forth in this paper are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party." 208 F. 3d at 1023. The "boilerplate" language could not detract from the reality that the "entire Guidance, from beginning to end ... read[] like a ukase. It command[ed], it

require[d] it order[d], it dictate[d]." *Id.*[3] *See also American Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 488 (D. Md. 2019). And in *Philip Morris*, a guidance document was found to establish legal consequences despite containing language that it did not establish legally enforceable responsibilities, "should be viewed only as [a] recommendation" and was "not binding on FDA or the public." 202 F.Supp.3d at 46.

To be sure, sometimes "when a[n agency document] clearly states that the comments contained therein 'do not constitute approval or disapproval decisions,' they do not, in fact, reflect the agency's final position ... [because] agencies need the ability to designate the import of the information they disseminate ... [and] to clearly communicate when a decision is final." *Sanitary Bd. of City of Charleston, W. Va. v. Wheeler*, 918 F.3d 324, 338-39 (4th Cir. 2019). *Sanitary Board*, however, dealt with a city's request to revise the standards of its wastewater treatment permit, and the EPA's denial of the same. *Id.* at 330. When dealing with the fact-specific inquiries necessary to approve, reject, or revise individual parties' applications for permits, the ability to designate documents as tentative and devoid of legal force does not risk spreading a pall of legal uncertainty over the entire regulated community. In fact, when issuing permits, or making enforcement determinations, tentative agency communications may further interests of due process and notice. *See, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012) (holding that FDA warning letters are not reviewable "final agency action"); *AT&T Co. v. EEOC*, 270 F.3d 973, 974 (D.C. Cir. 2001) (holding that an EEOC "letter of determination" that an employer violated discrimination law, and was required to undergo conciliation with its employee to avoid enforcement, was not final agency action).

[3] "A Russian ukase was a command from the highest levels of government that could not be disobeyed. But by the early 19th century, English speakers were also using *ukase* generally for any command that seemed to come from a higher authority, particularly one that was *final or arbitrary*," https://www.merriam-webster.com/dictionary/ukase (last visited July 30, 2021) (emphasis added)—to which we would add, as appropriate here, "final or arbitrary or both." ED's 2011 and 2014 policies were both.

By contrast, where a document sets forth a rule of general applicability, but the agency also says out of the other side of its mouth that the document nonbinding, all members of the regulated community are kept on tenterhooks as to whether they must engage in—often costly—compliance with the document's diktats. In such cases, agencies should not be able to disclaim the binding effect of its documents by giving them a tentative or nonbinding label. Such attempts by agencies to include "magic provisos" runs afoul of the law. *See, e.g., Texas v. EEOC*, 933 F.3d 433 n.23 (5th Cir. 2019) (observing that the "D.C. Circuit has ... distinguished between agency guidance 'affect[ing] the regulated community,' which [it] ... suggested would constitute final agency action, and statements directed at an individual entity 'expressing [the agency's] view of the law' with respect to that entity," which would not) (citing *AT&T*, 270 F.3d at 976). In any event, in *Sanitary Board*, the Court did not find that the action was unreviewable because it was nonfinal, but rather because it found that the EPA's denial was unreviewable as it was "a paradigmatic example of agency discretion." 918 F.3d at 332.

The Department's arguments that the challenged documents are nonfinal because they only: (1) contained "'policy guidance to provide recipients with information to assist them in meeting their obligations'"; (2) did "not add requirements to applicable law, but [only] provide[d] information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligation"; and (3) "contained ... language disclaiming any binding legal effect," are thus unavailing. Defendants' Brief at 15 (citations omitted). These statements bear the hallmarks of the self-serving "boilerplate language" that cannot strip documents of their finality. And like the guidance in *Appalachian Power Co.*, both the 2011 DCL and 2014 Q&A spoke like a "ukase," ED acting as tsar. Each is riddled with commands that federal fund recipients "must" implement policy X, Y, or Z. None of these commands consists of vague, far-off, or aspirational goals. They instead direct and

command regulated parties to implement specific and concrete policies, often delving into the minutia of university administration. Examples abound. Here are several:

- "If a student files a complaint with the school, regardless of where the conduct occurred, the school ***must*** process the complaint in accordance with its established procedures."), 2011 DCL at 4 (emphasis added);

- "Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school ***must*** use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)," *id.* at 11 (emphasis added).

