IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SARA WECKHORST, Plaintiff, v. KANSAS STATE UNIVERSITY, an agency of the State of Kansas, Defendant.	)	Case No. 2:16-cv-02255-JAR-GEB

RESPONSE TO THE
STATEMENT OF INTEREST OF THE UNITED STATES

Date: August 18, 2016

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I. INTRODUCTION/NATURE OF THE MATTER

Title IX prohibits colleges and universities from engaging in sex discrimination in "education programs and activities." 20 U.S.C. § 1681. But in its Statement of Interest (Doc. 26), the United States seeks to expand the scope of implied civil liability under Title IX beyond anything remotely connected to sex discrimination. It falsely claims that colleges and universities must investigate and regulate potential off-campus sexual misconduct between their students, including conduct at private parties, in their private cars, and in their private bedrooms, whether such conduct occurs during school, over breaks, or during the summer. The United States roots its argument in the Department of Education's ("ED") sub-regulatory "guidance" that is contrary to Title IX and controlling case law and that ED's officials have *admitted* to Congress is not "binding" and lacks the "force of law." The Supreme Court's opinion in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), holds that an institution has a Title IX obligation to respond to sexual harassment only when it has "substantial control over the harasser[s] and the context in which the known harassment occur[ed]." *Id.* at 645. This Court should follow *Davis* and reject the United States' attempt to change the law by *fiat*.

Irrespective of the flaws in its argument, the United States has no business involving itself in this case. This is a private lawsuit where Ms. Weckhorst seeks to recover money damages against K-State based on K-State's allegedly deficient response to alleged rapes. These rapes have not been proved here, in a criminal investigation, or anywhere else. It is not the government's job to help Ms. Weckhorst prove her claims so she can recover money from a public university. Indeed, ED's Office for Civil Rights ("OCR") is supposedly in the midst of a "neutral" investigation of Ms. Weckhorst's allegations—a "neutral" investigation required by OCR's own policies. By filing its Statement of Interest, the United States has compromised OCR's neutrality and created a conflict of interest. It has sent a signal that ED intends to punish

K-State, and other like institutions, that follow Title IX's language, and Supreme Court precedent, instead of OCR's non-binding edicts.

The United States' advocacy in support of Ms. Weckhorst is deeply troubling for another reason. If OCR were following its own Case Processing Manual, OCR would have closed its investigation the moment Ms. Weckhorst filed her lawsuit. But it has refused to do so, and the United States is instead advocating for legal rulings that amount to a declaration K-State is in violation of Title IX—rulings which, if obtained here, OCR will then use to establish K-State's violation of Title IX as a *fait accompli* in its administrative investigation. Through this tactic, the United States circumvents OCR's own administrative process, created by Congress, which requires OCR to seek voluntary compliance and afford K-State the right to a neutral administrative hearing, not to mention subsequent review under the Administrative Procedures Act ("APA"). The Court should not countenance this tactic.

Ms. Weckhorst's Complaint simply fails to meet the *Davis* standard for Title IX liability. The United States' attempt to help Ms. Weckhorst by advocating for a rule that would require K-State to investigate and remediate sexual harassment that occurs off-campus and in private settings is contrary to *Davis* and unsupportable.

II. STATEMENT OF FACTS

OCR is responsible for investigating complaints of sex discrimination against educational institutions such as colleges and universities. *See* http://www2.ed.gov/about/offices/list/ocr/aboutocr.html. Most of OCR's investigations are conducted by regional offices, including the Region VII office in Kansas City. *Id.* OCR conducts its investigations pursuant to a Case Processing Manual ("CPM") that it last updated in February 2015. *See* Ex. A, Case Processing Manual.

Since 2011, OCR has embarked on an aggressive campaign to address what its leaders perceive as a lack of institutional attention to sexual violence occurring in higher education. This campaign has included OCR's issuance of sub-regulatory "guidance" through "Dear Colleague Letters" and "Questions and Answers" documents that purport to provide advice to colleges and universities about how to comply with Title IX. *See, e.g.*, April 4, 2011 Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Questions and Answers on Title IX and Sexual Violence, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. OCR's issuance of such guidance has been accompanied by a marked increase in its efforts to conduct supposedly neutral investigation of colleges and universities, with 254 institutions currently under investigation. *See* Title IX Sexual Assault Investigation Tracker, The Chronicle of Higher Education, *available at* http://projects.chronicle.com/titleix/.

OCR's guidance has been widely criticized as an extra-legal attempt by OCR to expand the definition of sexual harassment, limit accused students' due process rights, regulate protected speech that some people find subjectively offensive, and force institutions to adopt specific adjudication procedures that are nowhere specified in Title IX. *See, e.g.*, Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault, available at https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf ("The federal Office for Civil Rights has ignored constitutional law, judicial precedent, and Administrative Procedure Act requirements by issuing numerous directives, and then enforcing these directives by means of onerous investigations and accompanying threats to withhold federal funding. OCR has brazenly nullified the Supreme Court's definition of campus sexual harassment."); American Association of University Professors ("AAUP"), The History, Uses,

and Abuses of Title IX, June 2016 ("Although its letter marked a substantial change in procedures, the OCR, prior to issuing this letter in 2011, did not engage in the public notice and comment process that is part of federal administration rulemaking."), *available at* https://www.aaup.org/file/TitleIX_final.pdf.

In response to Congressional pressure to explain its failure to engage in notice and comment rulemaking, and substantive critiques about constitutionally suspect statements in the guidance (such as a directive that institutions not permit accused students to cross-examine those who accuse them of rape because doing so could be "traumatic or intimidating"), *see* 2011 Dear Colleague Letter at 12, ED officials repeatedly assured Congress that OCR's guidance is not "binding" and does not have the "force" of law.

