IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DR. MUKUND VENGALATTORE	:	
	:	CIVIL ACTION NO.: 3:18-CV-01124
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CORNELL UNIVERSITY, ET AL.	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION TO DISMISS (DOC. 36)

July 15, 2019

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5217
N.D. N.Y. Bar Roll # 700434

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Plaintiff, by his attorney Caleb Kruckenberg, New Civil Liberties Alliance, files this Memorandum in Opposition to the U.S. Department of Education (Department) and Secretary Betsy DeVos's Motion to Dismiss (Doc. 36).

INTRODUCTION

Dr. Vengalattore was the victim of what Defendant Secretary DeVos described as a "failed system" of "kangaroo courts" "imposed [] by political letter." (Doc. 31 at ¶¶83, 88.) The Department sent colleges and universities across the country three edicts, its "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" (the 2001 Guidance), its "Dear Colleague Letter" on sexual harassment (2011 DCL), and "Questions and Answers on Title IX and Sexual Violence" (the 2014 Q&A), requiring them to create campus disciplinary systems "that lacked basic elements of due process and failed to ensure fundamental fairness." (Doc. 31 at ¶91.) If colleges refused, the Department tried to withhold their federal funding. (Doc. 31 at ¶¶71-80.) And at the Department's insistence, Cornell tore down basic protections in its own disciplinary proceedings. (Doc. 31 at ¶135-36.) Embroiled in one such proceeding, Dr. Vengalattore was subjected to a biased, discriminatory and fundamentally unfair system that was set up, by the Department, to ensure he would be disciplined. For its part in directing this process, the Department bears responsibility for its unlawful "rule by letter." (Doc. 31 at ¶89.)

ARGUMENT

I. DR. VENGALATTORE HAS STANDING TO CHALLENGE THE DEPARTMENT'S UNLAWFUL GUIDANCE DOCUMENTS

Much of the Department's Motion is dedicated to arguing that Dr. Vengalattore lacks standing to challenge its unlawful conduct. (*See* Doc. 36-1 at 8.) On the contrary, he has standing

against the Department because he has suffered both substantive and procedural injuries from the guidance documents at issue. These injuries can be remedied by action from this Court invalidating the documents and enjoining the Department from reissuing similar letters.

A. Dr. Vengalattore Has Suffered Injuries from the Guidance that Can Be Remedied by this Court

A plaintiff ordinarily must establish standing to sue a defendant by presenting "[1] an injury that is concrete, particularized, and actual or imminent; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling." *Department of Commerce v. New York*, --- S.Ct. ----, 2019 WL 2619473, at *7-8 (June 27, 2019) (internal citations and quotation marks omitted). Dr. Vengalattore has alleged all three requirements.

1. Dr. Vengalattore Suffered Concrete Injuries that Are Traceable to the Guidance

Dr. Vengalattore suffered two concrete injuries that were caused by the Department's guidance documents. First, Dr. Vengalattore was subject to a two-week suspension and other discipline by Cornell, which was the result of the flawed process instituted by the guidance. (*See* Doc. 31 at ¶638.) Second, Dr. Vengalattore continues to suffer from reputational injuries from that disciplinary finding also deriving from the same guidance. (*See* Doc. 31 at ¶¶648-57.)[1]

Faced with these real injuries, the Department simply insists that it is not to blame, saying that Dr. Vengalattore has alleged "injuries that are fairly traceable only to Cornell's independent actions." (Doc. 36-1 at 10.) But Cornell's conduct is also traceable to the Department's directives in its documents because it was entirely predictable that Cornell would impose its unfair

[1] Notably, while the Department challenges the causation and redressability elements of the standing inquiry, it concedes that Dr. Vengalattore's discipline by Cornell would be a sufficiently concrete injury conferring standing, so long as it was caused by the Department's own conduct. (*See* Doc. 36-1 at 12-13.)

disciplinary process in response. Dr. Vengalattore's injuries arose from this biased proceeding.[2]

Dr. Vengalattore has amply met his burden of demonstrating injury traceable to the Department's conduct. First, contrary to the Department's claim that Dr. Vengalattore has "offer[ed] no factual support for his conclusory allegations" that "Cornell applied the 2001 Guidance in disciplining proceedings against him" (Doc. 36-1 at 12 n. 16), the Amended Complaint proves the pervasive influence the Department's guidance documents played. Cornell officials claimed that Policy 6.4 was "necessary to be in compliance with the [2011] DCL," and Cornell promulgated Policy 6.4 "in response to the DCL." (Doc. 31 at ¶¶129-30.) Policy 6.4 governed allegations of "harassment and sexual and related misconduct" and was the "exclusive means of adjudicating" these kinds of allegations. (Doc. 31 at ¶¶130, 134.) Cornell maintained that the original Code of Conduct "did not fulfill requirements of Title IX" because of its due process protections. (Doc. 31 at ¶135.) The investigators even said they were "guided" by the 2001 Guidance and the 2014 Q&A's presumption that "any relationship between faculty and a student constitutes sexual harassment." (Doc. 31 at ¶578.) And Dean Gretchen Ritter applied the "preponderance of the evidence" standard required by the guidance when she sanctioned Dr. Vengalattore. (Doc. 31 at ¶¶621-23.) Thus, Cornell's application of the 2001 Guidance, 2011 DCL, and the 2014 Q&A to his disciplinary proceedings led to his unlawful suspension and ensuing reputational harms. (Doc. 31 at ¶¶742, 751, 759.)

