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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

15 SURVJUSTICE, INC.,  
16 1015 15<sup>th</sup> Street NW, Suite 632  
17 Washington, DC 20005

18 EQUAL RIGHTS ADVOCATES,  
19 1170 Market Street, Suite 700  
20 San Francisco, CA 94102

21 VICTIM RIGHTS LAW CENTER  
22 520 SW Yamhill Street  
23 Portland, OR 97204,

24  
25  
26  
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28

Plaintiffs,

v.

ELISABETH DEVOS, in her official  
capacity as Secretary of Education,  
400 Maryland Avenue SW  
Washington DC 20202, et al.

Defendants.

Case No. 3:18-cv-00535-JSC

**NOTICE OF MOTION AND MOTION  
FOR LEAVE TO INTERVENE AS  
PLAINTIFFS, MEMORANDUM OF  
POINTS AND AUTHORITIES, AND  
PROPOSED COMPLAINT IN  
INTERVENTION**

Date: February 14, 2019  
Time: 9:00 a.m.  
Place: 450 Golden Gate Ave., 15<sup>th</sup> Fl.  
Courtroom F  
San Francisco, CA 94102  
Judge: Hon. Jacqueline Scott Corley

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**NOTICE OF MOTION AND MOTION TO INTERVENE**

**PLEASE TAKE NOTICE THAT** on February 14, 2019 at 9:00 a.m. a hearing will be held before the Hon. Jacqueline Scott Corley in Courtroom F, 15<sup>th</sup> Floor, at the United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California, 94102, on the Women’s and Children’s Advocacy Project, Equal Means Equal, National Coalition Against Violent Athletes, Allies Reaching for Equality, Women Matter, We Are Woman, and SAFE Campuses, LLC (collectively “Equality Advocates”) motion for leave to intervene as Plaintiffs.

This case challenges the lawfulness of new rules affecting Title IX of the Education Amendments of 1972, (Title IX) issued by Defendants in September 2017 in the form of a “Dear Colleague Letter” and “Question and Answer” document. (Comp. pp.2-3) (hereafter DeVos Rules)<sup>1</sup> The DeVos Rules dictate how women’s civil rights under Title IX are to be enforced on campus and by oversight agencies, with particular regard to their application to sex-based harms. Equality Advocates have a significant interest in this matter, and seek to advance claims and arguments on behalf of women as a class, whose right to equal treatment under Title IX is at stake in this litigation, because the DeVos Rules permit or require unequal treatment of women and sex-based harms.

This case has become even more urgent and has taken on greater significance because Defendants recently released proposed changes to the Title IX regulations. Department of Education, *Notice of Proposed Rulemaking*, <https://www.2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>. Unlike the subregulatory DeVos Rules, which derive their authority, albeit unlawfully, from regulations promulgated under the Campus SaVE Act, the newly proposed regulations will be promulgated under Title IX and carry the force of law.

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<sup>1</sup> The first lawsuit to challenge the DeVos Rules was filed against Defendants in the United States District Court for the District of Massachusetts on October 19, 2017. *Equal Means Equal, et al., v. U.S. Dep’t of Education, et al.*, 1:17cv12043-MLW. Unlike this case, the Massachusetts plaintiffs seek fully equal treatment of women.

1 Proposed changes to the Title IX regulations mirror many unlawful provisions of the DeVos  
2 Rules, which will remain in effect while the regulatory changes are being decided. For example, the  
3 proposed regulations will permit schools to subject women and sex-based harms to unequal  
4 treatment by applying a burden of proof more onerous than preponderance of the evidence, while  
5 preponderance will remain the standard for civil rights harms based on race and national origin.  
6 *Notice of Proposed Rulemaking*, pp. 61-64. In addition, the proposed regulations will change the  
7 definition of a Title IX offense from unwelcome and based on sex, to unwelcome, based on sex, and  
8 so “severe, pervasive, and objectively offensive that it effectively denies a person equal access to  
9 the recipient’s education program or activity; or sexual assault as defined in 34 CFR 668.46(a)  
10 (Clery Act definition). *Id.*, at p.24. This definitional change, currently applicable as a liability  
11 standard in private lawsuits, will subject women and sex-based harms to unequal treatment because  
12 it will not be made applicable to harms based on race and national origin. A ruling on the merits by  
13 this Court will prevent schools and oversight agencies from relying on the DeVos Rules to justify  
14 unequal treatment of women under Title IX, and could provide important guidance on the proposed  
15 regulations. Indeed, Equality Advocates are asking this Court to rule that only Congress has  
16 authority to amend the Title IX statute to permit unequal treatment. Thus, a ruling by this Court  
17 could effectively prevent Defendants from promulgating regulations that violate the Title IX statute.  
18 Just as Defendants may not exceed their authority when issuing guidance documents, they may not  
19 exceed the authority granted to them by the enabling statute when promulgating regulations.

20 Equality Advocates endeavored to avoid intervening in this matter by submitting an amicus  
21 brief in connection with Defendants’ motion to dismiss Plaintiffs’ first amended complaint. A  
22 hearing on that motion was held July 19, 2018, but neither the parties nor the court addressed the  
23 main issue raised by Equality Advocates, namely, that the DeVos Rules are unlawful because they  
24 subject women and victims of sex-based harms to unequal treatment.