Specifically, in 2015, ED's Principal Deputy Assistant Secretary, Amy McIntosh, testified to Congress and was questioned by Senator Lamar Alexander about OCR's promulgation of such "guidance," including statements previously made by Catherine Lhamon, Assistant Secretary for Civil Rights, that OCR "expect[ed]" institutions to follow its guidance. Ms. McIntosh's testimony was as follows:

Senator Alexander:	Ms. McIntosh, do you believe that we gave Ms. Lhamon the authority to make Title IX guidance binding on 6,000 higher education institutions?
Ms. McIntosh:	Thank you, Senator Alexander, for that question. As you know, I was not there during ----
Senator Alexander:	I know, but I [just] read the exchange [that included Ms. Lhamon's testimony].
Ms. McIntosh:	During that exchange. Let me assure you, I tried to be very clear in my opening statement that guidance that the Department issues does not have the force of law.
Senator Alexander:	But this is the Assistant Secretary of the Department with Title IX, which affects, 6,000 institutions, 100,000 public schools, and she

apparently has not gotten the word. Who is going to tell her? Are you?

Ms. McIntosh: As she knows and as I know, Title IX is the binding law that applies in the cases that you ---

Senator Alexander: So guidance under Title IX is not binding, correct?

Ms. McIntosh: **Guidance under Title IX is not binding.** Guidance helps the many people who are subject to Title IX understand what they need to do to comply with the law.

Examining the Use of Agency Regulatory Guidance: Hearing Before the Subcomm. On Regulatory Affairs and Fed. Management of the S. Comm. On Homeland Security and Governmental Affairs, 114th Cong. 18 (2015) (statement of Amy McIntosh, Principal Deputy Assistant Secretary Delegated the Duties of the Assistant Secretary, Office of Planning, Evaluation, and Policy Development, U.S. Department of Education) (emphasis added), *available at* http://www.hsgac.senate.gov/download/rafm-09-23-2015_-final-printed-hearing-record.

Similarly, in January 2016, Senator James Lankford, member of the Senate's Homeland Security and Governmental Affairs Committee, sent a letter[1] to Acting Secretary of ED John B. King, Jr. asking, among other things, that ED provide legal support for certain assertions in OCR's guidance and state its position regarding the enforceability of such guidance. On February 17, 2016, Ms. Lhamon responded on behalf of Mr. King in writing and reiterated that "**The Department does not view such guidance to have the force and effect of law.**" Ex. B, Letter to Lankford of February 17, 2016.

In addition, Ms. Lhamon represented that OCR is required to attempt to resolve perceived non-compliance with Title IX "by informal means wherever possible," and if OCR determines an

[1] January 7, 2016 Letter to John B. King, Jr., *available at* http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf.

institution's non-compliance cannot be resolved informally, OCR "must initiate proceedings in front of a *neutral*, independent Department hearing officer to terminate Federal financial assistance or seek compliance through any means authorized by law. . . . If the hearing officer agrees with OCR, the recipient has additional opportunities to challenge that officer's findings both within the Department and then in court." *Id.* (citing 34 C.F.R. § 106.71 (incorporating, among other provisions, 34 C.F.R. §§ 101.104, 106) 20 U.S.C. § 1683) (emphasis added).

On August 4, 2014, OCR's Kansas City office sent a letter to K-State indicating it intended to investigate a complaint that K-State failed to "promptly and equitably" respond to a report by a student that she was "sexually assaulted by two male University students." Ex. C, Weckhorst Complaint Notification Letter at 1. Although OCR's letter did not specify who the complainant was,[2] and OCR repeatedly refused to provide a copy of the complaint, OCR's investigators later disclosed to K-State that the complaint was filed by Ms. Weckhorst's mother on Ms. Weckhorst's behalf. In the letter, OCR assured K-State that "opening the complaint for investigation in no way implies that OCR has made a determination with regard to its merits." *Id.* at 2. OCR also assured K-State that "[d]uring the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence." *Id.* (emphasis added). OCR represented to K-State that it would "ensure its investigation is legally sufficient and dispositive of the complaint, in accordance with the provisions of Article III of OCR's *Case Processing Manual*." *Id.*

Despite that Ms. Weckhorst's complaint focused on K-State's alleged deficient response to her report of rapes, OCR's notice indicated that OCR intended to examine K-State's handling of *all* complaints of sexual harassment and sexual violence since 2011, and demanded K-State

[2] OCR's practice is to withhold the identity of the complainant in notification letters and to provide it orally in a subsequent phone call. OCR does not provide institutions with a copy of the actual complaint that prompted the investigation and has consistently refused to produce such complaints in response to requests to the investigators and through Freedom of Information Act Requests.

produce copies of all related case files. *Id.* at 7. The letter also included a number of additional document production demands, including some that were facially overbroad. *Id.* at 6. K-State responded to these document requests by producing documents to OCR and/or making such documents available for inspection, including a great deal of documentation concerning Ms. Weckhorst's report and K-State's response to it.

As of the time Ms. Weckhorst filed her lawsuit with this Court on April 20, 2016, OCR had not concluded its investigation of Ms. Weckhorst's administrative complaint. Consequently, under OCR's Case Processing Manual, which states it contains "the procedures to promptly and effectively investigate and resolve complaints, compliance reviews and directed investigations to ensure compliance with civil rights laws enforced by OCR," *see* Ex. A, Case Processing Manual at 2, OCR was required to close its investigation of Ms. Weckhorst's administrative complaint as soon as she filed her lawsuit. Specifically, Section 110 of the Case Processing Manual states, in pertinent part, that OCR "**will** close the complaint allegation(s) for the following reasons: . . . the same allegations have been filed by the complainant against the same recipient with state or federal court." *Id.* at 10-11.

Although it became aware of Ms. Weckhorst's lawsuit shortly after it was filed, OCR did not close its pending investigation as its own Case Processing Manual requires. Thus, on May 9, 2016, K-State's counsel sent OCR a letter requesting that the investigation be closed as required by the Case Processing Manual. Ex. D, May 9, 2016 Letter to OCR.[3] After more than a month went by with no response from OCR, on June 17, 2016, K-State's counsel sent another letter to OCR again requesting closure and advising OCR its failure to close the case was in violation of

[3] The letter also requested that OCR close its pending investigation of three other complaints, including Tessa Farmer's complaint, based on the same and similar provisions of the Case Processing Manual.

its own Case Processing Manual. Ex. E, June 17, 2016 Letter to OCR. OCR did not provide a substantive response to this letter either.

