DISTRICT OF COLUMBIA

JOHN DOE and
OKLAHOMA WESLEYAN UNIVERSITY,

Plaintiffs,

v.

CATHERINE E. LHAMON, in her official capacity as Assistant Secretary for Civil Rights, United States Department of Education, *et al.*,

Defendants.

Case No. 1:16-cv-01158 (RC)

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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September 1, 2016

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CONSTITUTION, STATUTES, AND RULES

INTRODUCTION

If Plaintiffs' claims were properly before the Court and they are not Defendants would show them to be meritless. Title IX prohibits sex discrimination in Federally funded education progr

561 (1992). Doe claims that he was harmed by the 2011 DCL when, after a disciplinary hearing in January 2016, an adjudicator for the University of Virginia ("University" or "UVA") found by a preponderance of the evidence that Doe committed an act of sexual violence against a fellow law student. The University allowed Doe to graduate, but banned him from UVA property and activities and required him to undergo counseling, which he has since completed. A decision in Doe's favor would change none of that. Holding that OCR violated the APA in issuing the 2011 DCL would not disturb UVA's finding that Doe committed an act of sexual violence or relieve Doe from the sanctions that UVA deemed appropriate in light of that finding, neither of which Doe challenges here. And there is no indication that Doe ever will be affected by the challenged guidance again if he ever was.

OKWU fares no better because it cannot show that its challenge to the 2011 DCL satisfies the constitutional and prudential requirements for ripeness. The constitutional ripeness requirement encompasses the requirements of Article III standing. *See, e.g.*, *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427–28 (D.C. Cir. 1996). OKWU cannot demonstrate constitutional ripeness because it identifies no actual or imminent enforcement action in which the guidance in the 2011 DCL has been or will be applied to it. Nor is it evident that the standard of proof and cross-examination issues would be focal points in any future enforcement action against OKWU. The Amended Complaint does not reveal whether OKWU uses any procedure(a)4(i)-2(nqli)-2(n v)4((a)4(i1(not)-2(i1(ng((t)-2(e)4()-2(i).)]TJB)]TJB)]TJ2(i)-d)-

to the 2011 DCL but to federal requirements that predate the 2011 DCL and that OKWU does not challenge.

OKWU's challenge to the 2011 DCL is also prudentially unripe, because the issues are not presently "fit[] . . . for judicial decision" and because postponing judicial review would not cause OKWU "hardship." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). Waiting until Defendants initiate and complete any administrative proceedings against OKWU would allow development of a factual record concerning OKWU's handling of complaints of student sexual violence; permit Defendants to bring their administrative expertise to bear; reduce the likelihood of piecemeal litigation; and make it unnecessary for the Court to address one or

funds ("recipients") directly. See Cannon v. Univ. of Chi., 441 U.S. 677 (1979). Second, the Department is authorized to issue rules, regulations, and orders to effectuate Title IX, including by initiating proceedings to terminate Federal funding if voluntary compliance cannot be secured, or to enforce compliance by any other means authorized by law. 20 U.S.C. § 1682.

In 1975, the Department's predecessor (the Department of Health, Education, and Welfare ("HEW")) promulgated and President Ford approved regulations to effectuate Title IX. Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Sex, 40 Fed. Reg. 24,128 (June 4, 1975). Those regulations remain in effect today, subject to amendments not relevant here. See 34 C.F.R.[2] pt. 106.

Among other things, the regulations incorporate Title IX's nondiscrimination mandate, id. § 106.31(a), identify specific actions that constitute discrimination, id. § 106.31(b), and require assurances from recipients that their programs and activities comply with regulatory requirements, id. § 106.4(a). Recipients found to have discriminated on the basis of sex must "take such remedial action as the Assistant Secretary [for Civil Rights] deems necessary to overcome the effects of such discrimination." Id. § 106.3(a).

The regulations also require recipients to establish procedures for investigating and resolving complaints alleging violations of Title IX. Each recipient must "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities" under the regulations, "including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part." Id. § 106.8(a) (emphasis added). In addition, each recipient must "adopt and publish

[2] HEW's Title IX functions were transferred to the Department in 1979, leading to recodification of the regulations. See New Haven Bd. of Educ. v. Bell, 456 U.S. 512, 516 nn.4–5 (1982).

grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." Id. § 106.8(b) (emphasis added).