25 As discussed in the accompanying Memorandum and Points of Authorities, intervention as  
26 of right is warranted because the interests of women as a class are not adequately represented by the  
27



1 Plaintiffs.<sup>2</sup> Plaintiffs assert only a Fifth Amendment Equal Protection claim, (Comp. pp.51-52) and  
2 an ultra vires claim. (Comp. pp.52-53) The Equal Protection claim alleges only that Defendants  
3 were motivated by gender bias when they issued the DeVos Rules. It nowhere asserts a claim to  
4 equal treatment, or alleges that the DeVos Rules unlawfully subject women and sex-based harms to  
5 unequal treatment. In any event, Equality Advocates object to this Court’s consideration of the Fifth  
6 Amendment Equal Protection claim under middle-tier scrutiny, *Bolling v. Sharpe*, 347 U.S. 497  
7 (1954) rather than strict scrutiny, which permits rather than prohibits unequal treatment. As  
8 Plaintiffs nowhere ask this court to apply strict scrutiny, their ultra vires claim is inadequate. It is  
9 also inadequate because it alleges that Defendants acted in excess of authority on the grounds that  
10 the DeVos Rules “disadvantage” victims by “permitting schools to provide one-sided appellate  
11 rights” and because they were issued after Defendants considered “factors unrelated to Title IX’s  
12 mandate in doing so.” (Comp. p.52). Such a limited ultra vires claim cannot adequately protect the  
13 rights of women as class against other actions of the Defendants that exceeded their lawful authority  
14 and imposed on the rights of women as a class to fully equal treatment. Furthermore, Plaintiffs assert  
15 no Title IX, Tenth Amendment, or Spending Clause claims, or any other claims which could result  
16 in this Court issuing a decision affirming women’s right to equal treatment.

17 Equality Advocates initially refrained from seeking intervention in this matter in the hope  
18 Plaintiffs would amend their complaint to protect women’s right to equal treatment. But that did not

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19  
20 <sup>2</sup> Plaintiffs label the nature of women’s suffering “harassment” (Comp. p.14) rather than  
21 “discrimination” or “discriminatory conduct covered by Title IX.” Sexual harassment is a term of  
22 art, established as a liability standard for hostile environment discrimination in lawsuits for money  
23 damages. It requires proof of “severe or pervasive” words or conduct that interfere with a student’s  
24 education. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1991). Sex discrimination, by  
25 contrast, is a broader term defined as unwelcome and offensive conduct, based on sex.  
26 “Unwelcome” is then defined as conduct the student “did not request or invite it and considered the  
27 conduct to be undesirable or offensive.” <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>. It applies on campus, in administrative enforcement proceedings, and lawsuits. See  
28 Equal Employment Opportunity Commission, *Types of Discrimination*, available at  
<https://www.eeoc.gov/laws/types/sex.cfm>. Interestingly, the term sexual harassment appears in  
Plaintiffs’ complaint 131 times, while the term sex discrimination appears only 26 times, even  
though Plaintiffs’ lawsuit purports to be driven by concerns that the DeVos Rules are rooted in  
sex/gender discrimination in the form of stereotypes.

1 happen. Even after the hearing on Defendants’ Motion to Dismiss, at which this Court specifically  
2 asked the parties to submit additional briefs addressing the rights are at stake for women in this  
3 controversy, Plaintiffs filed a supplemental brief nowhere asserting women’s right to equal  
4 treatment. Plaintiffs’ newly filed second amended complaint similarly fails to mention women’s  
5 right to equal treatment, or even cite to the Title IX regulations that guarantee equal treatment, In  
6 fact, in a two-page section citing the Title IX regulations, Plaintiffs make no mention of several key  
7 regulations that mandate equal treatment by prohibiting “different” treatment. (Comp.pp.17-18) For  
8 example, one regulation prohibits schools to “subject any person to separate or different rules of  
9 behavior, sanctions or other treatment,” based on sex. 34 C.F.R. part 106.31(b)(4). This regulation  
10 obviously forbids schools to subject victims and offenders of sex-based harm to separate and  
11 different treatment (such as application of a different burden of proof) compared to the treatment  
12 afforded victims and offenders of harms based on race and national origin. The DeVos Rules permit  
13 such different treatment, but Plaintiffs nowhere cite the regulation, or assert in any claim that the  
14 DeVos Rules violate Title IX by permitting different treatment.<sup>3</sup> Equality Advocates seek to  
15 intervene in this matter to ensure that Title IX’s prohibitions against separate and different treatment  
16 are fully advanced and protected in this litigation.

17 In support of this Motion, Equality Advocates incorporate by reference its previously  
18 submitted Amicus Brief, (Document No. 47) and submit the following Memorandum of Points and

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19 <sup>3</sup> Plaintiffs appear not to understand recent Title IX history as they state on page 22 of their complaint  
20 that the 2011 Dear Colleague Letter (DCL) was issued after schools “solicited assistance” from the  
21 Department of Education (DOE) to better understand their obligations under Title IX. This is  
22 incorrect. In fact, the DCL was issued after Title IX investigations were opened against Harvard  
23 Law School and Princeton University, and then sent to OCR headquarters in fall 2010, along with a  
24 request that the DOE issue some form of “global guidance” because problems at Harvard and  
25 Princeton were systemic in higher education. Murphy, W., *From Explicit Equity to Sports to Sexual  
26 Assault to Explicit Subjugation: The True Story Behind Title IX and Women’s Ongoing Struggle for  
27 Equality in Education*, in Sexual Harassment in Education and Work Settings: Current Research and  
28 Best Practices and Prevention (Michele A. Paludi, et al. eds., 2015). Schools did not “solicit  
assistance.” Moreover, they were opposed to the DCL. Not surprisingly, higher ed supported the  
filing of the Campus SaVE Act only two weeks after the DCL was issued. The Campus SaVE Act  
ultimately overturned several important aspects of the DCL, including equitable treatment of  
victims, and mandatory use of the preponderance of evidence standard. Id.