Then, on July 1, 2016, the United States filed its Statement of Interest advocating for the viability of Ms. Weckhorst's claim. While admitting there is no local rule allowing for such a filing without leave, the United States apparently filed the statement based upon an opinion from the clerk's office that neither leave nor notice was required. Statement at 1, n.1. The Statement of Interest's signature block included information from some eleven different federal attorneys, representing multiple agencies, including attorneys from ED's main office in Washington, D.C. wherein OCR's headquarters is located. The United States filed the Statement of Interest without any prior notice to K-State, let alone a courtesy notice to K-State's counsel, whose letters OCR had been ignoring. It is unclear whether the United States gave Ms. Weckhorst and her counsel prior notice of its intention to file the Statement.

On July 18, 2016, OCR's Supervising Attorney from the Kansas City office sent a letter to K-State's counsel stating that OCR "has not made a final decision regarding the impact" of Ms. Weckhorst's lawsuit and, therefore, had not yet decided whether to close its investigation. Ex. F, July 18, 2016 Letter to K-State's Counsel. The letter stated that OCR's (supposedly neutral) investigation would "continue unless or until OCR's *national office* determines otherwise"—the very office that is advocating against K-State through the Statement. *Id.* (emphasis added). As of the date of this filing, OCR has made no finding with respect to its administrative investigation of K-State.

As the United States notes, "ED has four open Title IX investigations of K-State involving sexual harassment." Statement at 2. It is not clear what point the United States is trying to make, given that no findings have been made in any of the investigations, all are

purportedly "neutral" at this stage, and OCR itself has admitted "a college or university's . . . being the subject of a Title IX investigation **in no way** indicates at this stage that the college or university is violating or has violated the law." ED, *Press Release, U.S. Department of Education Releases List of Higher Education Institutions With Open Title IX Sexual Violence Investigations* (May 1, 2014), *available* at http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i.

One of the four investigations concerns Ms. Weckhorst's own administrative complaint. Another is an investigation into an administrative complaint filed by Tessa Farmer, who has also sued K-State seeking to collect money damages and is represented by the same attorneys as Ms. Weckhorst. *See* Case No. 16-02256. A third was filed by an individual who was also represented by the same attorney as Ms. Weckhorst and Ms. Farmer and whose veracity has been questioned by her own mother. The fourth was prompted by a report from a former K-State employee who disagreed with K-State's legal position that while it processes all reports of sexual violence, it is not required to engage in fact-finding pertaining to allegations of sexual violence that occur off-campus, between private persons in private settings unless it relates to discrimination or harassment alleged on campus.

III. ISSUES PRESENTED

1. Whether the United States has a legitimate interest in advocating on behalf of Ms. Weckhorst when it is supposedly in the midst of a "neutral" investigation of her administrative complaint against K-State?

2. Whether K-State lacked substantial control over J.F., J.G., and the context of the alleged rapes given that they occurred off campus, at private gatherings, and in private locations?

3. Whether Title IX requires institutions to investigate sexual harassment reported to have occurred outside the institution's programs and activities where the complainant reports no further harassment?

4. Whether Title IX permits a civil plaintiff to bring an equitable claim under some lesser standard than that set forth in *Davis* where the Supreme Court clearly limited a civil plaintiff to claims based on deliberate indifference to known, severe, sexual harassment caused by the institution's own action?

5. Whether the United States should be required to seek leave and provide notice prior to filing any further "Statements of Interest" in this case?

IV. ARGUMENT

A. Because The United States Does Not Have A Legitimate Interest In The Outcome Of This Private Lawsuit, The Court Should Disregard The Statement Of Interest

The United States claims it has the right to file its Statement of Interest pursuant to 28 U.S.C. § 517, which states that "any officer of the Department of Justice may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States."

The Statement of Interest fails to articulate any interest other than that ED and the Department of Justice ("DOJ") "share responsibility for enforcing Title IX" and that the "United States has an interest in ensuring effective private enforcement of Title IX." Statement at 1-2. Neither is a legitimate basis for the United States to involve itself in this litigation. In fact, because OCR is currently conducting a supposedly neutral investigation of Ms. Weckhorst's administrative complaint (along with supposedly neutral investigations of the three other complaints), the United States' true interest should be to remain entirely absent from this litigation.

1. Ms. Weckhort's lawsuit is a private cause of action, not a regulatory enforcement proceeding.

Title IX prohibits sex discrimination in the education programs and activities of educational institutions that receive federal financial assistance. 20 U.S.C. § 1681(a). Title IX is

not a law of general application. It is, instead, a law Congress enacted pursuant to its spending power. *Davis*, 526 U.S. at 638-39.

Congress delegated to ED and DOJ the ability to enforce Title IX through the promulgation of regulations and administrative enforcement mechanisms, including the ability to investigate complaints that an institution has violated Title IX and to bring administrative enforcement proceedings subject to eventual review under the APA. *See* 20 U.S.C. § 1682; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998). Importantly, however, and as Ms. Lhamon admitted, the regulations require ED and DOJ to seek an institution's voluntary compliance with Title IX prior to instituting enforcement proceedings. *Gebser*, 524 U.S. at 288 (citing 34 C.F.R. § 100.7(d) (1997)). Further, in the administrative enforcement proceedings, ED and DOJ lack the power to compel an institution to pay damages to a complainant; instead, ED and DOJ may seek injunctive relief or, failing the efficacy of that, move to revoke an institution's eligibility to receive federal funds. *Id.* at 289 ("[T]he regulations do not appear to contemplate a condition ordering payment of monetary damages. . . .").

Title IX itself contains no explicit private right of action for money damages. However, in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), a divided Supreme Court held such a right to be implied based primarily upon its conclusion Congress intended to benefit those persons subject to discrimination rather than merely to punish discrimination. *Id.* at 694-95. In *Davis*, the Supreme Court held the implied private cause of action could be predicated on an institution's deliberate indifference to known student-on-student sexual harassment but only where the institution had actual knowledge of severe sexual harassment that occurred within its "substantial control," and the institution's deliberate indifference to that harassment caused the victim to be excluded from the institution's education programs and activities. 526 U.S. at 650.

