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22 **pro hac vice motions forthcoming*

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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1 9. Without adequate justification or explanation, the Department undermined the
2 existing sexual harassment framework by changing the “what,” “where,” “when,” and “how” of
3 its prior interpretations of Title IX.

4 10. *What:* The 2020 Regulations constrict what misconduct constitutes unlawful
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1 at <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (“2001 Guidance”) – and a
2 series of others issued by both Democratic and Republic Administrations, including:

3 *Sexual Harassment: It’s Not Academic* (1988),

4 <https://files.eric.ed.gov/fulltext/ED330265.pdf>.

5 Dear Colleague Letter (Jan. 25, 2006),

6 <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

7 Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010),

8 <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

9 Dear Colleague Letter on Sexual Violence encac C.4n/lett(x)-10 (ua)4 (l)-2 (V)2 (i)-2 (ol)-2 (e)4
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1 words, sufficiently serious that it adversely affects a student's ability to participate
2 in or benefit from the school's program;

3 (2) schools are required to address all harassing conduct that creates a hostile
4 environment in an education program or activity, even if the conduct occurs
5 outside an education program or activity;

6
7 (3) schools are responsible for any sexual harassment of students that they knew or,
8 in the exercise of reasonable care, should have known about; and

9 (4) schools must take prompt and effective action to end the unlawful harassment,
10 prevent it from recurring, and remedy its effects.

11 29. Other than the definition of sexual harassment, all these requirements also applied
12 to all other forms of sex discrimination prohibited by Title IX, such as guidance counselors
13 steering students of different sexes to different classes, teachers grading students more or less
14 harshly on the basis of sex, or retaliation for raising concerns of sex discrimination.
15

16 30. All these requirements were also consistent with the Department's Guidances
17 concerning schools' responsibilities under Title VI of the Civil Rights Act of 1964, Section 504
18 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990 to
19 address race- and disability-based harassment, including:
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21 Racial Incidents and Harassment Against Students at Educational Institutions;

22 Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 10, 1994),

23 <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

24 Dear Colleague Letter on Prohibited Disability Harassment (July 25, 2000),
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1 31. The Department’s harassment Guidances around race and disability consistently
2 rejected the view that the standards adopted by courts to determine whether a private damages
3 action could be brought against a school should be incorporated into the administrative
4 enforcement process it oversees.

5 32. The Department continues to apply its traditional standards to students’ claims of
6 race and disability harassment. But, after the Department’s 2020 Regulations, the same is not
7 true for sexual harassment.
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9 33. Without adequate justification or explanation, the Department’s 2020 Regulations
10 – under then-Secretary Betsy DeVos – reduce protections to students from sexual harassment
11 with regard to each of these elements by narrowly redefining “sexual harassment,” “program or
12 activity,” and “notice,” and limiting its examination of whether schools had met their remedial
13 obligations.
14

15 34. Indeed, the Department acknowledged in the preamble to the 2020 Regulations
16 that schools under the new Regulations will be required to engage in fewer investigations of
17 sexual harassment, and thus will find fewer violations and provide fewer remedies. This was
18 viewed as feature, not a flaw, of the Regulations.

19 35. Although the Department refused to acknowledge it, the inevitable result of fewer
20 investigations and fewer remedies will be an increase in the amount of sexual harassment, as
21 would-be harassers will no longer be deterred by fear of being caught and disciplined, or have
22 the opportunity to learn to change their behavior thanks to an educational intervention. Yet the
23 Department never grappled with the tradeoff between increased sexual harassment and the
24 purported benefits it attributed to the Regulations.
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26 36. With the changes adopted by the 2020 Regulations, the Department provides less
27 protection to students who experience sexual harassment than to students who experience other
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1 forms of sex discrimination prohibited under Title IX, as well as race discrimination (including
2 harassment) prohibited under Title VI and disability discrimination (including harassment)
3 prohibited under the Rehabilitation Act and the Americans with Disabilities Act. The
4 Department offered no justification or evidence that would support a weaker standard for sexual
5 harassment relative to all other forms of discrimination and harassment.
6

7 *Limiting what constitutes sexual harassment under Title IX.*

8 37. The 2020 Regulations adopted a novel and narrow definition of “sexual
9 harassment” that is inconsistent with Title IX’s text and purpose, and excludes multiple forms of
10 misconduct that interfere with equal access to educational opportunities.

11 38. The 2020 Regulations define sexual harassment as conduct on the basis of sex
12 that is unwelcome conduct determined by a reasonable person to be so “severe, pervasive, *and*
13 objectively offensive that it effectively denies a person equal access to the recipient’s education
14 program or activity.” 34 C.F.R. 106.30 (emphasis added).
15

16 39. Without adequate justification or explanation, this new definition substantially
17 departs from the traditional definition for sexual harassment (and race- and disability-based
18 harassment) that the Department has instructed schools to apply for more than two decades.