Confronted with this chain of events, the Department resorts to an argument built on the wrong legal standard. The Department says that Dr. Vengalattore "must make a 'heightened showing'" of standing "because he alleges 'injury from the government's regulation of a third

[2] The Department also argues extensively that "the denial of [Dr. Vengalattore's] tenure" was not a cognizable injury for purposes of standing. (Doc. 36-1 at 11.) Contrary to the Defendants' insistence otherwise, Dr. Vengalattore does not rely on that injury to establish standing in this case.

party.'" (Doc. 36-1 at 10 (quoting *Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007).). But the authority the Department relies on is no longer good law. As the Supreme Court recently emphasized, a plaintiff has suffered an injury "traceable" to governmental action, even when the injury arose from the "decisions of independent actors," so long as there is "*de facto* causality." *Department of Commerce*, 2019 WL 2619473, at *8 (internal citations and quotation marks omitted). This causality can depend on a showing that "third parties will likely react in predictable ways" to governmental conduct. *Id*. Traceability can be premised on any "concurrent cause," even if it is not the sole, or even most important, cause of the injury. *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013).

The Department's series of arguments that Cornell *also* caused Dr. Vengalattore's injuries simply do not matter for purposes of standing. The Department rests its argument on the fact that Dean Ritter's ultimate disciplinary finding did not invoke Policy 6.4 as a basis for discipline. (Doc. 36-1 at 13.) The Department seems to suggest that Dr. Vengalattore—since he was only accused of violating the "Romantic and Sexual Relationships" policy—received the process due under that policy, and not the process laid out in Policy 6.4. *Id.*

But this is a factual argument refuted by the allegations in the Amended Complaint. The investigators *said* they were following Policy 6.4 *and* the Department's guidance. They premised their authority on the Faculty Handbook *and* Policy 6.4. (Doc. 31 at ¶577.) And they wrote that their decisions were "'guid[ed]' by the Department of Education's 2001 Guidance, as well as the 2014 Q&A, and the suggested presumption that any relationship between faculty and a student constitutes sexual harassment." (Doc. 31 at ¶578.)

And that is easily seen by comparing the guidance to the way the investigation was conducted. The 2001 Guidance said that a "presumption that any sexual conduct" between

faculty and students would be "not consensual" would apply to schools. (Doc. 31 at ¶33.) The 2011 DCL built upon the 2001 Guidance and directed schools to "adopt a preponderance of the evidence standard." (Doc. 31 at ¶40.) And it "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing." (Doc. 31 at ¶45.) The 2014 Q&A confirmed that these measures were *mandatory* and that schools had the responsibility for ending "sexual harassment and preventing its recurrence." (Doc. 31 at ¶58.) This was the process applied to Dr. Vengalattore.

Furthermore, the other policy the Department suggests was applicable was not used. That other policy was supposed to have been applied by the Committee on Professional Status, which was to be a "group of faculty." (Doc. 31 at ¶¶177-79.) The accused was also to have a "hearing before a board appointed by the provost and consisting of five members of the University Faculty." (Doc. 31 at ¶190.) At that hearing, the accused was to be "accompanied by an advisor or counsel of his or her choice, to present witnesses in his or her own behalf and to confront and question the witnesses against him or her." (Doc. 31 at ¶191.)

That process was never applied to Dr. Vengalattore. The investigation was conducted by Alan Mittman, Director of the Office of Workforce Policy and Labor Relations, and Sarah Affel, Title IX Coordinator, not the Committee on Professional Status or any other faculty. (Doc. 31 at ¶¶343-574.) And Cornell did not provide Dr. Vengalattore with a "hearing before a board" "consisting of five members of the University Faculty," where he could confront his accuser with counsel of his choice. (*See* Doc. 31 at ¶¶636, 669.) Thus, the Department's guidance documents caused Cornell to use a biased process against Dr. Vengalattore.

2. An Order Invalidating the Guidance Documents Would Partially Redress Dr. Vengalattore's Injuries

The Department also challenges standing by cursorily saying that Dr. Vengalattore

"cannot show that his injuries would likely be redressed by a favorable decision against the federal defendants." (Doc. 36-1 at 14.) That argument relies on a mischaracterization of the relief that Dr. Vengalattore seeks.

The Department says that Dr. Vengalattore's "injuries are that Cornell improperly denied him tenure and/or suspended him for two (2) weeks." (Doc. 36-1 at 14.) From that premise, the Department concludes that the "relief that plaintiff seeks against the federal defendants will do nothing to remedy that injury" because he "challenged th[e] denial of tenure and suspension in New York State Court, [but] lost at the Third Department of the Appellate Division[.]" (Doc. 36-1 at 14.) This assertion is simply incorrect.

Dr. Vengalattore's injuries are related to the discipline imposed by Cornell and the ensuing reputational harms, but they could *not* have been remedied by the New York courts. Dr. Vengalattore challenged the denial of tenure in state court, and the trial court described the entire process as "flawed, secretive, [and] unfair," and concluded that Cornell "violated Professor Vengalattore's due process rights to such an extent as to be arbitrary and capricious." (Doc. 31 at ¶634.) The Third Department did not reverse this decision, or even contest the trial court's finding, it simply concluded that "neither the sexual misconduct allegations raised by the graduate student nor her May 2014 letter improperly influenced the tenure decision." (Doc. 31 at ¶646.) Thus, the *tenure* decision has been settled, but the *disciplinary* findings, and their reputational effects, were not and could not have been resolved by the state courts. Indeed, Dr. Vengalattore filed his lawsuit in state court in 2016 but was not *sanctioned* by Cornell until February 6, 2017. (Doc. 31 at ¶¶632-33, 637-38.)