As the Supreme Court explained in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), while violating ED and DOJ's Title IX regulations may result in administrative efforts to compel compliance (consistent with the regime described above), an institution's violation of administrative regulations does not support an implied private claim for money damages. *Id.* at 292 ("We have never held, however, that the implied private right of action under Title IX allows for recovery in damages for violation of those sorts of administrative requirements."); *see also Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) ("[An] alleged failure to comply with the Title IX regulations does not establish actual notice and deliberate indifference."); *Doe v. Bibb County Sch. Dist.*, 126 F. Supp. 3d 1366, 1378 (M.D. Ga. 2015) ("Clearly, a funding recipient cannot be held liable simply because it did not conduct an appropriate investigation (even if such conduct could expose it to potential administrative action . . .)."). Rather, a plaintiff proceeding on an implied cause of action based on an institution's alleged failure to respond to third-party harassment must always show deliberate indifference that causes discrimination. *Gebser*, 524 U.S. at 290.

Because ED and DOJ have no right to bring implied private causes of action under Title IX to recover money damages for victims, the United States' assertion that ED and DOJ "share responsibility for enforcing Title IX" and therefore have an interest in this case is a *non sequitur*. While ED and DOJ have responsibility for enforcing Title IX under the *administrative scheme*, they have no responsibility to bring money damages actions for alleged deliberate indifference to student-on-student harassment. And because compliance with ED and DOJ's regulations is not the test for implied civil liability, adjudications of implied civil causes of action under Title IX implicate no more interest on the United States' part than any other private claim predicated on a civil rights theory. Yet, the United States does not routinely file 30 page statements of interest,

and enter the appearances of eleven different attorneys, in private lawsuits under statutes such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, just to name a few.

The United States also asserts it has an "interest in ensuring effective private enforcement of Title IX in court," by "[s]tudents who experience sexual assault." Statement at 2. Yet, this assertion pre-supposes that Ms. Weckhorst has actually been raped and thus experienced sexual assault—a conclusion that has yet to be proven here, or anywhere else, including in OCR's own supposedly neutral investigation. In fact, despite Ms. Weckhorst making a report to police, J.F. and J.G. have not even been arrested, much less indicted or convicted of any crime, even though two years have passed since the alleged rapes.

Thus, what the United States *really* appears to be saying is that the United States has an interest in helping *alleged* victims of rape *prove* their claims against colleges and universities and recover money. This interest finds no support in Title IX or the administrative enforcement scheme created by Congress, which contemplates neutral investigations by ED followed by attempts at voluntary compliance in the event an institution is found to be in non-compliance.

In short, the fact that this case involves only a private right of action, based on currently unproven claims of rape, forecloses the United States' claim that it has a legitimate interest at stake.

2. ED is supposedly in the midst of a "neutral" administrative investigation of Ms. Weckhorst's complaint.

The United States' advocacy on behalf of Ms. Weckhorst is deeply troubling because OCR is supposedly in the midst of a "neutral" investigation of Ms. Weckhorst's administrative complaint. OCR has not concluded its investigation and has not made a single finding that K-State is not in compliance. And it asserts its investigation of K-State remains open. Thus, its

entry into this case for the purpose of supporting Ms. Weckhorst is directly at odds with OCR's supposed role as a neutral investigator.

The United States' apparent decision to compromise OCR's neutrality, and create a conflict of interest, is particularly troubling given that OCR has largely ignored K-State's repeated requests that the administrative investigation be closed as the Case Processing Manual requires. Indeed, OCR's recent letter to K-State claims no "final decision" has been made on whether to close Ms. Weckhorst's administrative complaint even though OCR has now had *over three months* to consider the matter. What seems apparent is that OCR is attempting to stall the closure of its administrative investigation while it advocates for definitive rulings in this case that OCR will then attempt to use in its administrative investigation to declare K-State in violation of Title IX—a far cry from its required and self-proclaimed role as a neutral investigator.[4] This tactic is just an end run around the administrative enforcement regime that Ms. Lhamon assured Congress includes proceedings in front "of a *neutral*, independent Department hearing officer," followed by "additional opportunities to challenge that officer's findings both within the Department and then in court." Ex. B, Letter to Lankford of February 17, 2016. It also runs contrary to Congress' directive that OCR should attempt to obtain Title IX compliance through voluntary means, prior to initiating any legal action. *Gebser*, 524 U.S. at 288 (citing 34 C.F.R. § 100.7(d) (1997)).

In light of this, K-State respectfully submits that the United States has only one *legitimate* interest here, and that is to follow its own Case Processing Manual and close Ms. Weckhorst's administrative investigation. Further, the United States must remain "neutral" as OCR

[4] This would also explain why OCR elected to file a Statement of Interest without leave, instead of following the conventional intervention procedure required by Federal Rule of Civil Procedure 24. Specifically, by not being an intervenor, as the rule contemplates, OCR may be trying to avoid issue preclusion against itself with respect to any adverse rulings, while still being able to use adverse rulings against K-State.

represented it would, or it will be clear to K-State and the other 200+ institutions currently under investigation that OCR is not interested in objective fact finding, partnering with its "colleagues" in higher education, or following its own administrative processes. Instead, it will be clear that OCR is placing its thumb on the side of complainants in an attempt to penalize institutions who follow the text of Title IX and the Supreme Court's cases, instead of overbroad and unsupported guidance ED itself has admitted is not "binding."

To the extent the United States would claim its Statement of Interest merely articulates its views on the law, and that its Statement of Interest does not advocate for Ms. Weckhorst, a simple review of the Statement of Interest proves the opposite is true. Indeed, the Statement of Interest affirmatively advocates for Ms. Weckhorst by arguing, among many other things that:

- Ms. Weckhorst "pled a plausible Title IX claim for damages."
- Ms. Weckhort's "repeated reports to K-State made clear that the continuing effects of the alleged rapes created a hostile environment on campus."
- "K-State knew that the reported rapes . . . . had a 'concrete, negative effect" on Ms. Weckhorst's "ability to receive an education.'"
- The "unreasonableness of K-State's refusal [to consider Ms. Weckhrost's alleged fear of encountering J.F. and J.G.] contributed to a hostile environment."

Statement at 5, 7, 11, at 21.