1 Authorities, and Proposed Complaint in Intervention, which is attached hereto as **Exhibit “A”** and  
2 incorporated herein by reference.

3  
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 Equality Advocates seek to intervene in this matter to advance women’s right to equal  
7 treatment under Title IX because the DeVos Rules permit or require unequal treatment of women  
8 and the Plaintiffs advance no claims or arguments on behalf of women’s right to equal treatment.  
9 Equality Advocates have submitted a proposed complaint in intervention alleging that the DeVos  
10 Rules violate Title IX, the Tenth Amendment, the Spending Clause of the U.S. Constitution, and the  
11 Administrative Procedure Act. Equality Advocates also assert an ultra vires claim alleging  
12 additional and different theories than those set forth in Plaintiffs’ ultra vires claim in their second  
13 amended complaint. If left to stand, or modified only in accordance with the arguments and claims  
14 set forth by the Plaintiffs, the DeVos Rules will cause harm to women as a class.

15 **II. PRIOR PROCEEDINGS**

16 Plaintiffs filed their original complaint on January 25, 2018, purporting to represent the  
17 rights and interests of women as a class under Title IX. They amended their complaint on February  
18 21, 2018. Neither complaint included a Title IX claim, a Tenth Amendment claim, or a Spending  
19 Clause claim, and neither complaint asserted any claim seeking fully equal treatment of women.

20 Defendants filed a Motion to Dismiss on May 2, 2018. Plaintiffs filed an opposition in which  
21 it nowhere addressed or advocated for equal treatment of women. Equality Advocates filed a motion  
22 for leave to file an amicus brief on June 14, 2018, which was granted on June 29, 2018. The brief  
23 filed by Equality Advocates extensively addressed women’s right to equal treatment, and neither  
24 party opposed the brief’s filing. A hearing on Defendants’ Motion to Dismiss was held on July 19,  
25 2018. During the hearing, equal treatment of women was not addressed by any party or the court.  
26 At the end of the hearing, the Court asked for supplemental briefing on the issue of which rights and

1 obligations are affected by the DeVos Rules. Plaintiffs submitted a supplemental brief on August 2,  
2 2018, which nowhere mentioned women’s right to equal treatment under Title IX, and nowhere  
3 argued that the DeVos Rules violate this mandate. Nor did their brief cite case law recognizing  
4 unequal treatment as a cognizable legal injury. Equality Advocates subsequently filed a Motion to  
5 Intervene and a proposed complaint in intervention, which was opposed by both parties. A hearing  
6 on the Motion to Intervene was scheduled for October 18, 2018. Before the hearing court take place,  
7 the Court granted Defendants’ motion to dismiss. Thereafter, Equality Advocates withdrew their  
8 Motion to Intervene, subject to the Plaintiffs’ filing of a second amended complaint.

9 On October 31, 2018, Plaintiffs filed a second amended complaint in which they, again,  
10 failed to assert a Title IX claim, a Tenth Amendment claim, or a Spending Clause claim, and failed  
11 to even *cite* the Title IX regulations that forbid “different” treatment based on sex, or request equal  
12 treatment of women and harms covered by Title IX, on par with harms based on race and national  
13 origin.

14 In light of Plaintiffs’ persistent and inexplicable failure to advance women’s right to equal  
15 treatment under Title IX, Equality Advocates again seek to intervene in this mater for the purpose  
16 of advancing claims and theories that best protect the rights and interests of women as a class.

17 **III. INTERESTS OF PUTATIVE INTERVENORS**

18 The **Women’s and Children’s Advocacy Project** (WCAP) is a public interest law project  
19 of the Center for Law and Social Responsibility at New England Law|Boston. The WCAP engages  
20 in direct litigation, and submits amicus briefs in state and federal court on behalf of the rights and  
21 interests of abused women and children. The co-Director of WCAP has been involved in litigation  
22 related to sexual assault and Title IX since the early 1990s, and has written many scholarly articles  
23 on the topic, including a seminal law review article explaining how and why Title IX applies to  
24 campus sexual assault.<sup>4</sup> Since the release of the DeVos Rules, WCAP has served many women and

25 <sup>4</sup> *Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide*  
26 *Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 *New England Law Review*,  
27 *No. 4*, pp. 1007-1022 (2006); *Sexual Harassment and Title IX: What’s Bullying Got To Do With*  
*It*, *New England Journal on Criminal and Civil Confinement*, 37, 305-324 (2011); *Bullying and*

1 victims of sex-based harms who were subjected to discrimination by schools in the form of separate,  
2 different, and unequal treatment in the response to and redress of sex-based harm on campus. One  
3 client, a college student, was subjected to a hearing on campus where officials applied a burden of  
4 proof more onerous than preponderance. That client and another client were subjected to hearings  
5 on campus where school officials used criminal law definitions of offenses, and offenses more  
6 onerous than the Title IX definition of unwelcome, offensive, and based on sex. Both clients were  
7 subjected to separate and different substantive policies and procedures, based on sex, before the  
8 DeVos Rules were issued. Both clients were subjected to policies and procedures that afforded them  
9 separate, different and worse treatment compared to the policies and procedures afforded to students  
10 who suffered harms based on race and national origin. Both clients filed complaints with the  
11 Department of Education's Office for Civil Rights before the DeVos Rules were issued. Both  
12 complaints, which are still pending, were opened for investigation before the DeVos Rules were  
13 issued, and are now subject to the harmful effects of the DeVos Rules.