Title IX and the Department's implementing regulations together set forth the procedures for Department enforcement actions. See 20 U.S.C. § 1682; 34 C.F.R. § 106.71 (incorporating by reference the procedures applicable under Title VI of the Civil Rights Act of 1964, located at 34 C.F.R. §§ 100.6–.11). Prior to any enforcement action, the Department is required to seek voluntary compliance. See 20 U.S.C. § 1682; 34 C.F.R. § 100.8(a), (c). If voluntary compliance cannot be obtained and the Department were to initiate an enforcement action, the Department would provide the recipient with notice and the opportunity for a formal administrative hearing before a hearing examiner. See 34 C.F.R. §§ 100.8(c), 100.9. The hearing examiner would either issue an initial decision, from which exceptions could be taken to a reviewing authority (the Secretary or another authority designated by the Secretary, id. § 100.13(d)) or certify the record for decision by the reviewing authority. See id. § 100.10; [illegible]

environment. See OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 2001) ("2001 Guidance"), www.ed.gov/ocr/docs/shguide.pdf; Davis, 526 U.S. at 638–54. Although their focus was on sexual harassment more broadly, the 1997 Guidance and 2001 Guidance both contemplated that cases of sexual assault would proceed through schools' Title IX grievance procedures. See 1997 Guidance, 62 Fed. Reg. at 12,043, 12,045 (specifically addressing schools' responses to allegations of sexual assault); 2001 Guidance at 16, 21 (same).

On April 4, 2011, OCR issued the 2011 DCL to "supplement[] the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence." Ex. 1, at 2.[3] The 2011 DCL explicitly "does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal3(e)-6(d L(w)2(hdd r)2.9(e)4.1(qui)-2

The school investigated and adjudicated the sexual misconduct complaint against Doe, withholding his degree in the interim. See id. ¶¶ 60–61. On January 20, 2016, a three-hour hearing was held before an adjudicator, who was a retired justice of the Supreme Court of Pennsylvania. Id. ¶¶ 62–63. Applying a preponderance of the evidence standard, id. ¶ 63, the adjudicator found it "more likely than not" that Doe had "not properly obtained 'effective consent' from [the complainant] given her intoxication," id. ¶ 65.

According to the Amended Complaint, the adjudicator explained that the "closeness" of the case would be r(l)-2pf -0.004 Tc 0.1642 -2.id [(t226)Tj ( )tora9T("-15.47 -C)-3(om)(om)(4(a)42(o

Church, id. ¶ 77, and that its code of conduct prohibits engaging in premarital or extramarital sex (whether or not consensual) and drinking alcohol, id. ¶ 79.

The Amended Complaint does not indicate that OCR has taken any action against OKWU with respect to the 2011 DCL. Nonetheless, OKWU alleges that it "reasonably fears that it is just a matter of time before OCR threatens it with enforcement action," id. ¶ 81, and that "its students may one day" be "wounded" by the 2011 DCL, id. ¶

Everett Piper, President, OKWU, This Is Not a Police State, It's a University (May 2, 2016) ("May 2016 Web Post"), http://www.okwu.edu/blog/2016/05/this-is-not-a-police-state-its-a-university.

Second, Dr. Piper echoed these written comments in a May 2016 talk radio interview. Again, Dr. Piper seemed to state that OKWU objects to any requirement that OKWU adjudicate complaints of student-on-student sexual violence—whatever the standard of proof or rules for cross-examination—explaining that the school would instead defer to local law enforcement:

> [T]his Dear Colleague Letter. . . directs us to conduct a kangaroo court in the case of any investigation of sexual harassment. In other words, trusting the local police to investigate the matter, trusting the local law enforcement and the legal system to adjudicate the matter is not sufficient. The DOE [. . .]

Fourth, Dr. Piper amplified his prior statements regarding OKWU's objections to adjudicating complaints of student-on-student sexual violence in a talk radio interview days after OKWU joined Doe's lawsuit:

> [DR. PIPER:] The reason for our lawsuit is the Office for Civil Rights in the Department of Education has issued a Dear Colleague Letter. This letter forces all colleges across the United States to compromise a criminal investigation by requiring us to convene a campus committee of faculty, staff, and students that by definition violates the due process and other corresp

> their job. All because I want your student to have her civil rights. I want your student to have her right to due process. I want your student to have his right to representation. I want to have all of my students' right to privacy be recognized.