19 40. The Department previously defined unlawful sexual harassment as unwelcome
20 conduct of a sexual nature that “is sufficiently severe, persistent, *or* pervasive to limit a student’s
21 ability to participate in or benefit from an education program or activity.” (emphasis added).
22

23 41. Under this traditional definition, the Department applied a sliding scale: a single
24 or isolated incident of sexual harassment could, if sufficiently severe, constitute unlawful sexual
25 harassment without being repetitive or ongoing in nature, whereas less severe but ongoing or
26 pervasive conduct that limited a student was also considered to be unlawful harassment
27 prohibited by Title IX.
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1 42. Under the 2020 Regulations, however, a school is no longer required to
2 investigate and remedy an egregious but isolated incident of sexual harassment under Title IX
3 because such harassment is no longer sufficiently “pervasive” to fall within the Rule’s narrowed
4 definition of sexual harassment. Misconduct such as indecent exposure, a request for sexual
5 favors, some kinds of unwanted touching, and sharing of sexual images and videos are likely all
6 excluded under the 2020 Regulations. Yet this conduct can produce the very exclusionary effects
7 that the text of Title IX proscribes.
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9 43. Conversely, misconduct that is pervasive but not independently severe – such as
10 some persistent sexual comments about a student’s body – would likewise be excluded. This
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Injuries Caused by the 2020 Regulations

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2 65. While each of the challenged 2020 Regulations on its own is contrary to the text
3 and purpose of Title IX and, without adequate justification or explanation, at odds with the
4 Department’s traditional interpretation, their cumulative effect will lead to students experiencing
5 more sexual harassment and receiving fewer remedies.
6

7 66. Under these provisions, schools are not responsible for responding to sexual
8 harassment unless the sexual harassment qualifies as “severe, pervasive, and objectively
9 offensive;” the harassment takes place on school grounds (or in an education program),
10 regardless of where its effect is felt; and a school employee has actual knowledge of the
11 harassment. Even then, students will no longer be entitled to the full range of remedies that they
12 and their classmates may need to continue their education free from discrimination. And the
13 school may act with indifference to the harassment, as long as it avoids being “deliberately
14 indifferent.”
15

16 67. The 2020 Regulations vastly change the incentives of schools to prioritize
17 preventing and deterring sexual harassment. Under the challenged provisions, a school’s failure
18 to effectively prevent and promptly respond to sexual harassment will be much less likely to
19 carry any consequences. In fact, a school may be incentivized to avoid learning about the
20 harassment its students experience, in order to avoid triggering any obligations under the
21 Regulations.
22

23 68. The 2020 Regulations also discourage students from filing complaints with their
24 schools in the first place by creating uncertainty about what conduct will trigger a school’s
25 obligation under Title IX to investigate and respond to sexual harassment.

26 69. The Department itself acknowledged that the 2020 Regulations would reduce
27 investigations of sexual harassment by 50% in K-12 schools. But nowhere does the Department
28

1 the Regulations deny WSU the opportunity of the Department’s Office for Civil Rights to
2 investigate and resolve WSU’s Title IX complaints against its school district.

3 76. The Office for Civil Rights’ regulations require it to investigate any
4 administrative complaint it receives from a member of the public that indicates discrimination.
5 The regulations provide that a “responsible Department official or his designee *will* make a
6 prompt investigation whenever a ... complaint ... indicates a possible failure to comply with this
7 part. 34 C.F.R. 100.7(c) (emphasis added); *see* 34 C.F.R. 106.71 (Title IX regulation
8 incorporating the procedural provisions of the Department’s Title VI regulations). If the
9 investigation “indicates a failure to comply” with the regulations, the Office for Civil Rights
10 “will so inform the recipient and the matter will be resolved by informal means whenever
11 possible.” 34 C.F.R. 106.7(c).
12

13 77. In February 2021, WSU filed an administrative complaint against Berkeley
14 Unified School District with the Department’s Office for Civil Rights. That complaint alleged
15 violations of Title IX that, under the 2020 Regulations, are no longer cognizable. The allegations
16 include:
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1 which small groups or dyads of students converse on video without a teacher
2 present.

3 Failing to investigate and address harassment that occurs off campus but impacts
4 survivors' education, including sexual assaults committed by students with whom
5 the victims share classes and, during COVID-19, harassing messages sent and
6 received through students' personal phones while students share online
7 classrooms.

8 Failing at times to respond to sexual harassment in a prompt and effective
9 manner, and instead, for example, tolerating the open presence of an informal
10 club dedicated to sexually harassing students and placing the burden on victims to
11 avoid contact with their harassers and even transfer out of shared classes,
12 especially when the underlying harassment occurred off campus.

13 Failing to take action that addresses all the persons adversely affected by sexual occ-if 1li t5 (a
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CLAIM

Violations of Administrative Procedure Act, 5 U.S.C. § 706(2)(A) & (C)

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3 83. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as
4 though fully set forth here.

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6 84. The 2020 Regulations are not in accordance with law and short of statutory right
7 because the Department adopted provisions that are contrary to the text and purpose of Title IX.

8 85. The 2020 Regulations are arbitrary and capricious because the Department
9 changed its longstanding prior interpretations without sufficient justification for the change and,
10 in some instances, without displaying awareness that it was changing its view.

11 86. The 2020 Regulations are arbitrary and capricious because the Department failed
12 to consider important aspects of the problem, including that the Regulations discourage students
13 from filing complaints about sexual harassment with their schools and discourage schools from
14 learning about sexual harassment experienced by their students.

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16 87. The 2020 Regulations are arbitrary and capricious because, contrary to the
17 evidence and in conflict with its own rationale about the effect of the regulations on school and
18 student behavior, the Department refused to find that the provisions would increase the amount
19 of sexual harassment that students would experience. The Department thus disregarded a factor
20 that Title IX itself made highly relevant and failed to consider an important aspect of the
21 problem.

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23 88. The 2020 Regulations are arbitrary and capricious because, without a satisfactory
24 explanation, the Department imposed special limitations, procedures, and obstacles for sexual
25 harassment claims that do not apply to any other sex discrimination claims under Title IX or to
26 race- and disability-based discrimination (including harassment) claims under Title VI, the
27 Rehabilitation Act, and the Americans with Disabilities Act.
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