Plaintiffs John Doe[1] and Oklahoma Wesleyan University (OKWU), by and through undersigned counsel, file this amended complaint for violations of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(2)(A), (C) and (D). In support of this amended complaint, Plaintiffs state as follows:

INTRODUCTION

1. For far too long, the problem of sexual assault on college campuses, like the problem of sexual assault more generally, did not receive the attention it merited. Now, hardly a week goes by where the problem of campus sexual assault does not feature prominently in the mainstream media. That is not a bad thing; the war against sexual assault must be waged with the utmost seriousness. But "[t]he process of eliminating sexual harassment must go forward with recognition of the rights of all involved and witho

must be imposed no matter its lawfulness, OCR, on April 4, 2011, bucked a long-standing practice of cooperative consultation with educational institutions, like Plaintiff OKWU, and affected individuals and imposed a dramatically new sexual misconduct investigatory regime upon colleges and universities. It has also taken the unprecedented step of publicly identifying those schools it is currently investigating for alleged deficiencies in the fight against sexual assault and has added to that list of schools with astonishing speed. These efforts have left schools scrambling to determine how to abide by OCR's new requirements while simultaneously affording a fair process to the students in their care, both accuser and accused. A growing number of innocent students have been trampled in the wake of these new requirements, found responsible for serious charges based often on the flimsiest of evidence. Plaintiff John Doe is among them.

3. OCR's goal is laudable in the highest degree; its attempt to get there at any cost, disturbing to the same degree. The sweeping changes that OCR has imposed upon the nation's colleges and universities—in particular, its requirement that they use a "preponderance of the evidence" standard of proof, the lowest such standard known to the American judicial system—exceed any authority delegated to it to enforce Title IX. And those changes, despite being treated, in both theory and practice, as substantive rules carrying the force of law, were promulgated by OCR without subjecting them to notice and comment by the public. OCR has taken a "shoot first, ask questions later" approach, and it has managed to empty more than a few magazines before being challenged about whether it is even allowed to do so. It has also violated three separate provisions of the Administrative Procedure Act ("APA"). Plaintiff John Doe is among the wounded, and Plaintiff OKWU fears its students may one day be, too. As people do when the tides of the times sweep too broadly, Plaintiffs seek refuge in the courts.

PARTIES

4. Plaintiff John Doe is a citizen and resident of the Commonwealth of Virginia. In the fall of 2012, he enrolled in the J.D. program at the University of Virginia ("UVA").

5. Plaintiff Oklahoma Wesleyan University is a domestic non-profit corporation incorporated in, and with its principal place of business in, the State of Oklahoma. It receives federal funding in the form of federal financial aid provided to its students.

6. Defendant Catherine E. Lhamon is the Assistant Secretary for Civil Rights in the Department of Education's Office for Civil Rights ("OCR"). She is the head of the Office for Civil Rights. She is sued in her official capacity.

7. Defendant Office for Civil Rights, United States Department of Education is an office within the United States Department of Education, an agency of the United States. OCR is

JURISDICTION AND VENUE

assistance" when "there has been an express finding on the record, after opportunity for a hearing, of a failure to comply with" Title IX. 20 U.S.C. § 1682.

15. The overwhelming majority of colleges and universities in the United States receive federal funding in some form, including federal funding from the Department of Education. The federal government annually gives colleges and universities tens of billions of dollars for research and development and approximately $100 billion in the form of federal student loans.

16.

Guidance: Peer Sexual Harassment" (Peer Guidance) and inviting comments on the document. See 61 FR 42728.

20. On October 4, 1996, the Assistant Secretary published in the Federal Register a request for comments on a document entitled, "Sexual Harassment Guidance: Harassment of Students by School Employees" (Employee Guidance). See 61 FR 52172.

21. Both notices stated that the guidance documents reflected longstanding OCR policy and practice and invited comments and recommendations regarding their clarity and completeness.

22. OCR received approximately 70 comments on the Peer Guidance and 10 comments on the Employee Guidance. 62 FR 12035.

23. OCR combined the two guidance documents into one and published, as a final document, its "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" on March 13, 1997 ("the 1997 Guidance"). See 62 FR 12034–12046.

24. The 1997 Guidance contained a lengthy section titled, "Prompt and Equitable Grievance Procedures" that spelled out the requirements that any school must satisfy in its investigation and adjudication of allegations of sexual misconduct. See 62 FR 12044–45. Grievance procedures "must" apply to claims "filed by students against school employees, other students, or third parties," 62 FR 12044, and a school "must designate at least one employee to coordinate its efforts to comply with and carry out its Title IX responsibilities," 62 FR 12045. Schools may allow for informal mechanisms of resolution, but not in cases of "alleged sexual assaults." Id. Schools have a "duty to respond promptly" even when there is a parallel police investigation, and "because legal standards for criminal conduct are different" than the standard

Procedures" mirrored, almost word for word, that same section from the 1997 Guidance. Like the 1997 Guidance, it lists the same six elements it will consider in determining whether a school's grievance procedures are prompt and equitable and ultimately leaves schools with the flexibility to conform their procedures to local needs.