Dr. Piper on OCR/DOE Lawsuit & Sexual Harassment w/ PC [Pat Campbell], at 6:20-12:06 (Aug. 19, 2016) ("August 2016 Radio Interview"), http://www.1170kfaq.com/shows/pat-campbell/pat-campbell-podcast/dr-piper-on-ocr-doe-lawsuit-sexual-harassment-w-pc.[5]

STANDARD OF REVIEW

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the dismissal of an action for lack of subject matter jurisdiction. This Court reviews motions to dismiss for lack of standing and/or ripeness under Rule 12(b)(1). *See Delta Air Lines, Inc. v. Exp.-Imp. Bank of the U.S.*, 85 F. Supp. 3d 250, 259 (D.D.C. 2015).

As in the context of a motion to dismiss under Rule 12(b)(6), the Court must "treat the complaint's factual allegations as true . . . and must grant plaintiff[s] the benefit of all inferences that can be derived from the facts alleged." *Id.* (alterations in original) (quoting *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). Nevertheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements . . . , supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see, e.g., Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (applying *Iqbal* to dismissal under Rule 12(b)(1)).

[5] Needless to say, Defendants disagree with the foregoing characterization of federal policy which reflect serious misunderstandings of Title IX, the Department's Title IX regulations, and the 2011 DCL, and fail to recognize that victims of sexual violence have the right to a non-hostile educational environment whether or not they press criminal charges, whether or not law enforcement authorities decide to prosecute, and whether or not any criminal prosecution results in a conviction.

"Because subject matter jurisdiction focuses on the Court's power to hear a claim, the Court must give the plaintiff's factual allegations closer scrutiny than would be required for a 12(b)(6) motion for failure to state a claim." La Botz v. Fed. Election Comm'n., 61 F. Supp. 3d 21, 27 (D.D.C. 2014) (citing Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001)). "Finally, unlike with a motion to dismiss under Rule 12(b)(6), the Court 'may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.'" Delta Air Lines, 85 F. Supp. 3d at 259 (quoting Jerome Stevens Pharms., Inc v. Food & Drug Admin., 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

ARGUMENT

I.

A.

allege that any action by UVA was unlawful or would have been unlawful but for the 2011 DCL.[6]

The second category comprises cases "where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." Renal Physicians Ass'n, 489 F.3d at 1275 (quoting Nat'l Wrestling Coaches Ass'n, 366 F.3d at 941). As developed below, Doe's case does not fit within this category either.

B. Doe Cannot Establish Standing Because the Relief He Seeks Would Not Redress Any of His Purported Injuries

The Amended Complaint can be read to identify several purported injuries that Doe alleges were caused by OCR's issuance of the 2011 DCL. Some of Doe's allegations are ty(e)6

UVA to lift the sanctions it imposed on him or to relieve him of some other injury stemming from the finding that Doe more likely than not committed an act of sexual violence against another student. This is particularly so because Doe does not directly challenge UVA's finding or sanctions.

Turning to the discrete injuries alleged in the Complaint, Doe has not carried his burden to establish standing.

First, Doe's allegation that his graduation was delayed, Am. Compl. ¶¶ 60-61, cannot provide the basis for standing. "[B]ecause [Doe] seeks prospective declaratory and injunctive relief, he must establish an ongoing or future injury that is 'certainly impending'; he may not rest on past injury." Arpaio, 797 F.3d at 19 (quoting Clapper, 133 S. Ct. at 1147). UVA awarded Doe his degree in March 2016. Am. Compl. ¶ 69. Therefore, the ten-month delay is not an ongoing or future injury that could be redressed by declaratory and injunctive relief. Moreover, the delay cannot be attributed to the standard of proof used by UVA, and therefore cannot be attributed to OCR's guidance on the standard of proof. The delay was prompted by the need to investigate and adjudicate the complaint against Doe, not by the particular adjudicatory procedures used. See id. ¶ 61 ("Mr. Doe's degree was withheld while the investigation progressed . . . ."). The University could have used a clear and convincing evidence standard and found Doe not