These injuries could, at least in part, be redressed by a favorable decision against the Department, because it would improve Dr. Vengalattore's reputation with potential future

employers and his position with respect to Cornell. Redressability requires that the plaintiff demonstrate "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Teton Historic Aviation Found., v. U.S. DOD*, 785 F.3d 719, 724 (D.C. Cir. 2015). This requirement is not so demanding that the plaintiff must "show a certainty that a favorable decision will redress [the] injury." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1988). Redressability "does not require that a favorable decision would provide a plaintiff with complete relief." *Planned Parenthood of N.Y.C., Inc. v. U.S. HHS*, 337 F. Supp. 3d 308, 323 (S.D. N.Y. 2018). It can be enough that the plaintiff's position is improved relative to a third party. *See, e.g.*, *Parsons v. U.S. DOJ*, 801 F.3d 701, 717 (6th Cir. 2015) (injury was redressable even though it was not "certain whether and how the declaration" would affect third-party action, as it was "reasonable to assume a likelihood that the injury would be partially redressed" where it was alleged that a third party violated the plaintiff's rights *because* of the agency action); *Foretich v. United States*, 351 F.3d 1198, 1209, 214-15 (D.C. Cir. 2003) (same where a reputational injury had caused the plaintiff "a 30% decline" following government conduct even without evidence that his business would return with a declaratory judgment).

Both Dr. Vengalattore's reputation and his position with respect to Cornell would be redressed by a declaratory judgment against the Department. First, Dr. Vengalattore's career prospects would be improved. Like in *Foretich*, 351 F.3d at 1209, the reputational harm stemming from the defective investigation continues to cause Dr. Vengalattore serious harm and there is a significant chance it would alleviate some of his injury for this Court to declare the Department's process that was used against him as constitutionally deficient. (Doc. 31 at ¶716.) Cornell also could no longer just blame the Department for its own unfair proceeding if the guidance itself were declared unlawful, which would further improve Dr. Vengalattore's ability

to challenge the process used against him. *See Parsons*, 801 F.3d at 717.

B. Dr. Vengalattore Also Has Procedural Standing

Independently, Dr. Vengalattore has procedural standing for his claims in Counts V and VI, which relate to the Department's violation of the required notice-and-comment procedures when promulgating the 2011 DCL and 2014 Q&A.

The three-part requirement for standing is not always applicable. An injury in fact may be "procedural" or "substantive." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). And "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n. 7 (1992).

A person afforded a procedural right relative to an agency "is actually and particularly injured by the agency's disregard of its statutory duty." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1537 n. 4 (9th Cir. 1993). Thus, courts have often recognized that violations of the Administrative Procedure Act's notice-and-comment requirement constitute procedural injuries for purposes of standing, as long as they relate to some concrete injury. *See, e.g.*, *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005) (the plaintiffs had procedural standing because "procedural violations of the APA threatened [their] concrete interest to have the public participate in the rulemaking"); *United States Steel Corp. v. U.S. EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (same). Further, reputational injuries connected to procedural violations confer procedural standing, even if invalidating the agency action cannot directly redress the injuries. *See, e.g.*, *Parsons*, 801 F.3d at 713 ("freedom from placement" on a national gang registry was a "sufficiently concrete interest to establish a procedural injury in fact"); *Wright v. O'Day*, 706 F.3d 769, 772 (6th Cir. 2013) ("freedom from being classified as a child abuser" was

sufficiently concrete and imminent for a procedural injury in fact).

Dr. Vengalattore has procedural standing for his claims in Counts V and VI. (Doc. 31 at ¶¶735, 745.) His procedural rights were violated under 5 U.S.C. § 553 when he was not given an opportunity to comment on the 2011 DCL or 2014 Q&A. (Doc. 31 at ¶¶735, 745.) Dr. Vengalattore was a professor with a clear interest in the handling of alleged misconduct on campus but had no chance to participate in the required procedures. (Doc. 31 at ¶¶738, 749.) His injury is also within the zone of interests protected by Title IX and Title VI because he was discriminated against based on his race and gender. (Doc. 31 at ¶¶686, 742, 751.)

Dr. Vengalattore's injury is also concrete enough to establish a procedural injury. Dr. Vengalattore had a real interest in not having his future career prospects ruined by what Defendant Secretary DeVos called a "kangaroo court." (*See* Doc. 31 at ¶83.) Furthermore, Dr. Vengalattore suffered concrete damage to his reputation from this flawed process. (Doc. 31 at ¶672.) This injury suffices to confer standing for Counts V and VI, regardless of whether it can be redressed by an order invalidating those documents. *See Lujan*, 504 U.S. at 573 n. 7.

II. NONE OF DR. VENGALATTORE'S CLAIMS IS MOOT

Turning from standing, the Department says that Dr. Vengalattore's challenges to the 2011 DCL and the 2014 Q&A in Counts V, VI, VIII, IX, XI, XII, and part of XIII, are moot. With no analysis, the Department simply asserts that "since the Secretary has withdrawn the 2011 DCL and 2014 Q&A, plaintiff[']s request to enjoin their application is moot." (Doc 36-1 at 14.) Even if this argument were fully developed, it would fail because the Department cannot avoid litigation merely by rescinding its invalid orders when it has not disclaimed the broader

policy at issue, especially when those orders have already harmed the plaintiff.[3]

None of Dr. Vengalattore's claims is moot. The "burden of showing mootness logically falls on a defendant." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016). This burden is a "heavy" one. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). A case is only moot "when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *N.J. Carpenters Health Fund v. Novastar Mortg., Inc.*, 753 F. App'x 16, 19 (2d Cir. 2018) (unpublished).