30. Also like the 1997 Guidance, it does not include the preponderance of the evidence standard, or any evidentiary standard, among those six elements, nor does it require any particular evidentiary standard anywhere else.

The 2011 Dear Colleague Letter

31. On April 4, 2011, OCR published a "Dear Colleague Letter" on sexual harassment ("2011 DCL."). Though it styled itself a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, see 72 Fed. Reg. 3432, and claimed that it "does not add requirements to applicable law," it acknowledged elsewhere that it "supplements the

34. The 2011 DCL expressly requires, as part of schools' mandated efforts to publish and implement procedures for the "prompt and equitable resolution" of sexual misconduct claims, that schools adopt a preponderance of the evidence standard in their investigations of allegations of sexual misconduct: "OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints." The 2011 DCL gives schools no leeway in that regard (with emphases 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 (, it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (, 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

right to discovery, the right to the protections of the rules of evidence, or the right to cross-examine other parties), had to be transposed into campus sexual misconduct investigations.

37. The 2011 DCL, in fact, "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 have that right.

The 2014 "Questions and Answers on Title IX"

38. On April 29, 2014, OCR published a document signed by Defendant Lhamon titled, "Questions and Answers on Title IX and Sexual Violence" ("the 2014 Questions"). That document, like the 2011 DCL, styled itself a "significant guidance document" that added no new requirements to applicable law.

39. The 2014 Questions confirmed, beyond any shadow of a doubt, that OCR understood schools' use of a preponderance of the evidence standard to be mandatory. In a section titled "Title IX Procedural Requirements," it names preponderance of the evidence as "the evidentiary standard that ***must*** be used . . . in resolving a complaint[.]" (Emphasis added.)

40. The 2014 Questions confirm that, in OCR's view, the required use of the preponderance of the evidence standard is grounded in Title IX's requirement that grievance procedures provide for "prompt and equitable resolution" of allegations, stating that "any

determine whether the conduct occurred, but Title IX does not necessarily require a hearing. Furthermore, neither Title IX nor the DCL specifies who should conduct the investigation." (Emphasis added.) A school's flexibility in structuring its investigative process, however, is expressly understood not to include the ability to select an evidentiary standard:

> While a school has flexibility in how it structures the investigative process, for Title IX purposes, a school must give the complainant any rights that it gives to the alleged perpetrator. A balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions. Specifically: * * * The school must use a preponderance-of-the-evidence (, more likely than not) standard in any Title IX proceedings, including any fact-finding and hearings.

42. Like the 2011 DCL, the 2014 Questions mandate that a school, should it delay a Title IX investigation during a parallel criminal investigation, resume its work "once it learns that the police department has completed its evidence gathering stage of the criminal investigation."

B. OCR's Unprecedented Actions to Enforce the 2011 DCL

43. OCR has taken unprecedented steps to ensure that the mandatory requirements imposed by the 2011 DCL be adopted by schools, even though those requirements were never subjected to notice and comment rulemaking and thus, despite being styled as mandatory, do not carry the force of law. OCR's enforcement has been so aggressive that the overwhelming majority of schools have adopted even those elements of the 2011 DCL that are not expressly styled as mandatory but for which OCR has expressed a clear preference.

44. Just days after promulgating the 2014 Questions, OCR took the unprecedented step of publicly identifying those 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's list was first published, there were 55 colleges and universities on that list.

45. OCR has set an extraordinarily low threshold for adding schools to its very public list. Schools are typically added to the list upon OCR's receipt of just a single complaint, even before the accused school has been given a chance to respond to the allegation.

46. Not surprisingly, therefore, the number of schools on OCR's list has rapidly grown. By October 2014, the number of colleges and universities on OCR's public list had grown to 85 schools. In January 2015, it had reached 94 schools. In April, it had grown to 106 schools. By June 16, 2016, there were195 postsecondary institutions on that list.

47. As the 2011 DCL itself acknowledged, some schools at the time the 2011 DCL was promulgated were using evidentiary standards other than "preponderance of the evidence," in apparent compliance with the 2001 Guidance. At least 24 major universities, including Auburn University, Columbia University, Cornell University, Duke University, Tulane University, UVA, and West Virginia University used a "clear and convincing evidence" standard. Princeton University used a similar "clear and persuasive evidence" standard and the New Jersey Institute of Technology used a "reasonable certainty" standard.

48. Consistent with its dictate that only a preponderance of the evidence standard could allow for the "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 whatever evidentiary standard they had been using until that time with the preponderance of the evidence standard.