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procedures are fair. In fact, one survey of nearly 200 top colleges and universities showed that a substantial majority were using a preponderance of the evidence standard prior to the 2011 DCL. See FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, STANDARD OF EVIDENCE SURVEY: COLLEGES AND UNIVERSITIES RESPOND TO OCR'S NEW MANDATE app. (Oct. 28, 2011), https://www.thefire.org/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf?dmtr=1. There is thus

responsible for sexual misconduct, but he still would not have graduated as originally scheduled. Thus, the postponement of Doe's graduation date was not caused by the 2011 DCL and equitable relief from this Court would not redress it.

Second, Doe cannot establish standing based on the sanctions imposed by the UVA requirement that he undergo counseling and be barred for life from UVA property and activities,

service members, lacked standing to seek a declaratory judgment that the government exceeded its authority when it ordered their involuntary inoculation against anthrax because that declaration would not necessarily remedy their alleged injuries—a discharge and a court-martial conviction for refusing the vaccine. See *id.* at 62–64 & n.16; cf. Takhar v. Kessler, 76 F.3d 995, 1001 (9th Cir. 1996) (plaintiff's prior conviction for misbranding new animal drugs did not give him standing to seek equi

Because the Complaint offers no basis to find it "likely, as opposed to merely speculative," that a decision in Doe's favor would cause UVA to lift its sanctions, Defenders of Wildlife, 504 U.S. at 561, the existence of the sanctions does not support a finding that Doe has standing.

Third, the Complaint alleges that Doe has now been "labeled as someone who has committed sexual misconduct" and that "he will have to explain this finding to future employers, future friends, family members, and anyone else who asks" "[f]or the rest of his life." Am. Compl. ¶72. These allegations, too, provide no basis for standing.

Doe does not identify the source of this supposed obligation to disclose and explain UVA's finding against him. The Complaint does not allege that UVA has required Doe to "explain" the adjudicator's "finding" to anyone. In fact, based on UVA's policies and the allegations in the Complaint, it appears unlikely that Doe's transcript bears any indication that he was sanctioned or found responsible for any misconduct.[8] Thus, why Doe would need to explain the finding against him to "future friends," "family members" who are not already aware of it, or "anyone else who asks" is entirely unclear, as is why he could not avoid disclosing the finding against him to "future employers."

In any event, if Doe's point is that he may be asked to "explain" why there is a gap on his transcript or resume why he was awarded his degree in March 2016 instead of in May 2015, see Am. Compl. ¶¶58, 60, 69—then that purported injury provides no more basis for Doe's standing than his delayed graduation itself. As discussed above, the delay (and therefore any

II. OKLAHOMA WESLEYAN UNIVERSITY'S CHALLENGE TO THE 2011 DEAR COLLEAGUE LETTER IS NOT RIPE FOR JUDICIAL REVIEW

OKWU has similarly failed to establish that this Court has jurisdiction to entertain its challenge to the 2011 DCL. In the absence of any enforcement action against OKWU for violating Title IX or the Department's regulations, as interpreted in the 2011 DCL, OKWU's disagreements with the guidance in the 2011 DCL are not ripe for judicial review.

"The ripeness doctrine generally deals with when a federal court can or should decide a case." Delta Air Lines, 85 F. Supp. 3d at 269 (quoting Am. Petroleum Inst. v. EPA, 683 F.3d 382, 386 (D.C. Cir. 2012)). Like standing, "'[r]ipeness is a justiciability doctrine' that is 'drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" Devia v. Nuclear Regulatory Comm'n, 492 F.3d 421, 424 (D.C. Cir. 2007) (alteration in original) (quoting Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003)). The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Id. (quoting Abbott Labs., 387 U.S. at 149). But, as the D.C. Circuit has also explained, "the 'usually unspoken element of the rationale' is this: 'If we do not decide [the claim] now, we may never need to. Not only does this rationale protect the expenditure of judicial resources, but it comports with our theoretical role as the governmental branch of last resort. Article III courts should not make decisions unless they have to.'" Id. (quoting Nat'l Treasury Emps. Union, 101 F.3d at 1431).