14 **Equal Means Equal** (EME) is a national nonprofit 501(c)(4) organization that Advocates  
15 for sex/gender equality and the fully equal treatment of women and girls. Through the use of  
16 grassroots activism, social media, and documentary filmmaking, EME has actively lead or  
17 participated in hundreds of events to support sex/gender equality. In 2016, EME produced and  
18 released the film *Equal Means Equal*. In 2018, EME testified before the Illinois legislature in  
19 support of that state's successful ratification of the 1972 Equal Rights Amendment. Equal Means  
20 Equal is based in California, where its founder and president, actress Kamala Lopez, resides. EME's  
21 mission is to advocate for the fully equal treatment of women under all laws. Since the release of  
22

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23 *Harassment in Schools: Analysis of Legislation and Policy*, in M.A. Paludi (Ed.), *Women and*  
24 *Management, Global Issues and Promising Solutions*, volume 2: *Signs of Solutions* (pp. 29-51)  
25 (Santa Barbara, CA Praeger 2013); *Effective Gender Activism: An Exercise in Marginalization*, in  
26 Martin, J.L. (Ed.), *Racial Battle Fatigue: Insights from the Front Lines of Social Justice Advocacy*,  
27 (pp. 191-208) (Santa Barbara, CA Praeger 2015); Murphy, W., *Krakauer's Missoula: Where*  
*Subversive Meets Verisimilitude*, 42 *Journal of College and University Law*, number 2, pp. 479-  
516, at 490, n.45 (2016).

1 the DeVos Rules, EME has served women and victims of sex-based harms who were subjected to  
2 discrimination by schools in the form of separate, different, and unequal treatment in the response  
3 to and redress of sex-based harm on campus.

4       The **National Coalition Against Violent Athletes** (NCAVA) is a national 501(c)(3) non-  
5 profit organization that advocates for victims of violence, including sexual assault and domestic  
6 violence, as well as prevention training for athletes. Through media, prevention training, legal  
7 advocacy, research, grassroots advocacy and policy writing, the NCAVA has led a twenty-year  
8 movement for equal rights for victims. NCAVA is based in Colorado, where its founder and  
9 president, Katherine Redmond, resides. NCAVA's mission is to advocate for the equal treatment of  
10 women under all laws. Since the release of the DeVos Rules, NCAVA has served many women and  
11 victims of sex-based harms who were subjected to discrimination by schools in the form of separate,  
12 different, and unequal treatment in the response to and redress of sex-based harm on campus.

13       **Allies Reaching for Equality** (A.R.E.) was formed in 2017 to address the significant issue  
14 of university practices that allow hostile environments to go unchecked and places the achievement  
15 of women and other intersectional populations in jeopardy. A.R.E. is serving as advocate for  
16 university community members navigating discrimination and retaliation. A.R.E. will also provide  
17 effective training, resources, and empowerment for university staff to uphold civil rights law,  
18 including Title IX, Title VII, and 1964 civil rights laws to stop the uneven playing field and ensure  
19 equal access to education. The corporatization of higher education and the competitive environment  
20 to attract students has provoked a disincentive for universities to allocate resources to point to  
21 institutional problems dealing with gender and intersectional harassment. A.R.E.'s mission is to  
22 partner with university leadership, faculty, staff, and students to create a community prioritizing and  
23 upholding gender, race, and intersectionality equity at our universities. The United States  
24 government is not equipped to guarantee compliance with civil rights laws and attempts to enforce  
25 have historically caused a reaction with little effort to prevent the significant harms experienced by  
26 survivors of sexual assault, harassment, and retaliation. With its programs, A.R.E. is working to

1 close the gap caused by lack of government oversight with research-driven information and guided  
2 resources. A.R.E.'s mission is to advocate for the equal treatment of women, including equal  
3 treatment of civil rights laws. Since the release of the DeVos Rules, A.R.E. has served many women  
4 and victims of sex-based harms who were subjected to discrimination by schools in the form of  
5 separate, different, and unequal treatment in the response to and redress of sex-based harm on  
6 campus.

7 **Women Matter** is an organization based in Virginia. It supports gender equality under the  
8 law by advocating for ratification of the Equal Rights Amendment. (ERA) Through education and  
9 advocacy, Women Matter has increased bipartisan support for the ERA in Virginia and has assisted  
10 Nevada and Illinois in their recent successful ratification efforts. In collaboration with members of  
11 other regional and national organizations, Women Matter has helped establish a network of activists  
12 in Virginia and further elevated support for the Amendment's ratification by the Virginia General  
13 Assembly. Women Matter also participates in efforts by People Demanding Action to enlist  
14 sponsors and passage of bills in Congress to remove the deadline for ratification. Since its inception  
15 in 2013, Women Matter has advocated for the equal treatment of women under the United States  
16 Constitution and, consequently, all state and federal government action, including legislation and  
17 rulemaking.

18 **We Are Woman (WAW)** is a national nonprofit 501(c)(3) organization that advocates for  
19 the rights of women and families. The organization's mission is to enshrine the Equal Rights  
20 Amendment in the United States Constitution. WAW advocates on behalf of women for a variety  
21 of women's issues including domestic abuse, reproductive rights and providing education about the  
22 importance of voting in all elections. Through grassroots advocacy, social media activism, and  
23 participation in coalitions, WAW has led or participated in events throughout the country in support  
24 of its mission.