49. Princeton University, for instance, continued to use a "clear and persuasive evidence" standard after publication of the 2011 DCL. OCR informed Princeton, in a letter

dated November 5, 2014, that its policy "did not provide for an adequate, reliable and impartial investigation" of sexual misconduct claims because, among other things, it "did not use the preponderance of the evidence standard." In a "Resolution Agreement" accompanying that letter, OCR required Princeton to adopt "the proper standard of review of allegations of sexual

these comply with the

requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt."

57. Consistent with the 2011 DCL's mandate that schools apply a preponderance of the evidence standard in sexual misconduct proceedings, UVA adopted a "preponderance of the evidence" standard for such proceedings in 2011, after promulgation of the 2011 DCL.

58. On March 6, 2015, a UVA law student, Jane Roe, filed a sexual misconduct complaint against Mr. Doe based on an incident that had allegedly taken place on August 23, 2013.

59. Ms. Roe alleged that due to alcohol consumption, she could not effectively consent to sexual activity on August 23, 2013. Mr.

proof" available—preponderance of the evidence—which is satisfied whenever the evidence is

70. In June of 2016, Mr. Doe appeared before the Virginia State Bar's character and fitness board. On June 20, he was approved by that board for the practice of law in Virginia. He was

opportunity to discuss the scope of the action." Those corrective actions could impede, or destroy altogether, John Doe's ability to practice law.

D. OKWU's Ability to Afford Its Students Fundamental Fairness After the 2011 DCL

74. Students are not the only ones affected by the 2011 DCL's imposition of a preponderance of the evidence standard. Educational institutions, which are directly regulated by the Education Department, have an interest in selecting evidentiary standards tailored to their unique characteristics, history, and mission.

75. Plaintiff OKWU is a small school. It currently enrolls approximately 1,700 students.

76.

80. Plaintiff OKWU is not in compliance with the 2011 DCL because, , it does not currently apply a "preponderance of the evidence" standard in sexual misconduct proceedings.

81. OKWU does not wish to apply the "preponderance of the evidence" standard required by the 2011 DCL in sexual misconduct proceedings. Yet OKWU is acutely aware of the steps OCR has taken to impose the requirements of the 2011 DCL. OKWU reasonably fears that it is just a matter of time before OCR threatens it with enforcement action.

82. To sufficiently protect the rights of both accused students and their accusers, OKWU would like the freedom to make "clear and convincing evidence," rather than "preponderance of the evidence," the burden of proof for sexual misconduct proceedings on its campus.

83. OKWU would also like the freedom to let both the accuser and the accused cross-examine each other in any such proceedings.

84. Under OCR's 2001 Guidance, which was promulgated pursuant to the APA's notice and comment requirements, Plaintiff OKWU would be free to select the combination of evidentiary standard and procedural protections that best fit with, among other things, its size, student population, and identity as a religious school with a historical commitment to fundamental fairness.

85. As noted above, however, OCR has repeatedly cited the 2011 DCL as mandating "preponderance of the evidence" as the burden of proof in sexual misconduct proceedings and also strongly suggested that schools may not permit the parties in such proceedings to cross-examine each other.

86. OKWU therefore seeks an order vacating OCR's mandated use of the "preponderance of the evidence" standard in sexual misconduct proceedings.

COUNT I – VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
Action Pursuant to Unlawful Procedure, 5 U.S.C. § 706(2)(D)

87. Plaintiffs incorporate by reference the preceding paragraphs as though they were fully set forth herein.

88. Promulgation of the 2011 DCL constituted "rule making" within the meaning of the APA, 5 U.S.C. § 551(5), and was subject to the notice and comment requirements of 5 U.S.C. § 553. The 2011 DCL imposed substantive requirements upon regulated entities above and beyond those required by the ED before then. Under the 2011 DCL, schools receiving federal financial assistance are required, among other things, to use a preponderance of the evidence standard in sexual misconduct disciplinary proceedings and to resume sexual misconduct investigations before any criminal prosecution is completed.

89.

COUNT II – VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

A

enforcing federal civil rights laws differ from campus sexual misconduct proceedings in numerous material ways. Parties to such proceedings are guaranteed myriad tools with which to defend themselves and/or prove their claims, including the right to the full panoply of discovery tools to gather evidence, the protections of the rules of evidence in the admission of that evidence at trial, and the right to cross-examine other parties and witnesses.

106. In campus sexual misconduct disciplinary hearings, by contrast, respondents are guaranteed none of these things, including the right to obtain discovery from the complainant or third parties, and the rules of evidence do not apply.

107.

"prompt and equitable resolution" requirement mandates be transposed to campus sexual misconduct disciplinary proceedings.

111. Because there are many material differences between civil lawsuits and campus sexual misconduct disciplinary proceedings, it was arbitrary, capricious, and an abuse of discretion—and certainly not "equitable"—for OCR to impose a preponderance of the evidence standard on campus disciplinary sexual misconduct proceedings, particularly while simultaneously discouraging in theory, and forbidding in practice, the parties' right to directly cross-examine each other.

b.