It is "well settled" that an agency's voluntary withdrawal of a practice "does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). A "defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Mhany Mgmt.*, 819 F.3d at 603-04 (internal citations and quotation marks omitted). "This is both a stringent … and a formidable burden[.]" *Id*. at 604 (internal citations omitted).

The Department cannot meet its "stringent" and "formidable burden" of showing that it is "absolutely clear" it will not resume its violations, and thus it cannot meet its heavy burden of showing mootness through its withdrawal of the two guidance documents. *See id.* at 603-04. The Department's undeveloped aside in its brief makes no effort to discharge this burden and fails for that reason alone.

Moreover, even though the Department has withdrawn the 2011 DCL and the 2014 Q&A, it is reasonable to expect that the violations will recur. A case is not moot where the

[3] Notably, the Department does not argue that Dr. Vengalattore's challenge to the 2001 Guidance is moot. (Doc. 36-1 at 2.) Of course, that is because that document has not been withdrawn. So, Dr. Vengalattore's challenges to that document would remain viable even if the Department were otherwise correct about mootness.

agency has not renounced its policy. *See City of New York v. Baker*, 878 F.2d 507, 511 (D.C. Cir. 1989) (case was not moot when the "government ha[d] not renounced" its prior position despite an amendment that constituted a "significant change in the law"); *Allende v. Shultz*, 845 F.2d 1111, 1115 (1st Cir 1988) (voluntary withdrawal of an applied rule did not moot a case where the government still had not "disavowed that policy"). And a case is not moot if the agency's subsequent actions "d[o] not suggest a change of heart." *Conservation Law Found. v. Evans*, 360 F.3d 21, 26 (1st Cir. 2004). Suspicious timing is also evidence of a reasonable possibility of recurrence. *See Mhany Mgmt.*, 819 F.3d at 604 (claim was not moot because the development of the project that mooted the case "track[ed] the development of [the] litigation"). If the policy may be reenacted if the administration changes, it is also reasonable to expect that it will recur. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003) (case was not moot because "a change in the [] administration" might cause withdrawn action to be reenacted).

The Department has yet to renounce the 2011 DCL or the 2014 Q&A. The 2017 Q&A issued by the Department did not find that the 2011 DCL or the 2014 Q&A were contrary to law or mistaken; in fact, there are great similarities between the new and old guidance. (Doc. 31 at ¶¶92-103.) The 2017 Q&A did not require schools to "use an evidentiary standard more rigorous than a preponderance," nor did it require schools to grant "the accused a hearing" nor to separate the "investigatory and decision-making functions." (Doc. 31 at ¶¶101-02.) The Department has not indicated that schools must change the investigatory policies that responded to the prior guidance nor that the Department might not return to the old guidance.

More significantly, the Department *still* treats the rescinded documents as binding. The 2017 Q&A informed schools that "existing resolution agreements" related to the 2011 DCL and 2014 Q&A were "still binding" and would continue to be enforced. (Doc. 31 at ¶103.) Thus, the

Department is *still enforcing* the rescinded guidance.

The timing of the 2017 rescission is also suspicious. The voluntary withdrawal of the 2011 DCL and the 2014 Q&A came during the litigation of *Doe v. Jackson, et al*. No. 1:16-cv-01158 (RC) (D.D.C.). A university challenged both pieces of guidance as illegal, but when the rescission came, the parties agreed to dismiss the case. The Department therefore avoided judicial review of the guidance by rescinding it and has, thus far maintained the power to reissue the same or similar guidance in the future.

There is also a real possibility that a change in administration would cause the guidance to be reissued. Because the Department has not nullified the existing resolution agreements nor found the previous guidance contrary to law, schools are stuck in limbo waiting for the Department to act. (Doc. 31 at ¶103.) It is reasonable to expect that the violations may recur.

The Department has also failed to show that the effects of the now-withdrawn documents have been "completely and irrevocably eradicated" because Dr. Vengalattore is still suffering from the reputational effects of those documents. *See Granite State Outdoor Advert., Inc. v. Town of Orange, Connecticut*, 303 F.3d 450, 451 (2d Cir. 2002). If some effects of a violation remain, a case is not mooted just because the most obvious effect is eliminated. *See Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 533 (6th Cir. 2001) (racial discrimination claim was not moot despite the residency requirement in question being eliminated since "the percentage of black workers … remained practically non-existent"). And this mootness limitation extends to a plaintiff's reputational injuries. *See Derrick Storms v. United States*, No. 13-CV-811 (MKB), 2015 WL 1196592 at *22 (E.D. N.Y. Mar. 16, 2015) (claim of two debarred government contractors was not moot, even though the debarring was vacated, since mention of the debarment "continues to destroy Plaintiffs' reputations and livelihoods" by preventing them

"from obtaining employment and being awarded contracts").

Dr. Vengalattore likewise is still suffering from the effects of the Department's guidance. He no longer works at Cornell, does not have tenure at any university, and does not have access to his lab despite his "several million dollars of grant money" and persistent search to "secure lab support." (Doc. 31 at ¶¶649-51, 657.) Even if the obvious effect of the guidance has been reduced, Dr. Vengalattore is still stuck with all the results of a sham proceeding that was caused by the Department's guidance. His case is not moot because his injury was not even minimally redressed, much less eradicated.