25 **SAFE Campuses, LLC** provides education and training for all levels of education, in the  
26 United States and abroad, on a wide range of campus security issues including sexual assault, dating  
27

1 violence, and stalking. Founded in 2017, SAFE Campuses is based in Georgia and provides  
2 advocacy to ensure the fully equal treatment of women and sex-based harms. It also provides  
3 training and education for institutions and victims, and has extensive experience in higher education  
4 security issues and regulatory compliance, including Title IX, other civil rights laws, and the Jeanne  
5 Clery Act. Since the release of the DeVos Rules, SAFE Campuses LLC has served many women  
6 and victims of sex-based harms who were subjected to discrimination by schools in the form of  
7 separate, different, and unequal treatment in the response to and redress of sex-based harm on  
8 campus.

9  
10 **IV. ARGUMENT**

11 The requirements for intervention in federal actions are set forth in Rule 24 of the Federal  
12 Rules of Civil Procedure. Under Rule 24(a), intervention is allowed as a matter of right.  
13 Intervention is permissive under Rule 24(b).

14 **A. Equality Advocates Have a Right to Intervene**

15 Federal Rules of Civil Procedure 24(a) provides that upon timely motion, a court must permit  
16 anyone to intervene who: 1) is given an unconditional right to intervene by a federal statute; or 2)  
17 claims an interest relating to the property or transaction that is the subject of the action, and is so  
18 situated that disposing of the action may, as a practical matter, impair or impede the movant's ability  
19 to protect its interest, unless existing parties adequately represent that interest.

20 Equality Advocates satisfy the requirements for intervention as of right.

21 **1. The Application is Timely**

22 Plaintiffs filed their second amended complaint only a week ago, on October 31, 2018. The  
23 parties will not be prejudiced by intervention at this time, especially considering that all the issues  
24 raised by Equality Advocates have already been submitted in this case, in the form of an amicus  
25 brief and previously filed Motion to Intervene.



1                   2.       Equality Advocates Have a Significant Interest in the Subject of this Action

2           Equality Advocates have a significant interest in the subject matter of this action because the  
3 DeVos Rules require or permit the unequal treatment of women, and all Equality Advocates have  
4 alleged facts establishing that they are advocates for the fully equal treatment of women.

5           **B.       Standing/Injury**

6           Equality Advocates have as much standing as the Plaintiffs. Moreover, the denial of equal  
7 treatment at issue here is a cognizable legal injury to women as a class, whose interests are  
8 represented by Equality Advocates, and, as set forth in the proposed complaint in intervention,  
9 women served by Equality Advocates have already been subjected to unequal treatment. Denial of  
10 equal treatment is enough to establish standing. *See American Civ. Liberties Union of N.M. v.*  
11 *Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008) (“The injury in fact is the denial of equal  
12 treatment. Although the City argues that the bases identified by the district court to show injury are  
13 speculative or non-existent, the fact remains that the individual Plaintiffs will still be required to  
14 present photo identification that must be accepted if they vote in-person whereas those voting  
15 absentee will not.”) *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir.  
16 2004) (“[A] voter cannot know in advance that his or her name will be dropped from the rolls, or  
17 listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker  
18 who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there  
19 will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and  
20 imminent.”) (finding standing and holding that the denial of equal treatment is an injury in fact.)  
21 These cases make clear that the deprivation of equal treatment is more than just a “subjective chill,”  
22 see *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1090-91 (10th Cir. 2006).<sup>5</sup>

23 \_\_\_\_\_  
24 <sup>5</sup> In a lawsuit recently filed in the United States District Court for the District of Massachusetts  
25 against Harvard College, only an advocacy group serves as the plaintiff. The case is very similar to  
26 this lawsuit in that it seeks injunctive and other equitable relief under Title VI of the Civil Right Act  
27 of 1964 for the purpose of ensuring equal treatment and preventing discrimination based on national  
28 origin. No individual plaintiffs are named; only an organization whose purpose is to advocate for  
equality and protection from discrimination based on national origin. *Students for Fair Admissions*  
*v. President and Fellows of Harvard College, et al.*, 1:14-cv-14176-ADB.

1 Equality Advocates also have prudential standing under the Administrative Procedure Act,  
2 (APA) because women as a class are within the zone of interests recognized by the APA as a class  
3 of people intended to be protected by Title IX. 5 U.S.C. § 702 (a person is within the zone of interests  
4 if they are “adversely affected or aggrieved ...” within the meaning of a relevant statute.) The APA  
5 is broadly remedial, and those whose interests are directly affected by a broad or narrow  
6 interpretation of a statute or regulation are easily identifiable. *Association of Data Processing*  
7 *Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The plaintiff need only fall within the  
8 “zone of interests protected or regulated by the statutory provision ... invoked in the suit.” APA, 5  
9 U.S.C. §702; *Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). See *Thompson v. North American*  
10 *Stainless*, 131 S. Ct. 863, 869-70 (2011) (A person who has standing under Title VII of the Civil  
11 Rights Act of 1964 is anyone within the “zone of interests” as that phrase is used in APA standing  
12 jurisprudence.) All women fall within Title IX’s zone of interests because Title IX is intended to  
13 ensure that no person is subjected to sex discrimination in federally assisted programs. See  
14 *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.*, 463 U.S. 582, 633 (1983) (Because Title VI is  
15 intended to ensure that ‘no person’ is subject to discrimination in federally assisted programs, private  
16 parties function as third-party beneficiaries to these contracts). See also *Barlow v. Collins*, 397 U.S.  
17 159 (1970) (Tenant farmers had standing to challenge Department of Agriculture regulation because  
18 they were intended beneficiaries under the statute).

19 **C. The Court’s Prior Order Does Not Bar Intervenor’s Equal**  
20 **Treatment Claim Under Title IX**

21 As Plaintiffs did not assert a Title IX claim in its first amended complaint, the Court’s order  
22 dismissing that complaint does not bar Intervenor’s equal treatment claim under Title IX.