- "If a school provides for appeal of the findings or remedy, it *must* do so for both parties. Schools ***must*** maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings," *id.* at 12 (emphasis added);

- "Each school ***must*** ... disseminate a notice of nondiscrimination ... designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX ... adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints," 2014 Q&A, 16-17 (emphasis added).

The Department, therefore, cannot credibly claim that the 2011 DCL and 2014 Q&A imposed no obligations or legal consequences, and that all of "OCR's legal authority" to implement its directives was "based on [preexisting] laws and regulations." 2011 DCL at n.1. It's almost as if the Department is saying: "What should regulated institutions of higher learning believe, our long list of commands, or the weaselly proviso we slipped in?" ED's position should be rejected as fooling no one.

In *Doe v. University of Sciences*, the Third Circuit stated that "[a]lthough the 2011 Dear Colleague Letter was provided as "guidance," ED backed it up by investigating alleged noncompliance." 961 F.3d 203, 213 (3d Cir. 2020). The Court further noted that ED threatened to terminate the funding of schools that did not follow the 2011 Dear Colleague Letter, which would be ruinous to these schools. *See Id.* The Court noted that while the 2011 DCL was "fashioned as a guidance."In reality it imposed legal obligations. *See Id.* at 216 n.6.

In *Doe v. Purdue University*, the Seventh Circuit made the determination that ED enforced the 2011 DCL against colleges and universities through punitive financial measures: "[t]hat letter ushered in a more rigorous approach to campus sexual misconduct allegations by, among other things, defining "sexual harassment" more broadly than in comparable contexts, mandating that schools prioritize the investigation and resolution of harassment claims, and requiring them to adopt a lenient "more likely than not" burden of proof when adjudicating claims against alleged perpetrators. The Department of Education made clear that it took the letter and its enforcement very seriously. And it warned schools that "[t]his Administration is committed to using all its tools to ensure that all schools comply with [T]itle IX so campuses will be safer for students across the country." *Id.*, 928 F.3d 652, 668 (7th Cir. 2019). The Department, in other words, left no doubt that a school's federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct as per the requirements of the 2011 DCL.

That the Department "is purporting merely to interpret a statute that vests it with regulatory authority does not mean ... that its action is not final and therefore unfit for judicial review." *Philip Morris USA Inc.*, 202 F.Supp.3d at 47 (citing *CSI Aviation Servs., Inc. v. DOT*, 637 F.3d 408, 412 (D.C. Cir. 2011)); *see also Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 (D.C. Cir 1986) ("As this court has repeatedly held before, ... an agency's interpretation of its governing statute, with the expectation that regulated parties will conform to and rely on this interpretation, is final agency action fit for judicial review.") (citations omitted). Indeed, Courts have even characterized the "distinction" that the Department is attempting to draw here—between whether the statute or its guidance documents are the actual source of binding authority—as "a hollow one without any meaningful difference." *Pharmaceutical Research and Mfrs. of Am. v. HHS*, 138 F. Supp. 3d 31, 44 (D.C. Cir. 2015).

C. The Coercive Nature of These Documents Confirms that Legal Consequences Flowed from the 2011 DCL and 2014 Q&A

While, as a general matter, an "independent action of some third party not before the court" cannot infuse legal consequences into agency action as if the agency is itself responsible for the independent actions of that third party, if the third-party actions are instead "produced by [the] determinative or coercive effect" of an agency action, then those effects and the agency action are subject to judicial review. *See Bennett*, 520 U.S. at 168-69 (citations omitted).

That Plaintiff Reid's harm falls exactly into the exception for coerced or government determined third-party action cannot be doubted, especially not at the motion-to-dismiss stage. *See Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA*, 313 F.3d 852, 859 (4th Cir. 2002). Plaintiff is entitled to discovery into JMU's motivations. And a strong inference exists that JMU succumbed to the financial squeeze ED was applying to it.