III. Dr. Vengalattore Has Stated Viable Claims Against the Department

The Department next attempts to set up a variety of procedural hurdles that would block this Court's review of the guidance documents. But, as the guidance documents were binding agency action, they are subject to review under the APA. Moreover, because these documents violated the Spending Clause, they should be struck down for this reason as well.

A. Dr. Vengalattore's APA Claims Are Subject to Judicial Review

On the merits of Dr. Vengalattore's APA claims, the Department objects to all the counts against it because it says its guidance documents, despite their stated purpose and effect, were not really binding agency policies subject to judicial review. (Doc. 36-1 at 15.) The Department also says that that Dr. Vengalattore has another "adequate remedy" aside from this lawsuit. *Id.* But the guidance documents, by their terms, and by their consequences, are final agency action because they imposed binding requirements enforced against schools like Cornell. Moreover, the only forum where they can be challenged is here, in federal court.

1. The Guidance Documents Were Final Agency Action

Contrary to the Department's first argument, the guidance documents were final agency

action subject to review because they were effectively binding on Cornell and other universities.

An APA challenge only applies to "final agency action." 5 U.S.C. § 704. "[T]wo conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process … . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow[.]" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

The latter condition applies to "binding" agency statements. *Appalachian Power Co. v. U.S. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000). "But [courts] have also recognized that an agency's [informal] pronouncements can, as a practical matter, have a binding effect." *Id*. Thus:

> If an agency acts as if a document issued at headquarters 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, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

Id. Perhaps the most archetypal example of binding guidance is "a letter from an agency official stating the agency's position and threatening enforcement action unless the [party] complied." *Barrick Goldstrike Mines Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000).

The Department argues that the guidance fails the second part of the test[4] because the "challenged Guidance Documents plainly make no attempt to determine the rights or obligations of parties who represent complainants in sexual misconduct cases." (Doc. 36-1 at 15.) But this argument ignores practical reality.

The Department's guidance was binding, by its own terms, and through its use against

[4] The Department does not challenge the fact that the guidance documents marked the consummation of the agency's decisionmaking process under part one of the relevant test. (*See* Doc. 36-1 at 15.) This concession is hardly surprising, because the 2001 Guidance went through notice and comment procedures, and both the 2011 DCL and 2014 Q&A presented the Department's official and formalized view on the law. (*See* Doc. 31 at ¶¶35, 49.)

Cornell and other schools thought to be in noncompliance. Starting with the 2001 Guidance, schools were warned that they might be held liable for failing to take adequate steps to prevent sexual discrimination or harassment "whether or not it knew or should have known about it[.]" (Doc. 31 at ¶30.) The Department also warned schools that it "would apply a 'presumption' that any sexual conduct, even if otherwise consensual, between students and faculty, even involving postsecondary students, would be 'not consensual,'" and "required the school, if defending the faculty member, to 'bear[] the burden of rebutting the presumption.'" (Doc. 31 at ¶¶33-34.)

The 2011 DCL and 2014 Q&A were even more explicit. The 2011 DCL said that "the school *must* use a preponderance of the evidence standard" and the "clear and convincing standard" used by Cornell and others was "not equitable under Title IX." (Doc. 31 at ¶¶39-40.) Ominously, the 2011 DCL warned colleges and universities that the Office of Civil Rights (OCR) "may initiate proceedings to withdraw Federal funding" for noncompliance with the guidance. (Doc. 31 at ¶48.)

The 2014 Q&A reaffirmed the mandatory nature of the Department's statements. The Department insisted that "schools have no 'flexibility' concerning the evidentiary standard." (Doc. 31 at ¶53.) And the Department said at least three times that schools were forbidden from using any standard more protective than the preponderance of the evidence. The Department said that the preponderance standard "*must* be used … in resolving a complaint," "*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," and threatened schools using any other standard that they were not in compliance unless they "*appl[ied] the preponderance of the evidence standard of review*." (Doc. 31 at ¶¶52-54.) The 2014 Q&A also said that there would be a "strong presumption that sexual activity between an adult school employee and a student" was

nonconsensual. (Doc. 31 at ¶¶57-58.)

While that mandatory language would surely suffice, the Department also made good on its threats. Only days after issuing the 2014 Q&A, "OCR publicly identified colleges and universities it was then investigating" for not conforming to the guidance. (Doc. 31 at ¶61.) Cornell was later included on that list. (Doc. 31 at ¶65.) After that, Cornell was subject to "six more" investigations by OCR. (Doc. 31 at ¶66.) Schools that did not comply were forced into Resolution Agreements agreeing to comply with the guidance. (Doc. 31 at ¶¶75-80.) And those agreements emphasized that the Department viewed the guidance as mandatory. For example, the Department forced Princeton University to enter an agreement where it would adopt "the proper standard of review of allegations of sexual misconduct (preponderance of the evidence)." (Doc. 31 at ¶72.) Similarly, Harvard Law School was forced into an agreement lowering its standard of proof because the Department claimed it "*improperly* used a 'clear and convincing' evidence standard of proof in its Title IX grievance procedures, *in violation of Title IX*." (Doc. 31 at ¶73.) The State University of New York System likewise was forced into a similar agreement to "[r]evise the SUNY System grievance procedures to ensure that these comply with the *requirements* of Title IX; including using the preponderance of the evidence standard to investigate allegations of sexual harassment." (Doc. 31 at ¶77.) The Department even ordered Rockford University and Southern Virginia University "to adopt grievance procedures that expressly forbid parties from directly cross-examining each other in sexual misconduct disciplinary hearings." (Doc. 31 at ¶¶78-80.) Cornell was not forced into such an agreement, but only because it was first coerced into revising Policy 6.4. (Doc. 31 at ¶81.)