23 Title IX of the Education Amendments of 1972 forbids sex discrimination, including sex-  
24 based assaults. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998); *Davis v. Monroe*  
25 *County Bd. of Educ.*, 526 U.S. 629, 641 (1999) in or by federally funded educational entities. 20  
26 U.S.C. § 1681(a). Title IV of the Civil Rights Act of 1964 also prohibits discrimination in education,

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1 and covers race, color, religion, and national origin. 42 U.S.C. §§ 2000c through 2000c-9.

2 Long misunderstood to be primarily a sports equity rule for female athletes, Title IX was  
3 modeled after Title VI of the Civil Rights Act of 1964, which provides, “No person in the United  
4 States shall, on the ground of race, color, or national origin, be excluded from participation in, be  
5 denied the benefits of, or be subjected to discrimination under any program or activity receiving  
6 Federal financial assistance,” 42 U.S.C. §§ 2000d - 2000d-7. Title IX uses exactly the same enabling  
7 language and states, “No person in the United States shall, on the basis of sex, be excluded from  
8 participation in, be denied the benefits of, or be subjected to discrimination under any education  
9 program or activity receiving Federal financial assistance...” 20 U.S.C. § 1681(a).

10 The Title IX regulations forbid schools, on the basis of sex, to: “subject any person to  
11 separate or different rules of behavior, sanctions, or other treatment;” or otherwise “limit any person  
12 in the enjoyment of any right, privilege, advantage or opportunity;” “treat one person differently  
13 from another” in “determining whether such person satisfies any requirement of condition for the  
14 provision of such aid, benefit, or service;” or “provide different aid, benefits or services in a different  
15 manner;” 34 C.F.R. part 106.31(b)(1-7). Title IX regulations further prohibit the “use or distribut[ion  
16 of] a publication, which suggests by text or illustration that such school treats applicants, students  
17 or employees differently on the basis of sex” 34 C.F.R. part 106.9(b)(2), and mandate that funding  
18 recipients “adopt and publish grievance procedures providing for prompt and equitable resolution  
19 of student and employee complaints alleging any action, which would be prohibited by Title IX.”  
20 34 C.F.R. part 106.8(b).

21 Sex as a civil rights category is entitled to the same treatment as race and national origin.  
22 *Among the University of Montana - Missoula, the U.S. Department of Justice, Civil Rights Division,*  
23 *Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights,*  
24 RESOLUTION AGREEMENT, available at [http://www.justice.gov/crt/about/](http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf)  
25 [edu/documents/montanaagree.pdf](http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf) (announcing resolution agreement with the University of  
26 Montana and noting that Title IV and Title IX both require “equity” and are subject to the same  
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1 regulations and standards of enforcement). Title IX is coextensive with civil rights laws that protect  
2 against other civil rights harms, such as those based on race and national origin. *Cannon v.*  
3 *University of Chicago, supra*, at 694-98 (1979) (Congress intended that Title IX would be  
4 interpreted and applied as Title VI has been); *U.S. Department of Justice, findings letter against the*  
5 *University of New Mexico*, (April 22, 2016) (noting that Title IX, Title VI, and Title IV are  
6 coextensive civil rights laws); <https://www.justice.gov/opa/file/843901/download>; *Justice*  
7 *Department Announces Investigations of the Handling of Sexual Assault Allegations by the*  
8 *University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney's*  
9 *Office*, Department of Justice (May 1, 2012), [http://www.justice.gov/opa/pr/2012/](http://www.justice.gov/opa/pr/2012/May/12-crt-561.html) May/12-crt-  
10 561.html (announcing Title IX compliance review and Title IV investigation of the University of  
11 Montana and noting, "Title IX of the Education Amendments of 1972 and Title IV of the Civil  
12 Rights Act of 1964 prohibit sex discrimination, including sexual assault and harassment in  
13 education"); *Resolution Agreement*, [http://www.justice.gov/crt/about/edu/](http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf)  
14 *documents/montanaagree.pdf* (announcing resolution agreement with University of Montana and  
15 noting that Title IV and Title IX ensure enforcement of rights regarding discrimination, harassment,  
16 and violence.) *See also*, Civil Rights Restoration Act of 1987, equating standards from Title VI with  
17 Title IX, 20 U.S.C. § 1687; 29 U.S.C. § 794, 42 U.S.C. § 2000d-4a, and 42 U.S.C. § 6101; 34 C.F.R.  
18 § 106.71 (procedural provisions applicable to Title VI of the Civil Rights Act, 34 CFR §§ 100.6-  
19 100.11, are adopted and incorporated therein); *Title VI Enforcement Highlights Office for Civil*  
20 *Rights*, U.S. DEPARTMENT OF EDUCATION, [http://www2.ed.gov/](http://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf) *documents/press-releases/title-vi-*  
21 *enforcement.pdf* (noting that Title VI requires schools to apply standard of "equity"); *Title IX Legal*  
22 *Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE,  
23 <http://www.justice.gov/crt/about/cor/coord/ixlegal.php>; *see also* 42 U.S.C. § 2000d-7 (requiring  
24 equal treatment on behalf of all protected class categories, and in a section labeled "Civil rights  
25 remedies equalization" states that "(1) A State shall not be immune under the Eleventh Amendment  
26 of the Constitution of the United States from suit in Federal court for a violation of § 504 of the

1 Rehabilitation Act of 1973 [29 U.S.C. 794], Title IX of the Education Amendments of 1972 [20  
2 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], Title VI of the  
3 Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute  
4 prohibiting discrimination by recipients of Federal financial assistance.” This “Civil rights remedies  
5 equalization” mandate further states that “(2) In a suit against a State for a violation of a statute  
6 referred to in paragraph (1), remedies (including remedies both at law and in equity) are available  
7 for such a violation to the same extent as such remedies are available for such a violation in the suit  
8 against any public or private entity other than a State.)