No person could read the United States' Statement of Interest and believe OCR is "neutral" in its investigation of K-State. Thus, by filing the Statement of Interest here, the United States has actually undercut its Congressionally-imposed, and self-affirmed interest in

investigatory neutrality. *See* Ex. A, Case Processing Manual at 10 ("OCR is a neutral fact-finder").[5]

In a word, the United States' actions here are extraordinary. Title IX's implementing regulations set forth an orderly process for OCR to conduct its investigations, seek voluntary compliance, and bring administrative enforcement proceedings if it believes K-State is in violation of Title IX. In those proceedings, K-State has the right to challenge OCR's determinations, through judicial review under the APA if necessary. The Court should not indulge OCR's apparent attempt to circumvent that process, and deny K-State its administrative rights, by supporting private litigants such as Ms. Weckhorst who seek to recover money damages on implied civil claims that have yet to be proven.

B. K-State Did Not Have Substantial Control Over J.F., J.G., And The Context Of The Alleged Rapes

As K-State has repeatedly explained, *Davis* requires Ms. Weckhorst to show that K-State had substantial control over J.F., J.G. and the context in which the alleged rapes occurred. *See* Doc. 13, at 7-12; Doc. 32, at 9-16.

K-State already responded to, and refuted, Ms. Weckhorst's various arguments that seek to circumvent and dilute the substantial control requirement. *See* Doc. 32, at 9-16. Because the United States repeats many of the same (flawed) arguments as Ms. Weckhorst, K-State need not

[5] Indeed, numerous media articles have construed the United States' Statement of Interest as announcing OCR's definitive decision that K-State *is* in violation of Title IX. *See* Mará Rose Williams, *K-State Was Wrong To Not Investigate Rapes At Off-Campus Frat Houses, Federal Government Says*, K.C. Star, July 5, 2016 ("In court documents, the U.S. Department of Justice and the Department of Education say a K-State policy to not investigate complaints of student-on-student rape when the attacks occur off campus is wrong."); *available at* http://www.kansascity.com/news/local/article87842797.html; Stephanie Saul, *U.S. Urges Kansas State to Heed Reports of Off-Campus Rape*, N.Y. Times, July 5, 2016 ("Kansas State University's policy not to investigate accusations of rape in off-campus fraternity houses is 'incorrect' according to the federal government."), *available at* http://www.nytimes.com/2016/07/06/us/us-instructs-kansas-state-to-heed-reports-of-off-campus-rape.html?_r=0. Some media reports have gone so far as to describe the United States as "side[ing]" with Ms. Weckhorst in her lawsuit. *See* Associated Press, *Federal Government Sides With 2 Women Suing Kansas State Over Rapes*, Topeka Capital Journal, July 6, 2016, *available at* http://cjonline.com/news/2016-07-06/federal-government-sides-2-women-suing-kansas-state-over-campus-rapes.

repeat its arguments *in toto*. However, the United States' Statement of Interest requires additional response in a few key respects.

1. ED's position that "fraternities" are "education activities" is a red herring and irrelevant to a *Davis* analysis, which turns on whether the institution had substantial control over the harassers and the context of the harassment.

The United States' argument that "K-State fraternities are education activities covered by Title IX" is overbroad on its face. Statement at 7-10. And it is red herring intended to distract the Court from the real question—whether K-State had "substantial control over the harasser[s] and the context in which the known harassment occur[ed]." *Davis*, 526 U.S. at 645. Ms. Weckhorst has failed to plead facts showing K-State had such control here.

As a threshold matter, a fraternity is not an activity as the United States claims. A fraternity, like any other student group, is an organization that consists of members. Fraternities have activities—such as rush, service projects, and formal dances. Whether or not any particular fraternity activity can be fairly included in K-State's "operations" and, therefore, part of K-State's "education programs and activities" for Title IX purposes, is not something than can be answered categorically because different institutions have different relationships with fraternities. For example, some institutions—often private ones like Stanford and Dartmouth[6]—allow fraternities to reside in institution-owned buildings and thus have a degree of control over what occurs in the fraternity residence, including activities hosted there. Other institutions, like K-State, simply recognize fraternities as student organizations, but fraternity members, to the

[6] *See* https://rde.stanford.edu/studenthousing/greek-houses and http://www.dartmouth.edu/stulife/greek-soc/cfs/fraternities.html.

extent they choose to live communally, do so of their own accord and live at an off-campus house that the institution does not own, does not have access to, and does not control.[7]

Where, as here, K-State does not own the fraternity houses located throughout Manhattan—and Ms. Weckhorst does not even make such an assertion, nor could she (*see supra* n.7)—it is unreasonable to suggest that all activities that take place in those houses are part of K-State's education programs and activities, and it is even more unreasonable to suggest that private parties at places like Pillsbury Crossing and interactions between students in private cars are fairly characterized as part of K-State's education programs and activities.

OCR's own reasoning in prior cases illustrates the gross overreach of the United States' current position. Indeed, in 2008, ED investigated a complaint that the University of Wisconsin-Madison violated Title IX by failing to adequately investigate an alleged off-campus sexual assault. *See* Ex. G, University of Wisconsin Findings Letter. The complainant stated she went to a fraternity party where she became intoxicated and met two members of the men's crew team. *Id.* at 1-2. She alleged the males took her to an off-campus apartment where she alleged the males had sex with her while she was incapacitated. *Id.* at 2. The off-campus apartment was owned by a university employee—the boatmaster—and leased exclusively to crew team members. *Id.* Although men's crew is indisputably an education program or activity of the institution, and the crew members lived communally in the apartment, OCR concluded "the alleged assault did not occur in the context of an educational program or activity operated by the University." *Id.* at 13. Yet, the United States would have the Court hold precisely the opposite here, by categorically including everything that occurs within a private "fraternity house" as part

[7] *See* http://www.k-state.edu/fsl/parents_families/faq.html ("Chapter houses are all privately owned and are not owned or controlled by the University.").

of K-State's education programs and activities, simply because members of a recognized student organization happen to live there. Statement at 7.

The United States stresses that courts have "recognized that off-campus conduct occurring under a school's activity or program is covered by Title IX." Statement at 8. K-State has never contended otherwise and, accordingly, its Policy Prohibiting Discrimination, Harassment, Sexual Violence, and Stalking, and Procedure for Review Complaints (the "Policy), explicitly recognizes that K-State's jurisdiction extends to education programs and activities that occur off campus. *See* http://www.k-state.edu/policies/ppm/3000/3010.html. But just because education programs and activities *can* extend off campus, does not mean that all the activities involving students and/or members of a student organization that occur off campus are part of an institution's education programs and activities. The conclusion simply does not follow from the premise.