OKWU's challenges to the 2011 DCL are neither constitutionally nor prudentially ripe for judicial review. The Amended Complaint states that OKWU "does not currently apply a

'preponderance of the evidence' standard in sexual misconduct proceedings," Am. Compl. ¶ 80, but there is no allegation of any final, pending, or imminent administrative enforcement action by Defendants—much less any pending complaints with OCR relating to OKWU's handling of sexual violence complaints. Nor is it evident that the standard of proof and cross-examination issues would be focal points in any future enforcement action against OKWU, in no small part because, as discussed previously, there is no indication that OKWU will ignore and adjudicate any complaint of student-on-student sexual violence. See supra at 11. Delaying judicial review of OKWU's complaints about the 2011 DCL until after an administrative

fails to show that the 2011 DCL causes OKWU any injury in fact that would be redressed by a favorable decision. The facial deficiencies in the Amended Complaint are only compounded by public statements from OKWU and its president, which suggest that OKWU will not conduct any investigation or adjudication when presented with a complaint of student-on-student sexual violence but will instead defer to local law enforcement. Because the Amended Complaint and these public statements suggest OKWU is out of compliance with Title IX and the Title IX regulations for reasons other than its failure to use a preponderance of the evidence standard to adjudicate complaints of sexual violence, OKWU lacks standing to challenge the 2011 DCL.

The Amended Complaint does not allege any imminent action by Defendants to enforce the 2011 DCL against OKWU. OKWU represents that it "does not currently apply a 'preponderance of the evidence' standard," Am. Compl. ¶80, and offers no indication that it has done so in the past. But OCR has taken no action to enforce the 2011 DCL against OKWU in the five-plus years since OCR issued its guidance, and OKWU implicitly concedes that OCR has not even "threaten[ed] it with enforcement action." *Id.* ¶81. At best, OKWU "has shown nothing other than a speculative threat of enforcement," which falls short of an imminent injury in fact. *Matthew A. Goldstein, PLLC v. U.S. Dep't of State*, 153 F. Supp. 3d 319, 334 (D.D.C. 2016), appeal pending, 16-5034 (D.C. Cir.).

Moreover, OKWU's factual allegations fail to establish that any eventual enforcement action would be predicated on the 2011 DCL's guidance on the standard of proof and cross-examination. The Amended Complaint states that OKWU "does not currently apply a 'preponderance of the evidence' standard in sexual misconduct proceedings," and that "OKWU is not in compliance with the 2011 DCL" for this reason "*inter alia*." Am. Compl. ¶80 (emphasis added). But the Amended Complaint otherwise provides no information about the

procedures that OKWU does use to investigate and adjudicate complaints of sexual violence, or that it uses any such procedures at all. OKWU alleges that it "would like the freedom to make 'clear and convincing evidence,' . . . the burden of proof for sexual misconduct proceedings on its campus," id. ¶ 82, and "to let both the accuser and the accused cross-examine each other in any such proceedings," id. ¶ 83, for example, but not that it has established procedures for adjudicating complaints of sexual violence that require applying the clear and convincing evidence standard or permit the parties to personally cross-examine each other. Nor does the Amended Complaint disclose the ways in which OKWU considers itself "not in compliance with the 2011 DCL" aside from its failure to apply a preponderance of the evidence standard. Indeed, it is not clear from the Amended Complaint whether OKWU currently conducts any investigations or adjudications to determine whether accused students have committed acts of sexual violence.

Public statements by OKWU and its president, Dr. Piper, fill in some of the gaps in the Amended Complaint. As set forth more fully above, supra at 13–16, OKWU apparently takes the position that OKWU would "compromise a criminal investigation" if it were to independently investigate and adjudicate a complaint of student-on-student sexual violence. August 2016 Radio Interview at 6:26. Therefore, it seems that, rather than investigate and adjudicate complaints itself, OKWU has "always told a student who feels that they've been victimized by a crime, we will assist you in making a claim at the police office" and then "let the police office do its work." Id. at 10:10; see also May 2016 Web Post ("OKWU has always turned over all claims of criminal behavior to the local police and we will continue to do so. To the extent the DOE requires us to convene a kangaroo court that denies our students their due process and legal protections in investigating and adjudicating an allegation of criminal conduct, we will not do

so."); May 2016 Radio Interview ("[T]his Dear Colleague Letter . . . directs us to conduct a kangaroo court in the case of any investigation of sexual harassment. In other words, trusting the local police to investigate the matter, trusting the local law enforcement and the system to adjudicate the matter is not sufficient. The DOE says you must convene a campus court, and it circumvents and contravenes the local law enforcement. And we have said 'no' . . . .").