Contrast this case with *Flue-Cured*, which is instructive. There, the "critical issue" was whether a mere EPA report classifying tobacco as a known human carcinogen gave "rise to legal consequences, rights, or obligations." *Id.* at 858. The plaintiffs pointed to the "General Service Administration (GSA) ... [which] relied, in part, on the Report to justify its ban of the use of tobacco products in GSA motor vehicles," as evidence for the report's coercive effect. *Id.* at 858-60. But "even if other agencies ... relied on the Report in imposing tobacco related restrictions, these regulations [were] not direct consequences ... but [rather] the product of independent agency decisionmaking ... [because those agencies were] free to embrace or disregard the Report which [was] advisory and [did] not trigger the mandatory creation of legal rules, rights, or responsibilities." *Id.* at 860 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994)). Similarly, as for the possibility that the "report's persuasive value" would induce private groups to impose "tobacco-related restrictions," or cause consumers to forgo tobacco entirely, "these decisions [were] attributable to independent responses and choices of third parties" and were therefore not coerced legal consequences. (citing *Industrial Safety Equip. Ass'n*, 837 F.2d at 1121). While the plaintiffs feared "that the Report [would]

increase their vulnerability to liability," they could not get around the reality that "no statutory scheme trigger[ed] potential civil or criminal penalties for failing to adhere to the Report's recommendations." *Id.* at 861.

Moreover, under the Radon Act—which gave the EPA the authority to promulgate the report—Congress expressly prohibited the "EPA (and the courts) from giving the Report 'any regulatory' effect," beyond "research, development, and related reporting, information dissemination, and coordination activities." *Id.* at 858. So, as *Flue Cured* explains, even if third-party market actors or agencies felt coerced by the report, Congress had explicitly deprived it of any legal consequences. *Id.* (citing Pub.L. No. 99–499, §§ 401–405, 100 Stat. 1758). Title IX, by contrast, contains no provision explicitly depriving the Department's 2011 DCL and 2014 Q&A from being legally binding.

This Circuit has likewise found that third-party actors' independent responses to agencies' informative press releases do not carry legal consequences. *See Invention Submission Corp. v. Rogan*, 357 F.3d 452, 460 (4th Cir. 2004) (holding that an informative PTO advertising campaign warning of "inventor promotion" scams did not carry legal consequences even though a journalist could—from information contained in the releases—link the scams to a particular company and publish an expose on their activities).

The facts here, however, are materially distinct from a situation where the ***persuasive*** or ***informative*** effect of agency action induces third parties to act in a manner that harms a plaintiff. Indeed, the Department's challenged documents are more akin to the Fish and Wildlife Service's coercive biological opinion in *Bennett v. Spear*, which, as discussed above, was found to have "a powerful coercive effect", because a "federal agency that [chose] to deviate from [its] recommendations" risked criminal and civil liability for itself and its employees under the Endangered Species Act. 520 U.S. at 168, 169-70. Due to this overhanging threat of liability, agencies "rarely

[chose] to engage in conduct that the Service ha[d] concluded [wa]s likely to jeopardize the continued existence of a listed species." *Id.* at 169 (citation omitted).

Similarly here, though the department characterizes its diktats as benign, informative recommendations, universities chart their own course at their own peril. An enforcement action brought by the Department or Department of Justice, and the loss of federal funding, is always a looming concern. *See* 2011 DCL at 16 ("When conducting Title IX enforcement activities, OCR seeks to obtain voluntary compliance from recipients. When a recipient does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation."). Clearly, "defendants" Guidelines and actions indicate that Plaintiffs jeopardize their federal education funding by choosing not to comply with Defendants' Guidelines," *Texas v. United States*, 201 F.Supp.3d 810, 825 (N.D. Texas 2016), and such a loss of funds constitutes a legal consequence. *See Gill v. DOJ*, 913 F.3d 1179, 1185 (9th Cir. 2019) (holding that "eGuardian membership revocation is a legal consequence.").

D. The Totality of the Circumstances Confirms that the 2011 DCL and 2014 Q&A Were Final Agency Action

It would also be disingenuous for the Department to claim that its documents are nonfinal because the policy prescriptions contained therein are only non-dispositive ***factors*** to be considered in a totality of the circumstances analysis. In other words, the Department may argue that a university's noncompliance with any individual directive in the 2011 DCL—like the preponderance of the evidence requirement—is only a single factor to be considered amongst many others in determining compliance. On this view, because violating the preponderance of the evidence standard does not amount to a violation of Title IX in and of itself, a university remains free to implement another standard and still be found compliant with Title IX, ***if but only if*** some indeterminate number and variety of other factors also happen to weigh in its favor.