The Department could not have been clearer either by the language used in its documents or by its actions in *enforcing* the guidance documents. Undoubtedly, the Department itself has

recognized that "as a practical matter, [they] have a binding effect," because it was able to extort settlements, which continue in force today. *See Appalachian Power Co.*, 208 F.3d at 1021. Even Defendant Secretary DeVos has publicly recognized this reality, noting in public statements "that OCR had 'exert[ed] improper pressure upon universities to adopt procedures that do not afford fundamental fairness'" through these guidance documents, and describing them as part of the "era of 'rule by letter[.]'" (Doc. 31 at ¶¶87, 89.) As the Seventh Circuit observed, the 2011 DCL "ushered in a more rigorous approach to campus sexual misconduct allegations," and the Department "warned schools that … a school's federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct" consistent with the guidance. *Doe v. Purdue Univ.*, No. 17-3565, 2019 WL 2707502, at *11 (7th Cir. June 28, 2019). Thus the "letter[s] from an agency official stating the agency's position and threatening enforcement action" in this case plainly constituted binding agency action. *See Barrick Goldstrike Mines Inc.*, 215 F.3d at 48.

Still, the Department insists that these guidance documents were somehow non-binding "guidance" "that make no attempt to determine the rights or obligations of parties who represent complainants [sic] in sexual misconduct cases." (Doc. 36-1 at 15.) The Department claims that no legal consequences can "stem from independent actions taken by third parties," as if the legal obligation must fall directly on the plaintiff. *Id.*

To support this argument they point to *Parsons v. U.S. DOJ*, 878 F.3d 162, 168 (6th Cir. 2017) (*Parsons II*). But *Parsons II* does not say that legal consequences do not flow if *any* third party is involved, it merely concluded that government coercion of third parties will not be binding if it does not "impose[] a legal obligation" on the third party, which then lacks "a sufficiently direct and immediate impact on the aggrieved party and a direct effect on [its] day-

to-day business." 878 F.3d at 167, 170-71 (internal citation and quotation marks omitted). And the Court in *Parsons II* found there was no final agency action at the first line of inquiry because the agency never imposed a legal obligation on *anyone*, much less the plaintiffs. *Id*. at 168-69. The Court also recognized that legal consequences do flow when agency actions prevent "government actors from pursuing a particular course of action." *Id.* at 167. Whether third parties are involved or not, the question comes down to the "determinative or coercive effect upon the action of someone else." *Guerrero v. Clinton*, 157 F.3d 1190, 1195 (9th Cir. 1998).

Nor could *Parsons II* stand for the proposition that the Department asserts. As discussed, a person has standing to sue an agency for regulating a third party if that results in injury to the plaintiff. *See, e.g.*, *Tozzi v. U.S. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001). If the agency action also has a "legal effect" on the third party causing the plaintiff harm, then the agency action is reviewable because it is final. *Id.* at 308, 310. That is why, for example, a group of agricultural workers could sue the Department of Labor for regulating their employers with binding "guidance" documents, *Mendoza v. Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014), and manufacturers could sue the Department of Health and Human Services for listing their products as being potentially carcinogenic because that listing triggered "obligations under OSHA, Department of Labor and state regulations." *Tozzi*, 271 F.3d at 308, 310.

Cornell had no choice but to follow the Department's mandates, and thus, the Department's action had "a sufficiently direct and immediate impact on" Dr. Vengalattore to constitute final agency action. *See Parsons II*, 878 F.3d at 167. The documents could not have been clearer about their mandatory standards, and they emphasized that there was "no 'flexibility' concerning the evidentiary standard." (Doc. 31 at ¶53.) And just in case Cornell failed to get the message, it was put on the Department's hit list of noncompliant schools, while

the Department brought enforcement actions against other schools. (Doc. 31 at ¶¶65-66, 75-80.) The consequences of not complying with the Department's guidance were obvious.

2. Dr. Vengalattore Has No Other Adequate Remedy

Changing tack, the Department also says, again with no analysis, that Dr. Vengalattore has "another remedy in a court, which precludes his current APA claims." (Doc. 36-1 at 16.) This argument, once again, relies entirely on a misunderstanding of the relief Dr. Vengalattore seeks against the Department. This is the only forum for Dr. Vengalattore to seek invalidity of the guidance documents, and thus, the APA does not preclude review.

The APA limits review to circumstances when there is "no other adequate remedy in a court." 5 U.S.C. § 704. But "adequacy" is the operative word. Even if another avenue for review would result in the same legal ruling, it may nevertheless be inadequate if it causes additional consequences for the plaintiff. *See, e.g.*, *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (internal citation and quotation marks omitted) (no adequate alternative under the APA even though the plaintiff could later defend against agency action in an enforcement proceeding as the latter would "carry the risk of serious criminal and civil penalties"). Other forms of relief are not the same as "prospective" "equitable relief" in the form of an injunction. *See Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (money judgment in the Claims Court would not be "adequate" under Section 704 because that court lacked "the general equitable powers of a district court to grant prospective relief"). What matters is the "nature of the relief sought" by the plaintiff, and Section 704 "does not deny subject matter jurisdiction" when the plaintiff could not obtain the same relief in another venue. *Jackson Square Assocs. v. U.S. HUD*, 869 F. Supp. 133, 139-40 (W.D. N.Y. 1994) *aff'd by* 108 F.3d 329 (2d Cir. 1997) (unpublished); *see also Nat'l Ass'n of Waterfront Employers v. Chao*, 587 F. Supp. 2d 90, 97–98 (D.D.C. 2008)

(Section 704 did not bar review because "Plaintiffs [] seek to enforce their right to notice and comment rule making under the APA" and there was no other forum where that claim could be decided). Thus, "state court proceedings would not qualify as an 'adequate remedy' that deprives [a plaintiff] of the right to challenge [an agency's] Guidance in federal court" under the APA. *Scenic Am., Inc. v. U.S. DOT*, 983 F. Supp. 2d 170, 184-85 (D.D.C. 2013) *aff'd by* 836 F.3d 42 (D.C. Cir. 2016).