Similarly, the United States notes that it has "long interpreted Title IX and its regulations to protect students while they participate in extracurricular activities that extend outside the geographic confines of campus." Statement at 8. Again, K-State has never contended otherwise. But the United States cites no case, statute, or regulation holding a private party at Pillsbury Crossing, interactions in a private car, and interactions in a private bedroom in a privately-owned fraternity house are part of a university's "extracurricular" activity, let alone its "operations." And its finding in the University of Wisconsin case suggests exactly the opposite.

In fact, those courts that have considered the question have consistently rejected the notion that off-campus acts of fraternity members in private settings are subject to an institution's Title IX obligations. *See, e.g.*, *Roe*, 746 F.3d at 884; *Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003). They have done so on the basis of *Davis*' teaching that an institution

must have "substantial control over both the harasser and the context in which the harassment occurs" to trigger an institution's Title IX obligations. *See Davis*, 526 U.S. at 645.

The Supreme Court's words have meaning. Those words cannot be ignored at the United States' whim. "Substantial" means "of ample or considerable amount." www.dictionary.com (July 21, 2016). "Control" means "to exercise restraint or direction over." *Id.* "Context" refers to "the set of circumstances or facts that surround a *particular event or situation*." *Id.* (emphasis added). A generic claim that K-State's "fraternities" are part of its education programs and activities does nothing to show that K-State was able to exercise an "ample" or "considerable amount" of "restraint" or "direction" over the "particular event or situation" in which the alleged rapes occurred.

Indeed, Ms. Weckhorst does not allege that K-State organized the party at Pillsbury Crossing, had any agents there, or was even aware of its occurrence until after it was over. She does not allege that K-State had any agent in the car when J.F. drove her from Pillsbury Crossing to the fraternity. And she does not allege that K-State had any agents at the fraternity or any ability to enter the fraternity house, let alone a private bedroom, to regulate J.G.'s conduct. As such, this is a far cry from a situation where an alleged rape occurs in an institution-owned building. Indeed, here, Ms. Weckhorst affirmatively pleads that K-State's campus police do not have the same type of access to private fraternity houses that they have to campus buildings, such as dorms. *See* Complaint ¶ 66; *see also Reardon v. Wroan*, 811 F.2d 1025, 1028 & n.2 (7th Cir. 1987) (fraternity houses have the same Fourth Amendment protections as private homes).

Put simply, the allegations in Ms. Weckhorst's Complaint do not show that K-State had substantial control over J.F., J.G., and context of the rapes. Therefore, she fails to state a claim, contrary to ED's biased assertion.

2. ED's sub-regulatory guidance that declares activities in fraternity houses to be part of an institution's education programs and activities is unpersuasive, not binding, and should be afforded no deference.

Unable to support with logic or case law its conclusion that the acts of fraternity members in a private fraternity house are part of K-State's education programs and activities, the United States also spends a number of pages arguing the Court should accept the proposition simply because OCR says so. Specifically, the United States claims OCR's sub-regulatory guidance in its "Questions and Answers," which declares that "activities that take place at houses of fraternities or sororities recognized by the school," are part of "education programs and activities" should be entitled to *Chevron* and *Auer* deference. Statement at 9. This assertion is profound given that ED's own administrators explicitly represented to Congress that such guidance is not "binding" and lacks the "force and effect of law." In any event, OCR's guidance is not entitled to deference, and it is unpersuasive for a host of reasons.

First, the Questions and Answers were not promulgated pursuant to notice and comment rulemaking. For this reason alone, they are not entitled to *Chevron* deference under Tenth Circuit precedent. *See Mission Group Kan., Inc. v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998); *Headrick v. Rockwell Intern.*, 24 F.3d 1272, 1282 (10th Cir. 1994).

Second, OCR's declaration is not even an interpretation of Title IX or its implementing regulations, but instead an *application* of Title IX's definition of "operations" to the factual scenario of activities at fraternity houses; thus no deference is owed. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376 (1998) (no deference to agency determinations of fact made in light of regulatory interpretation); *see also People for the Ethical Treatment of Animals,*

Inc. v. U.S. Dep't of Agriculture, 2016 WL 2772284, at *6 (D. Colo. 2016) ("The *Chevron* test applies to legal interpretations, not factual determinations.").[8]

Third, deference of any kind is inappropriate where the underlying statute or regulation is unambiguous or has already been definitively construed. Title IX unambiguously defines "education programs and activities," to include all the "operations," of the institution. 20 U.S.C. §§ 1681(a) & 1687; 34 C.F.R. § 106.31(a). As noted above, in the context of a Title IX civil claim, *Davis* definitively construed the term "operations" to include only those activities where the institution has "substantial control over both the harasser and the context in which the harassment occurs." *Davis*, 526 U.S. at 645. Moreover, the *Davis* Court made this decision based on the *plain language* of the statute. *Id.* at 644 ("The statute's *plain language* confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs." (emphasis added)). And *Chevron* deference, of course, is only available if the plain language is ambiguous—but the Supreme Court has already decided it is not. *See, e.g.*, *Lamb v. Thompson*, 265 F.3d 1038, 1052 (10th Cir. 2001) (holding that *Chevron* deference is unavailable when the plain language of the statute is unambiguous). OCR's unsupported interpretation, which would classify all activities at fraternities as part of an institution's "operations," irrespective of a "substantial control" analysis, is clearly foreclosed.

Fourth, the Questions and Answers are inconsistent with OCR's own previous determinations in like situations. *See Indep. Training and Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) ("We decline to afford controlling deference where an agency pulls the rug out from under litigants that have relied on a long-

[8] To be sure, if OCR had made an *adjudicatory* decision that K-State has "substantial control" over its fraternities, such a finding could enjoy "substantial evidence" review in a subsequent action under the Administrative Procedures Act. *See* 5 U.S.C. § 706 (2)(E). Here, however, OCR has made no such finding. Indeed, as noted above, OCR's supposedly "neutral" investigations of K-State are still pending.

established, prior interpretation of a regulation . . . ."). Indeed, as noted above, OCR found that an alleged rape that occurred at a private residence owned by the crew team's boatmaster—and leased exclusively to crew team members—was not part of the institution's education programs and activities. And with respect to fraternities that own a private house off-campus (like those recognized by K-State), the analogy is direct. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (holding that when an agency changes its position without providing any justification for doing so, the regulation is arbitrary and capricious, and is not entitled to *Chevron* deference).