Courts have found, however, that agency guidance which highlights certain conduct determines legal consequences, even if the guidance document calls for a totality-of-the-circumstance's approach to assessing compliance. In *Mayor and City Council of Baltimore v. Trump*, 416 F.Supp.3d at 472, the State Department revised a portion of its Foreign Affairs Manual concerning the factors that consular officers were to consider in determining whether a visa applicant constituted a "public charge." Before the revisions, the manual directed consular officers to disregard an applicant or his family's receipt of "non-cash or supplemental assistance." *Id.* at 500 (citations omitted). The revised version, by contrast, advised the consular officers to consider such receipt as "part of the totality of the applicant's circumstances." *Id.* (citation omitted). And while the revised manual indicated that such receipt was a "heavily negative factor" in the analysis, *id.*, it remained only one factor amongst many. That the revision altered only one factor in a totality of the circumstances analysis—and the attendant fact "that consular officers [remained free to] deny visa applications for reasons other than the receipt of non-cash benefits"—did not "rob the FAM change of legal consequences," because it was "no longer the case that visa applicants and their families [could] use non-cash public assistance without the ***possibility*** of being deemed a public charge." *Id.* at 500-01 (emphasis added).

So too here. Even if the 2011 DCL and 2014 Q&A called for a totality-of-the-circumstances analysis—which is not at all clear—it remains the case the universities could no longer implement certain policies (like a clear-and-convincing-evidence standard) without the ***possibility*** of losing federal funds. This suffices to make the 2011 DCL and 2014 Q&A determinative of universities' legal obligations. *See Hawkes*, 136 S. Ct. at 1814 (holding that an agency action is one from which legal consequences flow where it both broadens or "narrows the field of potential ... liability").

Worse still, there is no indication that Department officials had the discretion to disregard non-compliance with the guidance documents' edicts in the course of weighing all evidence in

determining overall university Title IX compliance. *Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433, 443 (5th Cir. 2019) (noting that where a guidance document "limits [agency employees'] discretion respecting the use of certain evidence," legal consequences flow from the document). That the 2011 DCL also appears to create safe harbors from liability, which come into play where an agency implements a specific policy, *see, e.g.*, 2011 DCL at 12 ("OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so or both parties."), further indicates that it imposes legal consequences. *See Texas*, 933 F.3d at 442 ("Another indication that an agency's action binds it and thus has legal consequences or determines rights and obligations is whether the document creates safe harbors protecting private parties from adverse action"); *Hawkes*, 136 S. Ct. at 1814 (holding that an agency action is one from which legal consequences flow if it creates or denies "safe harbors" from liability for regulated parties).

E. Considering the Relief Sought, There Is No Alternative to Review by This Court

The Supreme Court has instructed that the "generous review provisions" of the APA must be given "a hospitable interpretation" such that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *Rusk v. Cort*, 369 U.S. 367, 379–380 (1962)). Of a piece with the instruction that APA's scope of review must be given a "hospitable interpretation," review is precluded under that statute only where the alternative remedy is a "special and adequate review procedure." *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988). While relief is sometimes deemed adequate "where there is a private cause of action against a third party otherwise subject to agency regulation," such a suit is only an adequate remedy under § 704 if it offers relief of the "same genre" as that provided under the APA, and if the alternative remedy is neither "doubtful [nor] limited." *El Rio Santa Cruz Neighborhood Health Ctr. v. HHS*, 396 F.3d 1265, 1272 (D.C. Cir. 2005).

In *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990), the plaintiffs sued ED's predecessor, the United States Department of Health, Education, and Welfare (HEW), for its alleged failure to meet statutory duties under Title VI to ensure federal fund recipients did not permit racial discrimination. The agency was, according to plaintiffs, less than expeditious in "conducting compliance reviews, investigations and in processing complaints." *Id.* at 745. The cause of action, however, could not go forward because the plaintiffs now had an implied right of action directly against the discriminating entities, under Title VI and IX. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979), all of which were of the same "genre" as the "default" APA remedy. *Women's Equity*, 906 F.2d at 751. The Court based this holding on the logistical and separation-of-powers concerns arising from the plaintiffs' request for "continuing, across-the-board federal court superintendence of executive enforcement." *Id.* at 747; *See also Council of and for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d 1521 (holding that third-party suits were an adequate remedy to the Office of Revenue Sharing's alleged systemic refusal to enforce a prohibition on funding discriminatory entities, even though "one nationwide suit [might have been] more effective than several" suits under the Revenue Sharing Act, 31 U.S.C. (1976 Ed.) § 1244); *Coker v. Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990) ("If other remedies are adequate, federal courts will not oversee the overseer" because "an agency choice not to enforce generally involves a complicated balancing of factors peculiarly within the agency's expertise.")