The Department's argument fails because Dr. Vengalattore's claims against it could only be adjudicated in this forum. While the harms that resulted from the Department's guidance documents have caused Dr. Vengalattore injury for the purposes of standing, his specific claims against the Department are limited to requests for declaratory and injunctive relief invalidating those agency actions. (*See* Doc. 31 at 101-02 (Prayer for Relief).) The Department's premise, that because Dr. Vengalattore "has availed himself of another adequate remedy in this very suit against Cornell, not to mention his previous suit in state court" he is forever foreclosed by the APA from challenging *the Department's* conduct in federal court, makes no sense. (*See* Doc. 36-1 at 16.) The claims Dr. Vengalattore has raised against the Department can *only* be resolved in this litigation. Dr. Vengalattore never challenged the Department's guidance documents in the New York courts or in his claims against Cornell, because he could not have. Without adequate prospective relief on those claims in state court, Dr. Vengalattore is not barred from raising his claims here. *See Bowen*, 487 U.S. at 905.

B. The 2011 DCL and 2014 Q&A Were Legislative Rules Subject to Notice-and-Comment Procedures

The Department also argues that Counts V and VI, related to the Department's issuance of the 2011 DCL and the 2014 Q&A without notice and comment, must be dismissed "because the 2011 DCL and/or 2014 Q&A are 'interpretative rules' or 'general statement[s] of policy' that

are exempt from the APA's notice-and-comment requirements." (Doc. 36-1 at 17.) But because these documents are binding on affected parties, they were legislative rules subject to the proper procedures.

A procedural challenge to final agency action can be made when an agency promulgates a rule, without following notice-and-comment procedures. *See* 5 U.S.C. §§ 553(b), 706(2)(D); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 385 (D.C. Cir. 2002). And "legislative" or "substantive rules" must undergo notice-and-comment procedures. *Mendoza*, 754 F.3d at 1021.

A "substantive" or "legislative" rule is any "agency action that purports to impose legally binding obligations or prohibitions on regulated parties." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). Stated differently: "A rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza*, 754 F.3d at 1021.

While technically distinct, this analysis is generally the same as determining whether agency action is "binding" under the finality analysis under Section 704, and a "binding" agency statement is a "legislative rule" subject to the notice-and-comment requirement. *Appalachian Power Co.*, 208 F.3d at 1020-22. Thus, courts have often struck down "guidance" documents as invalid legislative rules because they have the practical effect of carrying the force and effect of law. *See*, *e.g.*, *Mendoza*, 754 F.3d at 1025 (vacating guidance documents as legislative rules that failed to comply with APA notice-and-comment requirements); *Elec. Privacy Info. Ctr. v. U.S. DHS*, 653 F.3d 1, 8 (D.C. Cir. 2011) (same); *Hemp Indus. Ass'n v. DEA.*, 333 F.3d 1082, 1091 (9th Cir. 2003) (same).

As with the finality analysis set out above, the Department's guidance was binding, both by its own terms, and through its enforcement against Cornell and other schools thought to be in

noncompliance, and thus constituted legislative rules that were required to go through the notice-and-comment procedures. As discussed, the 2011 DCL and 2014 Q&A emphasized that all "school[s] *must* use a preponderance of the evidence standard," and the Department insisted that "schools have no 'flexibility' concerning the evidentiary standard." (Doc. 31 at ¶¶40, 53.) The Department created a hit list of noncompliant schools and began enforcement proceedings against schools that did not follow the rules set out in the "guidance." (Doc. 31 at ¶¶61, 75-80.) Even Defendant Secretary DeVos has publicly described these documents as "rule by letter." (Doc. 31 at ¶89.) These documents, "as a practical matter, have a binding effect," because they impose legal requirements on affected schools. *See Appalachian Power Co.*, 208 F.3d at 1021. They are therefore legislative rules that hat to go through notice and comment. *See Id.* Because they did not, they should be "set[] aside" by this Court. *Id*. at 1028.

C. Dr. Vengalattore Has Stated a Valid Spending Clause Count Against All the Guidance Documents

Finally, the Department challenges Dr. Vengalattore's Spending Clause argument in Count XIII, by asserting that he cannot sue the Department for violating the Spending Clause "under Title IX," and by claiming that, only with respect to "the 2001 Guidance," he has failed to allege a Spending Clause violation. (Doc. 36-1 at 19.) The Department is wrong, first, because Dr. Vengalattore has not brought a claim under Title IX against the Department, and instead has challenged the Department's actions directly, as being in violation of the Spending Clause itself. Second, on the merits, the 2001 Guidance altered the terms of Title IX in such a way as to violate the contractual limitations imposed by the Spending Clause.