9 **D. The DeVos Rules Require or Permit the Unequal Treatment of Women**

10 As addressed at length in Equality Advocates’ previously filed amicus brief at pages 7-12,  
11 which has been incorporated herein by reference, the DeVos Rules require or permit the unequal  
12 treatment of women in the following ways: They allow the use of a burden of proof more onerous  
13 than Title IX’s preponderance of the evidence standard (DeVos Rules, p.5); they require the use of  
14 criminal law definitions to address sex-based offenses rather than Title IX’s less onerous definition  
15 of unwelcome (DeVos Rules, pp.2, 3 & n.11-12; 5 & n.22-23; 6 & n.25); they permit schools to  
16 offer *fair* redress for victims of sex-based harms (DeVos Rules, p.3 & n.11), rather than *equitable*  
17 redress; they permit or require separate and different treatment of sex-based harms; they grant  
18 offenders of sex-based civil rights harms the same rights as victims of sex-based civil rights harms  
19 (DeVos Rules at p.4, 5), while offenders of civil rights harms based on other protected class  
20 categories, such as race or national origin, are not granted the same rights as their victims. The  
21 DeVos Rules also mandate that sex-based civil rights harms be treated the same as non-civil rights  
22 harms (DeVos Rules, p.5, n.19), while civil rights harms based on other protected class categories,  
23 such as race or national origin, are not treated the same as non-civil rights harms. These aspects of  
24 the DeVos Rules obviously affect the rights of women as a class to equal treatment.

25 **E. The Campus SaVE Act**

26 The DeVos Rules incorporate, and state that they derive their authority from, regulations  
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1 promulgated under SaVE, a statute that Amended the Clery Act, not Title IX. The DeVos Rules not  
2 only unlawfully incorporate SaVE’s regulations into Title IX, but also mandate that schools comply  
3 with SaVE when enforcing Title IX. Obviously, SaVE can have “no effect” on Title IX because it  
4 amended the Clery Act. *Doe v. U.S. Dept. of Health and Human Services*, 85 F. Supp. 3d 1, 11  
5 (D.D.C. 2015). The Department of Education itself acknowledged as much in an August 2014  
6 guidance document in which it wrote that “[n]othing in [SaVE] ... relieves a school of its obligation  
7 to comply with the requirements of Title IX ...” Dept. of Education, Office for Civil Rights,  
8 *Questions and Answers on Title IX and Sexual Violence*, April 29, 2014, p.44. Moreover, as noted  
9 in Equality Advocates’ amicus brief at page 1, OCR has no authority to enforce SaVE as it is not a  
10 civil rights law.

11 While not all aspects of SaVE’s regulations require or permit unequal treatment of women,  
12 key provisions do, and they have the force of law. *Cohen v. Brown Univ.*, 101 F.3d 155, 172 (1<sup>st</sup> Cir.  
13 1996). Women have a protectable interest against the enforcement of regulations that require or  
14 permit discrimination under Title IX because Title IX forbids sex discrimination. *See City of Los*  
15 *Angeles, Dep’t of Water and Power v. Manhart*, *supra*, at 707-11 (1978) (a statute designed to  
16 prevent sex discrimination cannot permit different treatment based on sex); *Title IX Legal Manual*,  
17 *supra* at 62 (“policies or practices that explicitly classify individuals on the basis of sex ... violate  
18 Title IX...); Accord, *Glycine & More, Inc. v. United States*, 880 F.3d 13335 ... n.2 (Fed. Cir. 2018)  
19 (guidance document granted no deference because it “represented an incompatible departure from  
20 the clear meaning of the regulation ... [and] “was not simply an interpretive statement regarding an  
21 ambiguity in the regulation...”)

22 **F. Administrative Redress**

23 Women also have a right under Title IX to file grievances on campus and complaints with  
24 federal oversight agencies, such as the Office for Civil Rights (OCR) at the Department of Education  
25 (DOE), and to have those complaints and grievances redressed under fully equal legal standards, on  
26 par with the standards applied in similar matters based on race and national origin. These

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1 administrative redress rights are negatively affected by the DeVos Rules because the DeVos Rules  
2 permit or require schools and OCR to subject grievances and agency complaints to unequal  
3 treatment. Indeed, as Plaintiffs have pointed out, schools are already applying the DeVos Rules, and  
4 the Rules themselves state that they are already being applied to investigations and compliance  
5 reviews. (“In the interim, [these rules] ... provide information about how OCR will assess a school’s  
6 compliance with Title IX.”) (DeVos Rules, p.1)

7 **G. Private Right of Action**

8 The federal courts are also allowing the DeVos Rules to affect women’s rights when  
9 determining whether schools should be held liable for violating Title IX. See e.g., *Kollaritsch et al.*,  
10 *v. Michigan State University Board of Trustees, et al.*, 1:15-cv-01191-PLM-PJG, United States  
11 District Court, Western District of Michigan, (court order issued 10/17/17 denying motion to strike  
12 and granting defendants leave to file supplemental authority regarding the DeVos Rules, described  
13 as a “significant change in Guidance on Title IX”).