Here, by contrast, Plaintiff does not ask for an "across-the-board" federal court monitoring of agency enforcement decisions, and she also does not allege that the Department has been lackadaisical in permitting funds to be received by entities violating Title IX's nondiscrimination provisions. Rather, her challenge is to the Department's implementation of two discrete policy measures: the 2011 DCL and the 2014 Q&A. The Department's observation that "systemic lags and lapses [in enforcement] by federal monitors" do not render "suits directly against [] discriminating

entities" inadequate is therefore a red herring, because the Plaintiff's Prayer for Relief does not ask for rectification of any such "lags [or] lapses." Brief at 17 (citing *Women's Equity*, 906 F.2d at 751).

Moreover, the form of relief that Plaintiff requests in her action against the Department—a declaratory judgment that the 2011 DCL and 2014 Q&A are unlawful and an injunction against the implementation of "substantially similar" policies in the future. Complaint at 113. That relief is not of the "same genre" as the relief Plaintiff could receive from the University Defendants, which includes monetary relief against JMU actors who violated clearly established rights. *See Esch v. Yeutter*, 876 F.2d 976, 982 (D.C. Cir. 1989) (holding that the review under the APA was not precluded where the "Claims Court [presiding over the purportedly adequate alternative claims] lack[ed] equitable jurisdiction to award injunctive relief of the type appellees" requested). Indeed, even the authorities the Department cites acknowledged that "situation-specific litigation" against discriminating entities might not constitute an adequate alternative remedy where the plaintiffs challenge a specific policy rather than an enforcement decision. *Women's Equity*, 906 F.2d 742, 751 (D.C. Cir. 1990); *see also id.* at n. 13 ("We note again that plaintiffs no longer complain of a conscious ***policy*** of nonenforcement") (emphasis added). It would also be irrational to imagine that Plaintiff can achieve adequate relief where the Department was ***the fountainhead*** of injury; JMU did not magically wake up one day and say we have to convene a task force to revise our Title IX policies. Instead, JMU was coerced into taking that step and put on a specific list of universities with, in the view of ED, a defective Title IX process—defective, ironically, because it provided ***too much process*** to the accused. The drafters of the Due Process Clause would be quite surprised by the notion that one could protect liberty and property interests from one-sided and arbitrary deprivations "too much."

In fact, even funding decisions as to specific entities—rather than the way an agency conducts enforcement overall—may be reviewable. *See Id.* at n.9 ("Recipient-specific suits against the federal funding agency are not equivalent to ... 'a nationwide suit seeking grand scale relief' in the form of

across-the-board supervision of the funding and enforcement practices of [an] agency") (citation omitted); *but see Washington Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993) (holding that the availability of a right of action against private entities receiving funds under Title VI precluded an APA claim against the Department for its continued funding of certain institutions that offered minority-only scholarships).

III. PLAINTIFF'S CLAIMS ARE NOT TIME BARRED

Defendants' final argument for dismissal of Plaintiff's Complaint is that her challenges to the 2011 DCL and 2014 Q&A are time-barred because "both guidance documents were issued more than six years ago[,]" exceeding the period allowed by the statute of limitations for civil actions against the United States pursuant to 28 U.S.C. § 2401(a). Defendants' Brief at 17. To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (internal quotations omitted). More specifically, "[a] motion to dismiss based on … the statute of limitations should not be granted unless the pleadings construed in the light most favorable to a plaintiff show as a matter of law that the applicable period for filing suit has expired." *Harrison v. Owens*, 611 F. App'x 151, 152 (4th Cir. 2015). Taking Plaintiff's Reid's factual statements as true, ED's statute of limitations argument (as a backup to its other arguments) fails because if the 2011 DCL and the 2014 Q&A were final agency actions, the six-year statute of limitations did not begin to run in 2011 and 2014, respectively, since they were not published in the ***Federal Register***, and thus, did not give sufficient legal notice to the Plaintiff.