With respect to the availability of a direct constitutional challenge to the relevant guidance, the Department simply misreads Dr. Vengalattore's claim. The Department insists, unhelpfully, that "[a]lthough Title IX creates private rights, they are for individuals against

institutions receiving federal funding[.]" (Doc. 36-1 at 19.) But Dr. Vengalattore's claim is not a private claim against the Department under Title IX, it is a direct constitutional claim seeking injunctive and declaratory relief. (Doc. 31 at p. 105 (Prayer for Relief (xv)).)

The Department seems to confuse the availability of a "private right" of action under the Spending Clause with the possibility that a court can declare governmental action invalid under the Spending Clause. The former is limited and a private right of action against a *school* for violating a statute enacted under the Spending Clause may well be limited. *See Gonzaga University v. Doe*, 536 U.S. 273, 285 (2002). The latter type of claim, however, has often been entertained by federal courts. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578, 581 (2012) (entertaining Spending Clause challenge to legislation in declaratory action); *South Dakota v. Dole*, 483 U.S. 203, 205 (1987) (same); *Alliance for Open Society Intern., Inc. v. U.S. AID*, 651 F.3d 218, 223, 230 (2d Cir. 2011) (same). Because Dr. Vengalattore seeks only a declaratory judgment that the Department's guidance documents violated the Spending Clause, and *not* a private right of action against Cornell on that constitutional theory, his claim is cognizable here.

Substantively, the Department fares no better. The Department merely asserts, with little analysis, that "the 2001 Guidance is a valid exercise of the Department's powers under the Spending Clause, and entitled to deference." (Doc. 36-1 at 20.)[5]

Initially, it should be noted that the Department's argument comes with an important concession, because it says nothing about the 2011 DCL or the 2014 Q&A. Those documents

[5] The Department's reference to "deference" is puzzling. Sometimes federal agencies invoke various "deference" doctrines when attempting to justify their interpretation of an ambiguous statute that they are tasked with administering. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). That has no application here, because the discussion concerns only a constitutional violation and not an issue of statutory interpretation. Courts afford agencies no deference on matters of constitutional interpretation. *See U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[A]n unconstitutional interpretation is not entitled to *Chevron* deference[.]")

were also challenged in Count XIII, and the Department has raised no challenge at all to the adequacy of the allegations against them. (*See* Doc. 31 at ¶¶845-46.)

In any event, the Department is wrong about the 2001 Guidance because it has altered the terms of the original bargain struck by Title IX. The Spending Clause limits Congress' authority to condition payment of federal funds on state and local actors' engaging or refusing to engage in certain behavior. For example, Congress must speak "unambiguously" if it "intends to impose a condition on the grant of federal moneys." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Congress is also forbidden from coercing states or local actors, including private universities, to adopt certain policies and practices on threat of having federal funds revoked. *South Dakota*, 483 U.S. at 211. Such "economic dragooning" imperils "the political accountability [that is] key to our federal system," because, when a local actor "has no choice, the Federal Government can achieve its objectives without accountability." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 578, 581.

To the extent that the conditions set by Title IX are contractual in nature, the 2001 Guidance improperly altered the very essence of the bargain struck between the government and funding recipients long after the terms were finalized. The terms of the agreement between Congress and funding recipients encompasses only a prohibition *on the recipient* from engaging in discrimination "on the basis of sex." 20 U.S.C. § 1681. But the 2001 Guidance expanded that agreement and insisted that "every school [] might be held liable for failing to take adequate steps to prevent sexual discrimination or harassment 'whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students.'" (Doc. 31 at ¶30.) More significantly, the 2001 Guidance told colleges and universities that "'due to the power a

professor or teacher has over a student,' a professor's conduct would be more likely to be unwelcome and to create a hostile educational environment," and that it "would apply a 'presumption' that any sexual conduct, even if otherwise consensual, between students and faculty, even involving postsecondary students, would be 'not consensual.'" (Doc. 31 at ¶¶32-33.) The 2001 Guidance even "required the school, if defending the faculty member, to 'bear[] the burden of rebutting the presumption.'" (Doc. 31 at ¶34.) These specific edicts could not have been foreseen as part of the Congressional directive to end discrimination "on the basis of sex." The Department, in its role as mere executor of the agreement, may not now fundamentally alter the terms of the agreement in this fashion. *See Pennhurst State Sch. & Hosp.*, 451 U.S. at 17.

Further, the 2001 Guidance also violates the Spending Clause because it is not a true mutual agreement. Spending Clause jurisprudence assumes, at minimum, that the parties have entered into a valid and mutual agreement without fear from improper compulsion. *See South Dakota*, 483 U.S. at 211. But the 2001 Guidance violates that assumption. Colleges and universities across the nation depend on substantial federal funding for their continued existence, and very few educational institutions could survive without continued funding. And, specifically, "Cornell receives a significant amount of federal funding each year, which is necessary for the university's continued operation." (Doc. 31 at ¶833.) This "federal funding is conditioned on the university's continued compliance with Title IX and Title VI." (Doc. 31 at ¶834.) With this level of dependency, schools as a whole, and Cornell in particular, do not have a meaningful choice between following the 2001 Guidance and forgoing funding.

CONCLUSION

This Court should deny the Department's Motion to Dismiss in its entirety.

July 15, 2019

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC 20036
caleb.kruckenberg@ncla.legal
(202) 869-5217
N.D. N.Y. Bar Roll # 700434

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg
Caleb Kruckenberg
Litigation Counsel
New Civil Liberties Alliance
1225 19th St. NW, Suite 450
Washington, DC, 20036
caleb.kruckenberg@ncla.legal
(202) 869-5217
N.D. N.Y. Bar Roll # 700434
Counsel for Plaintiff