14 Because the DeVos Rules incorporate SaVE, women’s private right of action is also affected  
15 because SaVE forbids victims a private right of action. 20 U.S.C. § 1092 (2013) (“Nothing in this  
16 subsection shall be construed ... to provide a right of action to any person to enforce any provision  
17 of this subsection ... or to create a cause of action against any institution of higher education or any  
18 employee of the institution for any civil liability.”) By contrast, victims have a right to sue under  
19 Title IX. *Cannon v. University*, 441 U.S. 677, 703, n.33 (1979).

20  
21 **H. Disposition of this Action Will Impair or Impede Intervenors’  
22 Ability to Protect Their Interests, and the Interests of Women as a Class**

23 The inadequate representation element of Rule 24(a) is satisfied if the applicant shows that  
24 representation of his interests “may” be inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528,  
25 538 n.10 (1972). The burden of making that showing is minimal. *Id.* An applicant should be allowed  
26 to intervene unless it is clear that the party will provide adequate representation. 7A Charles Alan  
27 Wright & Arthur Miller, *Federal Practice and Procedure* § 1909 (1<sup>st</sup> ed. 1972).

1           The interests of women as a class are not adequately represented by the Plaintiffs because  
2 the DeVos Rules permit and require unequal treatment, in contravention of Title IX’s equal treatment  
3 mandate, but the Plaintiffs’ complaint nowhere asserts any claims asserting that the DeVos Rules  
4 subject women to unequal treatment compared to race and national origin. Nor do Plaintiffs seek  
5 equal treatment. One of Plaintiff’s claims asserts that the DeVos Rules violate the Equal Protection  
6 Clause of the Fifth Amendment, but this claim, even if successful, will *permit* rather than *preclude*  
7 unequal treatment because the Fifth Amendment’s Equal Protection Clause affords women only  
8 middle-tier scrutiny, while race and national origin are afforded strict scrutiny. *Bolling v. Sharpe*,  
9 347 U.S. 497 (1954); *Rostker v. Goldberg*, 453 U.S. 57 (1981). Plaintiffs could have, but did not,  
10 ask this Court to adjudicate their Equal Protection claim under strict scrutiny, on par with the  
11 standard applied in Fifth Amendment cases where the claims allege discrimination based on race or  
12 national origin.

13           In addition to filing an inadequate complaint, Plaintiffs have not advanced any arguments  
14 against the unequal treatment of women under the DeVos Rules, compared to the treatment afforded  
15 harms based on race and national origin. Although Plaintiffs’ claims identify problematic aspects of  
16 the Devos Rules, (Comp. pp.38-40), they nowhere assert that they are problematic *because* they  
17 subject women to unequal treatment and violate Title IX’s equal treatment mandate. Thus, the  
18 disposition of this action will impair the ability of Equality Advocates to protect their interests and  
19 the interests of women as a class because even if the Court rules in Plaintiffs’ favor, the ruling will  
20 not require the fully equal treatment of women to which they are entitled.

21           Finally, although Plaintiffs have asserted an ultra vires claim, they assert that Defendants  
22 exceeded their authority only by allowing only “one-sided” appellate rights, and relying on gender  
23 stereotypes as justification for issuance of the DeVos Rules. Intervenors seek to advance a very  
24 different ultra vires claim based on the fact that Defendants exceeded their authority by issuing  
25 subregulatory guidance that permits or requires schools to subject women and sex-based harms to  
26 unequal treatment compared to race and national origin. This exceeds Defendants’ authority because



1 it directly and substantively conflicts with the Title IX statute and regulations.

2 **I. In the Alternative, Permissive Intervention Should be Granted**

3 If the Court finds that Equality Advocates do not satisfy the requirements for intervention as  
4 of right, permissive intervention should be granted.

5 Under Federal Rules of Civil Procedure 24(b)(1) the Court may liberally permit “anyone to  
6 intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim  
7 or defense that shares with the main action a common question of law or fact.” “In exercising its  
8 discretion, the court must consider whether the intervention will unduly delay or prejudice the  
9 adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

10 Whether to grant permissive intervention is within the court’s broad discretion, and the Court  
11 may consider factors such as the nature and extent of the intervenor’s interest; its standing to raise  
12 relevant legal issues; the legal position it seeks to advance and its probable relation to the merits of  
13 the case; whether the intervenor’s interests are adequately represented by other parties; whether  
14 intervention will prolong or unduly delay the litigation, and whether the party seeking intervention  
15 will significantly contribute to the full development of the legal questions presented. *Spangler v.*  
16 *Pasadena City Bd. Of Ed.*, 552 F.2d 1326, 1329 (9<sup>th</sup> Cir. 1977).

17 Equality Advocates meet the threshold requirements of 24(b)(1) for the reasons set forth in  
18 their previous arguments in favor of intervention as of right. Furthermore, Equality Advocates seek  
19 fully equal treatment of women, while Plaintiffs do not. In addition, Equality Advocates satisfy the  
20 *Spangler* criteria because they have a strong interest in ensuring that women and sex-based harms  
21 receive fully equal treatment under Title IX, and that courts and federal agencies abide by Title IX’s  
22 equality mandate. Finally, the participation of Equality Advocates will not unduly prolong or delay  
23 the litigation, and their involvement will contribute to the full development of the legal questions  
24 presented. Indeed, participation by Equality Advocates in this matter will likely conserve judicial  
25 resources in that Equality Advocates may choose not to pursue an independent action in a different  
26 forum if they can obtain relief here.

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**V. CONCLUSION**

Sex equality - the most fundamental of rights for all women - is at stake in this litigation and is not adequately protected by the Plaintiffs. Equality Advocates urge this Court to grant their motion to intervene, and order the clerk to file the proposed Complaint in Intervention, attached hereto as **Exhibit "A"**.

DATED: November 20, 2018

NEW ENGLAND LAW/BOSTON

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