Fifth, even if OCR's dictate is an interpretation, and would otherwise be accorded deference in a lawsuit premised on *regulatory* enforcement, agency interpretations are not afforded any deference whatsoever in private lawsuits premised on an implied private right of action. *See Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.27 (1977) ("Indeed, in our prior cases relating to implied causes of action [under the securities laws], the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in a particular case."); *see also Doe*, 126 F. Supp. 3d at 1377 ("[I]t is obvious the guidance in the [Dear Colleague Letter] is broader than the scope of liability for private causes of action for money damages."). Given that Ms. Weckhorst's claim here is indisputably based on the implied cause of action recognized in *Davis*, 526 U.S. at 639-40, the Court should give OCR no deference.

Sixth, OCR's position is facially unpersuasive because it carelessly rests on the assumption that a college or university's mere "recognition" of a fraternity gives it "substantial control" over what happens at a fraternity "house." As discussed above, whether or not this is true necessarily depends on factors specific to the institution's relationship with fraternities.

Where an institution recognizes fraternities as student organizations, but does not control where fraternity members live, what happens in a private fraternity house is not something the institution has substantial control over. The Eighth Circuit's closely analogous decisions in *Roe* and *Ostrander* correctly illustrate why this is so. *See Roe*, 746 F.3d at 883; *Ostrander*, 341 F.3d at 750-51.

C. Title IX Does Not Require An Institution To Remedy The Effects Of Sexual Harassment That Occurs Outside Its Education Programs And Activities

Failing in its efforts to establish that off-campus acts of fraternity members in private settings are subject to K-State's substantial control, the United States erroneously argues K-State still has a Title IX obligation to remediate the *effects* of sexual harassment suffered by its students, even if K-State had no substantial control over the harassment in the first place.

But Ms. Weckhrost's claim is governed solely and exclusively by *Davis* and its progeny. There the Court found that a plaintiff could pursue a claim in only the limited circumstances where a school is "deliberate[ly] indifferen[t] to known acts of harassment *in its programs and activities*," and only where the harassment is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633. The United States asks this Court to expand Title IX liability by disregarding *Davis*' fundamental elements.

1. Under *Davis* an institution can only be liable for violating Title IX if its own conduct causes discrimination in its education programs and activities.

In *Davis*, the Supreme Court explicitly rejected the notion that a school can be held liable for "permitting [peer-on-peer] harassment in programs and activities." *Davis*, 526 U.S. at 639. That standard would, of course, amount to the imposition of vicarious liability for the criminal conduct of third parties, a standard the Supreme Court soundly rejected. *Id.* at 672. Instead, for

liability to attach the "recipient *itself* must exclude persons from participation in, deny persons the benefits of, or subject persons to discrimination under its programs and activities." *Id.* at 641 (internal quotations and ellipses omitted). This means that, to be actionable, the harassment "must take place in a *context* subject to the school district's control"—that is, where the institution exercises "substantial control over both the harasser and the context in which the harassment occurs." *Id.* at 645. "Only then can the recipient be said to 'expose' its students to harassment or 'cause' them to undergo it 'under' the recipient's programs." *Id.* *Davis* specifically holds that an institution cannot be liable for its response to sexual harassment that occurs outside its substantial control.

2. *Davis* requires a showing that the institution's deliberate indifference caused further harassment.

Davis also makes clear that a Title IX claim against an institution involving peer-on-peer harassment must rest on an allegation that the institution itself *caused* discrimination. Where, as here, the claim is supposedly predicated on an institution's deliberate indifference to sexual harassment reported by Ms. Weckhorst, the plaintiff must plead and prove that the institution's deliberate indifference to the harassment caused *further* harassment. *See Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008); *Escue v. N. Okla. College*, 450 F.3d 1146, 1155 (10th Cir. 2006). Indeed, without this causal element, an institution would be liable merely for failing to remedy the effects of harassment occurring outside its substantial control. But Title IX is not, by its terms, a remedial statute. It is a statute that prohibits institutional sex discrimination. Thus, the United States' assertion that Title IX requires K-State to remediate the effects of sexual harassment it had no control over runs counter to Title IX and a key element of *Davis*.

The United States also asserts that an alleged "hostile environment" that results from a single act of sexual harassment is always sufficient to establish "further harassment" as contemplated by the Tenth Circuit cases following *Davis*. But this is just a dressed up version of the same, flawed argument that Title IX requires an institution to remediate sexual harassment it had no control over. That is not the law. And a complete reading of the Tenth Circuit's decision in *Rost*, including the dissent (which takes the position the United States advances here), makes this clear. *See Rost*, 511 F.3d at 1121.

In fact, OCR's own guidance confirms that for harassment to be actionable under Title IX—even in the *regulatory* sense—it must be "unwelcome conduct of a *sexual* nature." *See* ED's Revised Sexual Harassment Guidance at 2 (ED, 2001) ("Sexual harassment is unwelcome conduct of a *sexual* nature") (emphasis added), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. Fear that a person *might* suffer unwelcome conduct of a sexual nature is not sexual harassment. But all Ms. Weckhorst alleges here is that she *feared* she would *encounter* J.F. and J.G. on campus. Notably, she does not allege that she fears further sexual harassment from J.F. and J.G., only that she fears "encountering" them. That is not sexual harassment, nor even a fear of it. Further, Ms. Weckhorst does not allege she was even in proximity to J.F. and J.G., let alone that they took any further "unwelcome conduct of a sexual nature" against her.

OCR's own 2011 Dear Colleague Letter, that the United States so desperately urges this Court to follow, actually illustrates the point: "For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that *upon returning to school* he or she was *taunted and harassed* by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a

sexually hostile environment." Notably, the scenario posed by OCR involves *further adverse action* taken against the student—that is, unwelcome taunting and harassment about the sexual assault that occurred in the school. Not even OCR's own guidance suggests, as the United States and Ms. Weckhrost do now, that a mere subjective *fear* of a future "encounter" is enough to constitute "further harassment."