Moreover, pre-enforcement review of the *de facto* regulations that the 2011 DCL and 2014 Q&A represent could not remotely have been obtained. Any plaintiff not willing to aver that they were affirmatively contemplating engaging in sexual harassment would have been laughed out of court (and how such a plaintiff could show that it would suffer ***cognizable hardship*** by not being able to

engage in blameworthy conduct is a separate mystery). Article III Judges would have uniformly said that a preenforcement suit by someone who could not show that they were likely to run afoul of Title IX was unripe and could not meet the standing requirements. There are millions of just college students in the United States. Obviously, the 2011 and 2014 actions by ED could only be reviewed once they were ingredients in the mix of legal and factual causes of Ms. Reid's injuries or those facing similar plights.

According to 28 U.S.C. § 2401(a): "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The question is when Plaintiff's right of action first accrued. In *United States v. Kubrick*, 444 U.S. 111, 117 (1979), the Supreme Court opined that sufficient legal notice is key to the enforcement of statutes of limitations, stating that statutes of limitations represent "a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time ...." The Fourth Circuit held that "[u]nder federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995). The Fourth Circuit further held that "[a] cause of action governed by § 2401(a) accrues or begins to run at the time of 'final agency action.'" *See Hire Ord. Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir. 2012). More specifically, when plaintiff brings a facial challenge to an agency action, "the limitations period begins to run when the agency publishes the regulation [in the Federal Register]." *Id.* (quoting *Dunn–McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (the original Fifth Circuit quotation includes the "in the Federal Register" phrase)).

Defendants argue that if their other defenses fail, that is, if the 2011 DCL and the 2014 Q&A were indeed final agency actions, the six-year state of limitations found in 28 U.S.C. § 2401(a) will nevertheless time bar Plaintiff's claims. But that last-ditch-refuge argument cannot stand. Given that

the 2011 DCL and the 2014 Q&A were, in fact, final agency actions (as explained above), the limitations period would normally have begun to run when the Department published them in the Federal Register. Because the Department never subjected the legally binding 2011 DCL and 2014 Q&A to the proper APA rulemaking process by providing notice and accepting public comment, and thus never published them in the Federal Register as rules, the accrual clock for these two agency actions never started. The 2011 DCL and the 2014 Q&A were legally binding documents instead just released by ED to the public disguised as agency guidance documents.

Additionally, as noted above, the statute of limitations did not begin to run until Plaintiff Reid possessed sufficient facts about the harm done ***to her*** by the Department's actions. And because the Department relies on the same reasoning to argue that Plaintiff Reid's constitutional claim is time-barred by the six-year statute of limitations period, this argument also fails, and Plaintiff's constitutional claim is not time-barred either.

The Department's claim that Plaintiff's challenge to the 2011 DCL and the 2014 Q&A are time-barred fails for the reasons set forth above. Defendants failed to comply with the APA's rulemaking and publication requirements, and Ms. Reid could not have successfully sought preenforcement judicial review because she couldn't possibly have anticipated that her ex-girlfriend Ms. Lese would unleash such a baseless set of allegations against her (as Plaintiff more than adequately pleaded in the Complaint). Accordingly, the statute of limitations did not begin to run as to Plaintiff Reid until she was personally impacted by Defendants' actions.

CONCLUSION

For the reasons set forth above, the Department's Motion to Dismiss should be denied.

July 30, 2021

Respectfully,

/s/ Harriet M. Hageman
Harriet M. Hageman (Admitted *Pro Hac Vice*)
John J. Vecchione (VSB No. 73828)
Attorneys for Plaintiff
New Civil Liberties Alliance
1225 19th St. N.W., Suite 450
Washington, D.C. 20036
Telephone: (202) 869-5210
Facsimile: (202) 869-5238
Harriet.hageman@ncla.legal
John.Vecchione@ncla.legal

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on 30th day of July 2021, a copy of PLAINTFF'S RESPONSE TO DEPARTMENT OF EDUCATION'S AND SECRETARY CARDONA'S MOTION TO DISMISS was filed with the Court's CM/ECF system, which will send notice of electronic filing to the counsel of record.

/s/ Harriet M. Hageman
Harriet M. Hageman