If OKWU's failure to "currently apply a 'preponderance of the evidence' standard," Am. Compl. ¶80, is part of a broader refusal to independently investigate and adjudicate sexual violence complaints, then OKWU's non-compliance with Title IX and the Department's regulations requiring a prompt and equitable grievance process for Title IX complaints cannot be attributed to the 2011 DCL. The standard of proof in OKWU's non-existent adjudications would be immaterial to OKWU's non-compliance with its Title IX obligations. OKWU's problem would be with the Department's regulations themselves, which OKWU does not challenge. Thus, OKWU lacks standing because it has not established a causal connection between any alleged injury and "the challenged action of [Defendants]." Defenders of Wildlife, 504 U.S. at 560; see, e.g., Nat'l Ass'n of Home Builders v. EPA, 667 F.3d 6, 13–14 (D.C. Cir. 2011) (holding that plaintiffs lacked standing to challenge an EPA determination that did not "substantially increase[] the risk of regulation or enforcement relating to particular property" of plaintiffs' members, where they "face[d] only the possibility of regulation, as they did before"); Atl. Urological Assocs. v. Leavitt, 549 F. Supp. 2d 20, 28 (D.D.C. 2008) (no standing to challenge agency action that did not "alter th[e] new landscape" created by prior agency action).

If OKWU does not refrain entirely from investigating and adjudicating complaints of student-on-student sexual violence, the Amended Complaint leaves unclear how it is violating Title IX and the Department's regulations, as interpreted by OCR, in addition to not using the

preponderance of the evidence standard. Absent clarity on that point, there is no basis to conclude that the 2011 DCL substantially contributed to the risk that the Department might terminate Federal financial assistance to OKWU, or that the relief OKWU seeks would materially reduce that risk.

Because the threadbare allegations in the Amended Complaint—particularly when read in light of the public statements of OKWU and its president—are insufficient to satisfy the requirements for Article III standing, OKWU cannot establish that its challenge to the 2011 DCL is constitutionally ripe.[9]

B. OKWU Cannot Establish Prudential Ripeness

"Even if a case is 'constitutionally ripe,' . . . the prudential aspect of ripeness may provide an independent basis for a court not to exercise its jurisdiction.'" Delta Air, 85 F. Supp. 3d at 269 (quoting Nat'l Park Hospitality Ass'n, 538 U.S. at 807–08). In evaluating the prudential ripeness of an APA challenge to agency action, the court applies "a familiar two-

2011 DCL is not fit for immediate judicial review, and postponing review beyond the five years that OKWU has itself delayed in filing suit will not cause OKWU any meaningful hardship.

1. OKWU's challenge to the 2011 DCL is not fit for review

"Among other things, . . . 'the fitness of an issue for judicial [review] depends on whether it is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" Delta Air Lines, 85 F. Supp. 3d at 269 (quoting Atl. States Legal Found. v. EPA, 325 F.3d 281, 284 (D.C. Cir. 2003)) (brackets in

regarding OKWU's procedures for investigating and adjudication complaints of student-on-student sexual violence, as well as the extent to which OKWU adheres to those procedures in

delayed. See Nat'l Ass'n of Home Builders v. Norton, 298 F. Supp. 2d 68, 80 (D.D.C. 2003) (finding no hardship to plaintiff trade associations from delaying review of challenged agency Protocols where "the record contains no evidence that any member of plaintiffs' organizations has to date been subject to adverse federal agency action under the Protocols, over a period of more than four years"), aff'd on other grounds, 415 F.3d 8 (D.C. Cir. 2005); cf. New York v. EPA, 413 F.3d 3, 20–21 (D.C. Cir. 2005) (finding no hardship from delaying review of agency's three-year-old regulatory interpretation).

Finally, any risk to OKWU's eligib