Finally, the United States asserts that Title IX requires an institution to at least investigate every report of rape, regardless of where it occurs, even if the institution does not remediate the effects of the rape. This conclusion has no support in case law. *Davis* is clear that a Title IX plaintiff must show, among other things, that she actually suffered severe sexual harassment, that the institution had substantial control over the harasser and the context of the harassment, and that the institution's deliberate indifference caused the plaintiff to be excluded from the institution's education programs and activities. 526 U.S. at 644-45. Courts have held that the mere failure to investigate does not meet this standard even when the sexual harassment indisputably occurs *inside* an institution's education programs and activities. *See Preusser ex rel. E.P. v. Taconic Hills Cent. Sch. Dist.*, 2013 WL 209470, at *11 (N.D.N.Y. 2013) ("Plaintiffs also argue that defendants were deliberately indifferent because the Title IX officer failed to properly investigate the matter but offer no caselaw in support of that assertion. Upon receipt of a Title IX grievance, a school district is not required to proceed in any particular manner, even if there are policies in place that would appear to require the initiation of a formal investigation."). Clearly, it follows then that Title IX liability cannot be premised merely on an institution's allegedly inadequate investigation of sexual harassment that occurs *outside* an institution's education programs and activities.

Again, OCR's own prior findings prove the point. Specifically, in 2004 OCR investigated a complaint against Oklahoma State University ("OSU") that alleged the institution violated Title IX by failing to adequately respond to a female student's report that she was sexually assaulted by four football players off-campus at a private residence. *See* Ex. H, Oklahoma State Findings Letter. In rejecting the complainant's charge that OSU violated Title IX by failing to respond to her report, OCR stated, in pertinent part:

> A university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient. OCR's investigation . . . substantiated that the sexual assault . . . took place off-campus in a private residence. Therefore, OSU did not have an obligation **to take any action under Title IX**.

Id. at 2 (emphasis added).

In sum, the United States' attempt to expand the scope of an institution's Title IX obligations beyond the text of Title IX, and contrary to *Davis*, is unsupported, misguided, and an unexplained departure from OCR's own previous findings. The Court should reject it.

D. ***Davis* Sets The Sole Standard For Civil Liability Under Title IX; There Is No Lesser Standard That Applies To Claims For Equitable Relief**

In another overreach, the United States attempts to argue that Ms. Weckhorst's equitable claim is governed by a lesser standard than her claim for money damages. This assertion is incorrect for at least two reasons.

First, the United States cites no case holding that the type of equitable relief Ms. Weckhorst seeks in this case—namely, an order forcing K-State to conduct an investigation and "disciplinary proceedings" against J.F. and J.G.—is even *available* in a private cause of action. Notably, the United States cites *Cannon v. University of Chicago*, 441 U.S. 677 (1979), but that case sought to enjoin an institutional policy that was specifically excluding certain individuals from a university program based on sex.

The United States cites no case holding that, where the claim is predicated on peer-on-peer harassment, a private litigant can request particular equitable relief or demand a particular institutional response. In fact, *Davis* itself suggests that this type of relief is *not* available. 526 U.S. at 648 ("Likewise, the dissent *erroneously* imagines that victims of peer harassment now have a Title IX right to make particular remedial demands." (emphasis added)); *see also Rost*, 511 F.3d at 1123; *Escue*, 450 F.3d at 1155; *Doe ex rel. Conner v. Unified Sch. Dist. 233*, 2013 WL 3984336, at *6 (D. Kan. 2013).

Even if equitable relief is available, it makes no sense that this equitable relief is available under a *lesser* legal standard given that the Supreme Court went out of its way in *Davis* to state plaintiffs cannot make particular remedial demands. Indeed, the United States does not cite a *single case* holding that equitable relief is subject to a lower legal standard than money damages in a student-on-student harassment case. Instead, the United States asks, again, that this Court defer to OCR's *administrative* guidance. But this is not an administrative case; it is a private cause of action that must meet the standards set forth in *Davis*. As already discussed, an agency's views about the proper scope of an implied cause of action are entitled to no deference whatsoever. *See, e.g.*, *Piper*, 430 U.S. at 42 n.27.

Thus, to the extent any equitable relief is available, it must be governed by standards articulated in *Davis*.

E. The Court Should Require The United States To Seek Leave Before Making Any Further Filings

By making its filing, the United States has compromised its neutrality, created a conflict of interest, injected a substantial amount of duplicative argument into the record, and burdened the Court and parties with another round of briefing where Ms. Weckhorst already has counsel representing her interests. If the United States continues to file Statements of Interest whenever

it sees fit, and without leave, this will lead to further disruption of briefing schedules, duplication of effort, and distraction from the real issues at hand. Therefore, K-State respectfully requests that the Court order the United States to seek leave prior to making additional filings.

This outcome is supported by law and the rules of civil procedure. While 28 U.S.C. § 517 allows DOJ to appear and represent the "interests" of the United States, the statute does not grant the United States an unfettered right to file briefs in cases without seeking leave. Nor does it exempt the United States from the rules of civil procedure and local rules.

As noted above, Federal Rule of Civil Procedure 24 creates an explicit process for the United States to intervene where, as here, a substantive claim is premised on a statute that an "officer or agency" is charged with "administering." That process explicitly requires a "timely motion" for leave. Moreover, Local Rule 15.1 requires a motion for leave prior to a party filing any "document" that "may not be filed as of right." Consistent with these rules, the Court should not permit the United States to file additional briefs unless and until the United States seeks leave, the parties have an opportunity to respond to the request, and the Court determines whether or not the filing is justified.

V. CONCLUSION

The United States does not have a legitimate interest in this lawsuit. Its true interests are to remain neutral in private litigation, conduct a neutral administrative investigation, and follow the administrative process prescribed by Congress and its own Case Processing Manual. To the extent the Court considers the United States' arguments, it should reject them. The United States wrongly advocates for an expansion of Title IX obligations that goes far beyond the teachings of *Davis*, while publically acknowledging the "guidance" upon which it bases its argument is not binding. And it conflates principles of civil liability and regulatory enforcement without any support or justification.

Date: August 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2016, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

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